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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1831.

By RICHARD PETERS,

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

VOL. V.

THIRD EDITION.

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,
" ROBERT TRIMBLE,
" JOHN MCLEAN,
" HENRY BALDWIN,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Clerk of the Supreme Court.

TENCH RINGGOLD, Marshal.

HENRY ASHTON, Marshal.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The References are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

XXXVII. 1. In all cases, the clerk shall take of the plaintiff a bond, with competent security, to respond the costs, in the penalty of two hundred dollars; or a deposit of that amount, to be placed in bank, subject to his draft.

2. In all cases, the clerk shall have fifteen copies of the records printed for the court: provided the government will admit the item in the expenses of the court.

3. In all cases, the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal, and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy. (*a*)

(*a*) See the dissenting opinion of Mr. Justice BALDWIN, *post*, p. 724.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1831.

CHEROKEE NATION *v.* STATE OF GEORGIA.

Status of Indian nations.

Motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia, in the territory of the Cherokee nation of Indians, on behalf of the Cherokee nation; they claiming to proceed in the supreme court of the United States, as a foreign state, against the state of Georgia, under the provision of the constitution of the United States which gives to the court jurisdiction in controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens or subjects thereof, are parties.

The Cherokee nation is not a foreign state, in the sense in which the term "foreign state" is used in the constitution of the United States.

The third article of the constitution of the United States describes the extent of the judicial power; the second section closes an enumeration of the cases to which it extends, with "controversies between a state or the citizens thereof, and foreign states, citizens or subjects;" a subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party—the state of Georgia may then certainly be sued in this court.

The Cherokees are a state; they have been uniformly treated as a state, since the settlement of our country; the numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community; laws have *been enacted in the spirit of these treaties; the acts of our government plainly recognise the [*2
Cherokee nation as a state; and the courts are bound by those acts.

The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two peoples in existence. In general, nations not owing a common allegiance are foreign to each other; the term foreign nation is with strict propriety applicable by either to the other; but the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indians are acknowledged to have an unquestionable, and heretofore, an unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations; they may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title, independent of their will, which must take effect, in point of possession, when their right of possession ceases—meanwhile, they are in a state of pupilage; their relations to the United States resemble that of a ward to his guardian;

they look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[1]

The bill filed on behalf of the Cherokees seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example, on the laws making it criminal to exercise the usual power of self-government in their own country, by the Cherokee nation, this court cannot interpose, at least, in the form in which those matters are presented; that part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful; the mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title; the bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force; the propriety of such an interposition by the court may well be questioned; it savors too much of the exercise of political power, to be within the proper province of the judicial department.

Motion for Injunction. This case came before the court on a motion, on behalf of the Cherokee nation of Indians, for a *subpœna*, and for an injunction, to restrain the state of Georgia, the governor, attorney-general, judges, justices of the peace, sheriffs, deputy-sheriffs, constables, and others the officers, agents and servants of that state, from executing and enforcing the laws of Georgia, or any of these laws, or serving process, or doing anything towards the execution or enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation.

*3] The motion was made, after notice, and a copy of the bill *filed at the instance and under the authority of the Cherokee nation, had been served on the governor and attorney-general of the state of Georgia, on the 27th December 1830, and the 1st of January 1831. The notice stated that the motion would be made in this court on Saturday, the 5th day of March 1831. The bill was signed by John Ross, principal chief of the Cherokee nation, and an affidavit, in the usual form, of the facts stated in the bill, was annexed; which was sworn to before a justice of the peace of Richmond county, state of Georgia.

The bill set forth the complainants to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to

[1] The Indian tribes are distinct, independent political communities, retaining the right of self-government, subject to the protecting power of the United States. Worcester *v.* Georgia, 6 Pet. 515. They are not regarded as the owners of the territories which they respectively occupy; it is considered as vacant and unoccupied land belonging to the United States. United States *v.* Rogers, 4 How. 567. But their hunting-grounds are as much in their actual possession, as the cleared fields of the whites; and their right to its exclusive enjoyment, in their own way, and for their own purposes, is as much respected, until they abandon them, make a cession to the government, or an authorized sale to individuals. Mitchell *v.* United States, 9 Pet. 746. Subject to this right of possession, the ultimate fee is in the government; they cannot cut timber merely for purpose of sale; though if the cutting of timber be merely incidental to the improvement of their land, they may dispose of it at their pleasure. United States *v.* Cook, 19 Wall. 591. A grant of alternate sections of land for railroad purposes, only operates on public land owned absolutely by the United States; not to such as is set apart for the use of an Indian tribe, under a treaty. Railroad Co. *v.* United States, 92 U. S. 733. The Pueblo Indians of New Mexico, however, occupy a different position; by the Plan of Iguala, they became citizens of Mexico, and by the treaty of Guadalupe-Hidalgo, citizens of the United States, and of right entitled to all the privileges of citizens. United States *v.* Lucero, 1 New Mexico 422. The removal of an Indian tribe can only be made by the authority and under the care of the general government. Fellows *v.* Blacksmith, 19 How. 366; s. c. 7 N. Y. 401.

any state of this Union, nor to any prince, potentate or state, other than their own." "That from time immemorial, the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognised, and still stand recognised, by the United States, in the various treaties subsisting between their nation and the United States." That the Cherokees were the occupants and owners of the territory in which they now reside, before the first approach of the white men of Europe to the western continent; "deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs." Composing the Cherokee nation, they and their ancestors have been and are the sole and exclusive masters of this territory, governed by their own laws, usages and customs.

The bill stated the grant, by a charter, in 1732, of the country on this continent, lying between the Savannah and Alatahama rivers, by George the Second, "monarch of several islands on the eastern coast of the Atlantic," the same country being then in the ownership of several distinct, sovereign and independent nations of Indians, and amongst them the Cherokee nation. The foundation of this charter, the bill stated, was asserted to be the right of discovery to the territory granted; a ship manned by the subjects of the king having, "about two centuries and a half before, sailed along the coast of the western hemisphere, from the 56th to the 38th degree of north *latitude, and looked upon the face of that coast, without even landing on any part of it." This right, as affecting the right of the [*4
Indian nation, the bill denied; and asserted, that the whole length to which the right of discovery was claimed to extend among European nations was, to give to the first discoverer the prior and exclusive right to purchase these lands from the Indian proprietors, against all other European sovereigns: to which principle the Indians had never assented; and which they denied to be a principle of the natural law of nations, or obligatory on them. The bill alleged, that it never was claimed, under the charter of George the Second, that the grantees had a right to disturb the self-government of the Indians who were in possession of the country; and that on the contrary, treaties were made by the first adventurers with the Indians, by which a part of the territory was acquired by them for a valuable consideration; and no pretension was ever made, to set up the British laws, in the country owned by the Indians. That various treaties had been, from time to time, made between the British colony in Georgia; between the state of Georgia, before her confederation with the other states; between the confederate states afterwards; and finally, between the United States under their present constitution, and the Cherokee nation, as well as other nations of Indians; in all of which, the Cherokee nation, and the other nations, had been recognised as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self-government within that territory. That the various proceedings, from time to time, had by the congress of the United States under the articles of their confederation, as well as under the present constitution of the United States, in relation to the subject of the Indian nations, confirmed the same view of the subject.

The bill proceeded to refer to the treaty concluded at Hopewell, on the 28th November 1785, "between the commissioners of the United States and head-men and warriors of all the Cherokees;" the treaty of Holston, of the

22d July 1791, "between the President of the United States, by his duly-authorized commissioner, William Blount, and the chiefs and warriors of
*5] the Cherokee nation of Indians," and the additional *article of 17th November 1792, made at Philadelphia, by Henry Knox, the secretary at war, acting on behalf of the United States; the treaty made at Philadelphia, on the 26th June 1794; the treaties between the same parties, made at Tellico, 2d October 1790; on the 24th October 1804; on the 25th October 1805, and the 27th October 1805; the treaty at Washington, on the 7th January 1806, with the proclamation of that convention by the president, and the elucidation of that convention of 11th September 1807; the treaty between the United States and the Cherokee nation, made at the city of Washington, on the 22d day of March 1816; another convention, made at the same place, on the same day, by the same parties; a treaty made at the Cherokee agency, on the 8th July 1807; and a treaty, made at the city of Washington, on the 27th February 1819; "all of which treaties and conventions were duly ratified and confirmed by the senate of the United States, and became thenceforth, and still are, a part of the supreme law of the land." By those treaties, the bill asserted, the Cherokee nation of Indians were acknowledged and treated with as sovereign and independent states, within the boundary arranged by those treaties; and that the complainants were, within the boundary established by the treaty of 1719, sovereign and independent; with the right of self-government, without any right of interference with the same on the part of any state of the United States. The bill called the attention of the court to the particular provisions of those treaties, "for the purpose of verifying the truth of the general principles deduced from them."

The bill alleged, from the earliest intercourse between the United States and the Cherokee nation, an ardent desire had been evinced by the United States to lead the Cherokees to a greater degree of civilization. This is shown by the 14th article of the treaty of Holston; and by the course pursued by the United States in 1808, when a treaty was made, giving to a portion of the nation which preferred the hunter-state, a territory on the west of the Mississippi, in exchange for a part of the lower country of the Cherokees; and assurances were given by the president, that those who chose to remain, for the purpose of engaging in the pursuits of agricultural and civ-
*6] ilized life, in the country they occupied, might rely "on the *patronage, aid and good neighborhood of the United States." The treaty of 8th July 1817, was made to carry those promises into effect; and in reliance on them, a large cession of lands was thereby made; and in 1819, on the 27th February, another treaty was made, the preamble of which recites that a greater part of the Cherokee nation had expressed an earnest desire to remain on this side of the Mississippi, and were desirous to commence those measures which they deem necessary to the civilization and preservation of their nation; to give effect to which object, without delay, that treaty was declared to be made; and another large cession of their lands was thereby made by them to the United States. By a reference to the several treaties, it would be seen, that a fund was provided for the establishment of schools; and the bill asserted, that great progress had been made by the Cherokees in civilization and in agriculture. They had established a constitution and form of government, the leading features of which

they had borrowed from that of the United States ; dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments had all been organized. They had formed a code of laws, civil and criminal, adapted to their situation ; had erected courts to expound and apply those laws, and organized an executive to carry them into effect. They had established schools for the education of their children, and churches in which the Christian religion is taught ; they had abandoned the hunter-state, and become agriculturists, mechanics and herdsmen ; and under provocations long continued and hard to be borne, they had observed, with fidelity, all their engagements by treaty with the United States. Under the promised "patronage and good neighborhood" of the United States, a portion of the people of the nation had become civilized Christians and agriculturists ; and the bill alleged, that in these respects they were willing to submit to a comparison with their white brethren around them.

The bill claimed for the Cherokee nation the benefit of the provision in the constitution, that treaties are the supreme law of the land, and all judges are bound thereby ; of the declaration in the constitution, that no state shall pass any law *impairing the obligation of contracts ; and averred, that all the treaties referred to were contracts of the highest [*7 character and of the most solemn obligation. It asserted, that the constitutional provision, that congress shall have power to regulate commerce with the Indian tribes, was a power which, from its nature, was exclusive ; and consequently, forbade all interference by any one of the states. That congress had, in execution of this power, passed various acts, and among others the act of 1802, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." The object of these acts was to consecrate the Indian boundary as arranged by the treaties ; and they contained clear recognitions of the sovereignty of the Indians, and of their exclusive right to give and to execute the law within that boundary.

The bill proceeded to state, that, in violation of these treaties, of the constitution of the United States, and of the act of congress of 1802, the state of Georgia, at a session of her legislature held in December, in the year 1828, passed an act which received the assent of the governor of that state on the 20th day of that month and year, entitled, "an act to add the territory lying within this state, and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall and Habersham, and to extend the laws of this state over the same, and for other purposes." That afterwards, to wit, in the year 1829, the legislature of the said state of Georgia passed another act, which received the assent of the governor on the 19th December of that year, entitled, "an act to add the territory lying within the chartered limits of Georgia, now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall and Habersham, and to extend the laws of this state over the same, and annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal processes in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1828 on this subject." The effect of these laws, and their purposes, was stated to be, to parcel out the territory of the Cherokees ; to extend all the laws of Gerogia over the same ; to abolish the Cherokee laws, and to deprive the Cherokees

of the protection of their laws; *to prevent them, as individuals, from enrolling for emigration, under the penalty of indictment before the state courts of Georgia; to make it murder, in the officers of the Cherokee government, to inflict the sentence of death, in conformity with the Cherokee laws, subjecting them all to indictment therefor, and death by hanging; extending the jurisdiction of the justices of the peace of Georgia into the Cherokee territory, and authorizing the calling out of the militia of Georgia to enforce the process; and finally, declaring that no Indian, or decendant of any Indian, residing within the Cherokee nation of Indians, should be deemed a competent witness in any court of the state of Georgia, in which a white person might be a party, except such white person resided within the said nation. All these laws were averred to be null and void: because repugnant to treaties in full force; to the constitution of the United States; and to the act of congress of 1802.

The bill then proceeded to state the interference of President Washington for the protection of the Cherokees, and the resolutions of the senate, in consequence of his reference of the subject of intrusions on their territory. That in 1802, the state of Georgia, in ceding to the United States a large body of lands within her alleged chartered limits, and imposing a condition that the Indian title should be peaceably extinguished, admitted the subsisting Indian title. That cessions of territory had always been voluntarily made by the Indians, in their national character; and that cessions had been made of as much land as could be spared, until the cession of 1819, "when they had reduced their territory into as small a compass as their own convenience would bear; and they then accordingly resolved to cede no more." The bill then referred to the various applications of Georgia to the United States, to extinguish the Indian title by force, and her denial of the obligations of the treaties with the Cherokees; although, under these treaties, large additions to her disposable lands had been made; and stated, that Presidents Monroe and Adams, in succession, understanding the articles of cession and agreement between the state of Georgia and the United States in the year 1802, as binding the United States to extinguish the Indian title, so soon only as it could be done peaceably and on reasonable terms, refused,

*9] themselves, to apply force to these *complainants, or to permit it to be applied by the state of Georgia, to drive them from their possession; but, on the contrary, avowed their determination to protect these complainants by force, if necessary, and to fulfil the guarantee given to them by the treaties. The state of Georgia, not having succeeded in these applications to the government of the United States, had resorted to legislation, intending to force, by those means, the Indians from their territory. Unwilling to resist, by force of arms, these pretensions and efforts, the bill stated, that application for protection, and for the execution of the guarantee of the treaties, had been made by the Cherokees to the present president of the United States, and they had received for answer, "that the president of the United States has no power to protect them against the laws of Georgia."

The bill proceeds to refer to the act of congress of 1830, entitled "an act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi." The act is to apply to such of the Indians as may choose to remove, and by

the proviso to it, nothing contained in the act shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes. The complainants had not chosen to remove, and this, it was alleged, it was sufficient for the complainants to say: but they proceeded to state, that they were fully satisfied with the country they possessed; the climate was salubrious; it was convenient for commerce and intercourse; it contained schools, in which they could obtain teachers from the neighboring states, and places for the worship of God, where Christianity is taught by missionaries and pastors easily supplied from the United States. The country, too, "is consecrated in their affections, from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives and friends." Little was known of the country west of the Mississippi; and if accepted, the bill asserted, it would be the grave not only of their civilization and Christianity, but of the nation itself.

It also alleged, that the portion of the nation who emigrated *under the patronage and sanction of the president, in 1808 and 1809, and settled on the territory assigned to them on the Arkansas [*10 river, were afterwards required to remove again; and that they did so, under the stipulations of a treaty made in May 1828. The place, to which they removed under this last treaty, was said to be exposed to incursions of hostile Indians, and that they were "engaged in constant scenes of killing and scalping, and have to wage a war of exermination with more powerful tribes, before whom they will ultimately fall." They had, therefore, decidedly rejected the offer of exchange. The bill then proceeded to state various acts, under the authority of the laws of Georgia, in defiance of the treaties referred to, and of the constitution of the United States, as expressed in the act of 1802; and that the state of Georgia had declared its determination to continue to enforce these laws, so long as the complainants should continue to occupy their territory. But while these laws were enforced in a manner the most harassing and vexatious to the complainants, the design seemed to have been deliberately formed, to carry no one of these cases to final decision in the state courts; with the view, as the complainants believed, and therefore alleged, to prevent any one of the Cherokee defendants from carrying these cases to the supreme court of the United States, by writ of error, for review, under the 25th section of the act of congress of the United States, passed in the year 1789, and entitled "an act to establish the judicial courts of the United States."

Numerous instances of proceedings were set forth at large in the bill. The complainants expected protection from these unconstitutional acts of Georgia, by the troops of the United States; but notice had been given by the commanding officer of those troops to John Ross, the principal chief of the Cherokee nation, that "these troops, so far from protecting the Cherokees, would co-operate with the civil officers of Georgia, in enforcing their laws upon them." Under these circumstances, it was said, that it could not but be seen, that unless this court should interfere, the complainants had but these alternatives; either to surrender their lands in exchange for others in the western wilds of this continent, which would be to seal, at once, the doom of their civilization, Christianity and *national existence; or to surrender their national sovereignty, their property, rights and liber- [*11

ties, guarantied as these now are by so many treaties, to the rapacity and injustice of the state of Georgia; or to arm themselves in defence of these sacred rights, and fall, sword in hand, on the graves of their fathers.

These proceedings, it was alleged, were wholly inconsistent with equity and good conscience, tended to the manifest wrong of the complainants, and violated the faith of the treaties to which Georgia and the United States were parties, and of the constitution of the United States. These wrongs were of a character wholly irremediable by the common law; and the complainants were wholly without remedy of any kind, except by the interposition of the court. The bill averred, that this court had, by the constitution and laws of the United States, original jurisdiction of controversies between a state and a foreign state, without any restriction as to the nature of the controversy; that by the constitution, treaties were the supreme law of the land. That as a foreign state, the complainants claimed the exercise of the powers of the court to protect them in their rights, and that the laws of Georgia, which interfered with their rights and property, should be declared void, and their execution be perpetually enjoined.

The bill stated, that John Ross was "the principal chief and executive head of the Cherokee nation;" and that, in a full and regular council of that nation, he had been duly authorized to institute this and all other suits which might become necessary for the assertion of the rights of the entire nation. The bill then proceeded, in the usual form, to ask an answer to the allegations contained in it, and "that the said state of Georgia, her governor, attorney-general, judges, magistrates, sheriffs, deputy-sheriffs, constables, and all other her officers, agents and servants, civil and military, might be enjoined and prohibited from executing the laws of that state, within the boundary of the Cherokee territory, as prescribed by the treaties now subsisting between the United States and the Cherokee nation, or interfering in any manner with the rights of self-government possessed by the Cherokee nation, within the limits of their territory, as defined by the treaty; that the two laws of Georgia before mentioned as having been passed in the years
*12] *1828 and 1829 might, by the decree of the court, be declared unconstitutional and void; and that the state of Georgia, and all her officers, agents and servants might be for ever enjoined from interfering with the lands, mines and other property, real and personal, of the Cherokee nation, or with the persons of the Cherokee people, for, or on account of anything done by them within the limits of the Cherokee territory; that the pretended right of the state of Georgia to the possession, government or control of the lands, mines and other property of the Cherokee nation, within their territory, might be declared to be unfounded and void, and that the Cherokees might be left in the undisturbed possession, use and enjoyment of the same, according to their own sovereign right and pleasure, and their own laws, usages and customs, free from any hindrance, molestation or interruption by the state of Georgia, her officers, agents and servants; that the complainants might be quieted in the possession of all their rights, privileges and immunities, under their various treaties with the United States; and that they might have such other and further relief as the court might deem consistent with equity and good conscience, and as the nature of their case might require."

On the day appointed for the hearing, the counsel for the complainants

filed a supplemental bill, sworn to by Richard Taylor, John Ridge and W. S. Coodey, of the Cherokee nation of Indians, before a justice of the peace of the county of Washington, in the district of Columbia.

The supplemental bill stated, that since their bill, now submitted, was drawn, the following acts, demonstrative of the determination of the state of Georgia to enforce her assumed authority over the complainants and their territory, property, and jurisdiction, had taken place. The individual called in that bill Corn Tassel, and mentioned as having been arrested in the Cherokee territory, under process issued under the laws of Georgia, had been actually hung; in defiance of a writ of error allowed by the chief justice of this court to the final sentence of the court of Georgia in his case. That writ of error having been received by the governor of the state was, as the complainants were informed and believed, immediately communicated by him to the legislature of the *state, then in session; who promptly resolved, in substance, that the supreme court of the United States [*13 had no jurisdiction over the subject, and advised the immediate execution of the prisoner, under the sentence of the state court; which accordingly took place.

The complainants begged leave further to state, that the legislature of the state of Georgia, at the same session, passed the following laws, which had received the sanction of the governor of the state.

"An act to authorize the survey and disposition of lands within the limits of Georgia, in the occupancy of the Cherokee tribe of Indians, and all other unlocated lands within the limits of the said state, claimed as Creek land; and to authorize the governor to call out the military force to protect surveyors in the discharge of their duties; and to provide for the punishment of persons who may prevent, or attempt to prevent, any surveyor from performing his duties, as pointed out by this act, or who shall willfully cut down or deface any marked trees, or remove any land-marks which may be made in pursuance of this act; and to protect the Indians in the peaceable possession of their improvements, and of the lots on which the same may be situate." Under this law it was stated, that the lands within the boundary of the Cherokee territory were to be surveyed, and to be distributed by lottery among the people of Georgia.

At the same session, the legislature of Georgia passed another act, entitled, "an act to declare void all contracts hereafter made with the Cherokee Indians, so far as the Indians are concerned;" which act received the assent of the governor of the state on the 23d December 1830. The legislature of Georgia, at its same session, passed another law, entitled, "an act to provide for the temporary disposal of the improvements and possessions purchased from certain Cherokee Indians and residents;" which act received the assent of the governor of the state, the 22d December 1830. At its same session, the legislature of Georgia passed another law, entitled, "an act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered *limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws [*14 of the state within the aforesaid territory." At the same session of its legislature, the state of Georgia passed another act, entitled "an act to author-

ize the governor to take possession of the gold, silver and other mines, lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing any person or persons who may hereafter be found trespassing upon the mines."

The supplemental bill further stated the proceedings of the governor of Georgia, under these laws; and that he had stationed an armed force of the citizens of Georgia, at the gold mines within the territory of the complainants, who were engaged in enforcing the laws of Georgia. Additional acts of violence and injustice were said to have been done under the authority of the laws of Georgia, and by her officers and agents, within the Cherokee territory.

The complainants alleged, that the several legislative acts, therein set forth and referred to, were in direct violation of the treaties enumerated in their bill, to which this was a supplement, as well as in direct violation of the constitution of the United States, and the act of congress passed under its authority, in the year 1802, entitled, "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." They prayed, that this supplement might be taken and received as a part of their bill; that the several laws of Georgia therein set forth might be declared by the decree of this court to be null and void, on the ground of the repugnancy to the constitution, laws and treaties set forth above, and in the bill to which this was a supplement; and that these complainants might have the same relief by injunction, and a decree of peace, or otherwise, according to equity and good conscience, against these laws, as against those which were the subject of their bill as first drawn.

The case was argued by *Sergeant* and *Wirt*, on the part of the complainants. No counsel appeared for the state of Georgia.

*15] *For the complainants it was contended: 1. That the parties before the court were such as, under the constitution, to give to this court original jurisdiction of the complaint made by the one against the other. 2. That such a case or controversy, of a judicial nature, was presented by the bill, as to warrant and require the interposition of the authority of the court. 3. That the facts stated by the complainants exhibited such a case in equity, as to entitle them to the specific remedy by the injunction prayed for in the bill.

Marshall, Ch. J., delivered the opinion of the court.—This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokee as a political society, and to seize for the use of Georgia, the lands of the nation which have been assured to them by the United States, in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands, by successive treaties, each of which contains a solemn guarantee of the residue, until

they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Before we can look into the merits of the case, a preliminary inqury presents itself. Has this court jurisdiction of the cause? The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or citizens thereof, and foreign states, citizens or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction, in all *cases in which a state shall be a party. The party defendant may then unquestionably be sued in [*16 this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognise the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a *foreign* state in the sense of the constitution? The counsel have shown conclusively, that they are not a state of the Union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state; each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely, before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term *foreign* nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. *The Indian ter- [*17 ritory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves, in their treaties, to be under the protection of the United States; they admit, that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed

by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes, by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence. Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would *be considered by all as an invasion of our territory and an act of hostility. These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states.

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In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In this clause, they are as clearly contradistinguished, by a name appropriate to themselves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the application distinguishing either of the others be, in fair construction, applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the conven-

tion considered them as entirely distinct. We cannot assume that the distinction was lost, in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend, that the words *"Indian tribes" were introduced into the article, empowering congress to reg- [*19 ulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation. This may be admitted, without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said, that the same words have not necessarily the same meaning attached to them, when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence, is to be determined by the context. This may not be equally true with respect to proper names. "Foreign nations" is a general term, the application of which to Indian tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contradistinguishing them from each other. We perceive plainly, that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention, the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that *construction on us. We find nothing in the context, and nothing in [*20 the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighboring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example, on the laws making it criminal to exercise the usual powers of self-government in their own country, by the Cherokee nation, this court

cannot interpose; at least, in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned; it savors too much of the exercise of political power, to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true, that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true, that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction is denied.

JOHNSON, Justice.—In pursuance of my practice, in giving an opinion on all constitutional questions, I must present my views on this. With the morality of the case, I have no concern; I am called upon to consider it as a legal question.

*21] *The object of this bill is to claim the interposition of this court, as the means of preventing the state of Georgia, or the public functionaries of the state of Georgia, from asserting certain rights and powers over the country and people of the Cherokee nation. It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an original suit to this court. It is essential to such suit, that a state of this Union should be a party; so says the second member of the second section of the third article of the constitution; the other party must, under the control of the eleventh amendment, be another state of the Union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.

Two preliminary questions then present themselves: 1. Is the complainant a foreign state, in the sense of the constitution? 2. Is the case presented in the bill one of judicial cognisance? Until these questions are disposed of, we have no right to look into the nature of the controversy any further than is necessary to determine them. The first of the questions necessarily resolves itself into two: 1. Are the Cherokees a state? 2. Are they a foreign state?

1. I cannot but think that there are strong reasons for doubting the applicability of the epithet "state," to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees, under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states.

Until then, I must think, that we cannot recognise it as an existing state, *under any other character than that which it has maintained hitherto as one of the Indian tribes or nations. [*22

There are great difficulties hanging over the question, whether they can be considered as states, under the judiciary article of the constitution. 1. They never have been recognised as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered. When the populous and civilized nations beyond the Cape of Good Hope were visited, the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government, the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned, that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded.

It may be suggested, that they were uniformly cessions of land, without inhabitants; and therefore, words competent to make a cession of sovereignty were unnecessary. This, however, is not a full answer, since soil, as well as people, is the object of sovereign action, and may be ceded, with or without the sovereignty, or may be ceded, with the express stipulation that the inhabitants shall remove. In all the cessions to us from the civilized states of the old world, and of our transfers among ourselves, although of the same property, under the same circumstances, and even when occupied by these very Indians, the express cession of sovereignty is to be found. In the very treaty of Hopewell, the language or evidence of which is appealed to, as the leading proof of the existence of this supposed state, we find the commissioners of the United States expressing themselves in these terms. "The commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the *United States on the following conditions." This is certainly the language of sovereigns and conquerors, and not the address of equals to equals. And again, when designating the country they are to be confined to, comprising the very territory which is the subject of this bill, they say, "Art. 4. The boundary allotted to the Cherokees for their hunting-grounds" shall be as therein described. Certainly, this is the language of concession on our part, not theirs; and when the full bearing and effect of those words, "for their hunting-grounds," is considered, it is difficult to think, that they were then regarded as a state, or even intended to be so regarded. It is clear, that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see, how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the states, or United States, over the territory within their limits. The pre-emptive right, and exclusive right of conquest in case of war, was never questioned to exist in the states, which circumscribed the whole or [*23

any part of the Indian grounds or territory. To have taken it from them by direct means, would have been a palpable violation of their rights. But every advance, from the hunter-state to a more fixed state of society, must have a tendency to impair that pre-emptive right, and ultimately to destroy it altogether, both by increasing the Indian population, and by attaching them firmly to the soil. The hunter-state bore within itself the promise of vacating the territory, because when game ceased, the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character of the pre-emptive right.

But it is said, that we have extended to them the means and inducement to become agricultural and civilized. It is true: and the immediate object of that policy was so obvious, as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions, during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise, *to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments; a policy which their inveterate habits and deep-seated enmity has altogether baffled. But the project of ultimately organizing them into states, within the limits of those states which had not ceded or should not cede to the United States the jurisdiction over the Indian territory within their bounds, could not possibly have entered into the contemplation of our government. Nothing but express authority from the states could have justified such a policy, pursued with such a view.

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To pursue this subject a little more categorically. If these Indians are to be called a state: then—1. By whom are they acknowledged as such? 2. When did they become so? 3. And what are the attributes by which they are identified with other states?

As to the first question, it is clear, that as a state they are known to nobody on earth but ourselves, if to us: how then can they be said to be recognised as a member of the community of nations? Would any nation on earth treat with them as such? Suppose, when they occupied the banks of the Mississippi, or the sea coast of Florida, part of which, in fact, the Seminoles now occupy, they had declared war and issued letters of marque and reprisal against us, or Great Britain, would their commissions be respected? If known as a state, it is by us, and us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or state: but regards them as what they were, a band of hunters, occupying as hunting-grounds, just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them, in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper; amounting in terms to a relinquishment of all *power, legislative, executive and judicial, to the

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United States, is yielded in the ninth article. It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed, that he was to be recognised as a minister, or to sit in the congress as a delegate. There is nothing express and nothing implied, that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.

There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission. Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognised as a state? We should, indeed, force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having, indeed, a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death; and have recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognised, as far as such recognition can operate to communicate the character of a state.

But secondly, at what time did this people acquire the character of a state? Certainly, not by the treaty of Hopewell; for every provision of that treaty operates to strip it of its sovereign attributes; and nothing subsequent adds anything to that treaty, except using the word nation instead of Indians. And as to that article in the treaty of Holston, and repeated in the treaty of Tellico, which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell; on what principle can it be contended, that the guarantee can go further than to secure to them that right over the territory, which is conceded by the Hopewell treaty; which interest is only that of hunting-grounds. The general policy of the *United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question. [*26

If they were not regarded as one of the family of nations, at the time of that treaty, even though, at that time, first subdued and stripped of the attributes of a state, it is clear, that, to be regarded now as a state, they must have resumed their rank among nations, at some subsequent period. But at what subsequent period? Certainly, by no decisive act, until they organized themselves recently into a government; and I have before remarked, that, until expressly recognised by the executive, under that form of government, we cannot recognise any change in their form of existence. Others have a right to be consulted on the admission of new states into the national family. When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain, from that time, blotted them from among the race of sovereigns. From that time, Great Britain considered them as her subjects, whenever she chose to claim their allegiance; and their country as hers, both in soil and

sovereignty. All the forbearance exercised towards them was considered as voluntary, and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so.

And thirdly, by what attributes is the Cherokee nation identified with other states? The right of sovereignty was expressly assumed by Great Britain over their country, at the first taking possession of it; and has never since been recognised as in them, otherwise than as dependent upon the will of a superior. The right of legislation is, in terms, conceded to congress, by the treaty of Hopewell, whenever they choose to exercise it. And the right of soil is held by the feeble tenure of hunting-grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia. They have, in Europe, sovereign and demi-sovereign states, and states of doubtful sovereignty. But this state, if it be *a state, is still a grade below them all; for not to be able to alienate, without permission of the remainder-man or lord, places them in a state of feudal dependence. *27]

However, I will enlarge no more upon this point; because I believe, in one view, and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least, while they occupy a country within our limits. Their condition is something like that of the Israelities, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them; and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing, and retaining the right of self-government, may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty, except as to their land and trade.

But in no sense can they be deemed a foreign state, under the judiciary article. It does seem unnecessary, on this point, to do more than put the question, whether the makers of the constitution could have intended to designate them, when using the epithets "foreign" and "state." State, and foreign state, are used in contradistinction to each other. We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations; and yet we were not admitted, until we had declared ourselves no longer provinces, but states, and showed some earnestness and capacity in asserting our claim to be enfranchised. Can it then be supposed, that when using those terms, we meant to include any others than those who were admitted into the community of nations, of whom, most notoriously, the Indians were no part?

The argument is, that they were states; and if not states of the Union, must be foreign states. But I think it very clear, that the constitution neither speaks of them as states or foreign states, but as just as what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and *having neither laws nor government, beyond what is required in a savage state. The distinction is clearly made in that section which vests in congress *28]

power to regulate commerce between the United States with foreign nations, and the Indian tribes.

The language must be applied in one of three senses; either in that of the law of nations, or of the vernacular use, or that of the constitution. In the first, although it means any state not subject to our laws, yet it must be a state and not a hunter horde; in the vernacular, it would not be applied to a people within our limits and at our very doors; and in the constitution, the two epithets are used in direct contradistinction; the latter words were unnecessary, if the first included the Indian tribes. There is no ambiguity, though taken literally; and if they were, facts and circumstances altogether remove it.

But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether; and put my rejection of this motion upon the nature of the claim set up, exclusively. I cannot entertain a doubt, that it is one of a political character altogether, and wholly unfit for the cognisance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a court of justice can take jurisdiction of the questions made in the bill. The substance of its allegations may be thus set out. That the complainants have been, from time immemorial, lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty, and by laws of the United States. That within those limits, they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That in violation of their just rights, so secured to them, the state of Georgia has passed laws, authorizing and requiring the executive and judicial powers of the state to enter their territory and put down their public functionaries. That in pursuance of those laws the functionaries of Georgia have entered their territory with an armed force, and put down all powers legislative, executive and judicial, exercised under the government of the Indians.

What does this series of allegations exhibit, but a state *of war, and the fact of invasion? They allege themselves to be a sovereign [*29 independent state, and set out that another sovereign state has, by its laws, its functionaries, and its armed force, invaded their state and put down their authority. This is war, in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum* and *tuum*, in the judicial, but in the political sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not to appeal to any arbiter but the sword, for the justice of his cause. If the state of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case. In the *Nabob of Arcot's Case* (3 Bro. C. C. 292; s. c. 1 Ves. jr. 371; 2 Ibid. 56), a case of a political character not one half so strongly marked as this, the courts of Great Britain refused to take jurisdiction, because it had its origin in treaties entered into between sovereign states: a case in which the appeal is to the sword and to Almighty justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation.

But there is still another ground, in this case, which alone would have prevented me from assuming jurisdiction; and that is, the utter impossibility of doing justice, at least, even-handed justice, between the parties. As to restoring the complainant to the exercise of jurisdiction, it will be seen at once, that this is no case for the action of a court; and as to quieting him in possession of the soil, what is the case on which the complainant would have this court to act? Either the Cherokee nation are a foreign state, or they are not. If they are not, then they cannot come here; and if they are, then how can we extend our jurisdiction into their country?

We are told, that we can act upon the public functionaries in the state of Georgia, without the limits of the nation. But suppose, that Georgia should file a cross-bill, as she certainly may, if we can entertain jurisdiction in this case; and should, in her bill, claim to be put in possession of the whole Indian country; and we should decide in her favor; how is

*30] *that decree to be carried into effect? Say, as to soil; as to jurisdiction, it is not even to be considered. From the complainant's own showing, we could not do justice between the parties. Nor must I be considered as admitting that this court could, even upon the other alternative, exercise a jurisdiction over the person, respecting lands under the jurisdiction of a foreign nation. I know of no such instance. In *Penn* v. *Lord Baltimore*, the persons were in England, and the land within the king's dominions, though in America.

There is still another view in which this cause of action may be considered in regard to its political nature. The United States, finding themselves involved in conflicting treaties, or, at least, in two treaties respecting the same property, under which two parties assert conflicting claims; one of the parties, putting itself upon its sovereign right, passes laws which in effect declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws, by means of physical force; and the other party appeals to the executive department for protection. Being disappointed there, the party appeals to this court, indirectly to compel the executive to pursue a course of policy, which his sense of duty, or ideas of the law, may indicate should not be pursued. That is, to declare war against a state, or to use the public force to repel the force, and resist the laws of a state, when his judgment tells him the evils to grow out of such a course may be incalculable. What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore, are very unfit instruments to control the action of that branch of government, which may often be compelled, by the highest considerations of public policy, to withhold even the exercise of a positive duty.

There is then a great deal of good sense in the rule laid down in the *Nabob of Arcot's Case*, to wit, that as between sovereigns, breaches of treaty were not breaches of contract cognisable in a court of justice; independent of the general principle, that for their political acts, states were not amenable to tribunals of justice.

*31] *There is yet another view of this subject, which forbids our taking jurisdiction. There is a law of the United States, which purports

to make every trespass set out in the bill to be an offence cognisable in the courts of the United States. I mean the act of 1802, which makes it penal to violate the Indian territory. The infraction of this law is in effect the burden of complaint. What then, in fact, is this bill, but a bill to obtain an injunction against the commission of crimes? If their territory has been trespassed upon, against the provisions of that act, no law of Georgia could repeal that act, or justify the violation of its provisions. And the remedy lies in another court and form of action, or another branch of jurisprudence.

I cannot take leave of the case, without one remark upon the leading argument, on which the exercise of jurisdiction here over cases occurring in the Indian country, has been claimed for the complainant; which was, that the United States, in fact, exercised jurisdiction over it, by means of this and other acts, to punish offences committed there. But this argument cannot bear the test of principle. For the jurisdiction of a country may be exercised over her citizens, wherever they are, in right of their allegiance; as it has been in the instance of punishing offences committed against the Indians. And also, both under the constitution and the treaty of Hopewell, the power of congress extends to regulating their trade, necessarily within their limits. But this cannot sanction the exercise of jurisdiction, beyond the policy of the acts themselves, which are altogether penal in their provisions. I vote for rejecting the motion.

Baldwin, Justice.—As jurisdiction is the first question which must arise in every cause, I have confined my examination of this, entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court, in dismissing the bill, but not for the reasons assigned. In my opinion, there is no plaintiff in this suit; and this opinion precludes any examination into the merits of the bill, or the weight of any minor objections. My judgment stops *me at the threshold, and forbids me to examine into the acts complained of. [*32

As the reasons for the judgment of the court seem to me more important than the judgment itself, in its effects on the peace of the country, and the condition of the complainants, and as I stand alone on one question of vital concern to both; I must give my reasons in full. The opinion of this court is of high authority in itself; and the judge who delivers it has a support as strong in moral influence over public opinion, as any human tribunal can impart. The judge, who stands alone in decided dissent on matters of the infinite magnitude which this case presents, must sink under the continued and unequal struggle; unless he can fix himself by a firm hold on the constitution and laws of the country. He must be presumed to be in the wrong, until he proves himself to be in the right. Not shrinking even from this fearful issue, I proceed to consider the only question which I shall ever examine in relation to the rights of Indians to sue in the federal courts, until convinced of my error in my present convictions.

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the constitution, applies to all the tribes with whom the United States have held treaties; for if one is a foreign nation or state, all others, in like condition, must be so, in their aggregate

capacity ; and each of their subjects or citizens, aliens, capable of suing in the circuit courts. This case, then, is the case of the countless tribes, who occupy tracts of our vast domain ; who, in their collective and individual characters, as states or aliens, will rush to the federal courts, in endless controversies, growing out of the laws of the states or of congress.

In the spirit of the maxim *obsta principiis*, I shall first proceed to the consideration of the proceedings of the old congress, from the commencement of the revolution up to the adoption of the constitution ; so as to ascertain whether the Indians were considered and treated with, as tribes of savages, or independent nations, foreign states, on an equality with any other foreign state or nation ; and whether Indian affairs were viewed as those of foreign nations, and in connection with this view, refer to the acts of the federal government on the same subject.

*33] *In 1781 (1 Laws U. S. 586), a department for foreign affairs was established, to which was intrusted all correspondence and communication with the ministers or other officers of foreign powers, to be carried on through that office ; also with the governors and presidents of the several states ; and to receive the applications of all foreigners, letters of sovereign powers, plans of treaties, conventions, &c., and other acts of congress relative to the department of foreign affairs ; and all communications, as well to as from the United States in congress assembled, were to be made through the secretary, and all papers on the subject of foreign affairs to be addressed to him. The same department was established under the present constitution in 1789, and with the same exclusive control over all the foreign concerns of this government with foreign states or princes. (2 Laws U. S. 6, 7.) In July 1775, congress established a department of Indian affairs, to be conducted under the superintendence of commissioners. (1 Ibid. 597.) By the ordinance of August 1786, for the regulation of Indian affairs, they were placed under the control of the war department (Ibid. 614) ; continued there by the act of August 1789 (2 Ibid. 32, 33), under whose direction they have ever since remained. It is clear, then, that neither the old nor new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states or princes.

I will next inquire, how the Indians were considered ; whether as independent nations, or tribes with whom our intercourse must be regulated by the law of circumstances. In this examination, it will be found, that different words have been applied to them in treaties and resolutions of congress ; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees, for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject-matter acted on ; believing it requires no reasoning to prove, that the omission of the words prince, state, sovereignty or nation, cannot

*34] divest a contracting party of these *national attributes, which are inherent in sovereign power pre- and self-existing, or confer them, by their use, where all the substantial requisites of sovereignty are wanting.

The proceedings of the old congress will be found in 1 Laws U. S. 597, commencing 1st June 1775, and ending 1st September 1788, of which some

extracts will be given. 30th June 1775: "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians; as the Indians depend on the colonists for arms, ammunition and clothing, which are become necessary for their subsistence." "That the commissioners have power to treat with the Indians;" "to take to their assistance gentlemen of influence among the Indians." "To preserve the confidence and friendship of the Indians, and prevent their suffering for want of the necessaries of life, 40,000*l.* sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians, without a license;" "traders shall sell their goods at reasonable prices; allow them to the Indians for their skins, and take no advantage of their distress and intemperance;" "the trade to be only at posts designated by the commissioners." Specimens of the kind of intercourse between the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion.

In 1782, a committee of congress report, that all the lands belonging to the Six Nations of Indians have been in due form put under the crown, as appendant to the government of New York, so far as respects jurisdiction only; that that colony has borne the burden of protecting and supporting the Six Nations of Indians, and their tributaries, for one hundred years, as the dependents and allies of that government; that the crown of England has always considered and treated the country of the Six Nations as one appendant to the government of New York; that they have been so recognised and admitted, by their public acts, by Massachusetts, Connecticut, Pennsylvania, Maryland and Virginia; that by accepting this cession, the jurisdiction of the whole western territory, belonging to the Six Nations and their tributaries, will be vested in the United States, greatly to the advantage of the Union (p. 606). The cession alluded to is the *one from New York, March 1st, 1781, of the soil and jurisdiction of all [*35 the land in their charter, west of the present boundary of Pennsylvania (1 Laws of U. S. 471), which was executed in congress and accepted.

This makes it necessary to break in on the historical trace of our Indian affairs, and follow up this subject to the adoption of the constitution. The cession from Virginia in 1784 was of soil and jurisdiction. So, from Massachusetts in 1785, from Connecticut in 1800, from South Carolina in 1787, from Georgia in 1802. North Carolina made a partial cession of land, but a full one of her sovereignty and jurisdiction of all without her present limits in 1789. (2 Laws U. S. 85.) Some states made reservations of lands to a small amount, but, by the terms of the cession, new states were to be formed within the ceded boundaries, to be admitted into the Union on an equal footing with the original states; of course, not shorn of their powers of sovereignty and jurisdiction, within the boundaries assigned by congress to the new states. In this spirit, congress passed the celebrated ordinance of July 1787, by which they assumed the government of the north-western territory, paying no regard to Indian jurisdiction, sovereignty, or their political rights, except providing for their protection; authorizing the adoption of laws "which, for the prevention of crimes and injuries, shall have force in all parts of the district; and for the execution of process, civil and criminal, the governor has power to make proper division thereof." (1 Laws U. S. 477.) By the fourth article, the said terri-

tory, and the states which may be formed therein, shall for ever remain a part of this confederacy of the United States; subject to the articles of confederation, alterations constitutionally made, the acts and ordinances of congress. This shows the clear meaning and understanding of all the ceding states, and of congress, in accepting the cession of their western lands, up to the time of the adoption of the constitution. The application of these acts to the provisions of the constitution will be considered hereafter. A few more references to the proceedings of the old congress, in relation to the Indian nations, will close this view of the case.

*36] *In 1782, a committee, to whom was referred a letter from the secretary at war, reported, "that they have had a conference with the two deputies from the Catawba nation of Indians; that their mission respects certain tracts of land reserved for their use, in the state of South Carolina, which they wish may be so secured to their tribe, as not to be intruded into by force, nor alienated even with their own consent:—Whereupon, resolved, that it be recommended to the legislature of South Carolina to take such measures for the satisfaction and security of the said tribe, as the said legislature shall in their wisdom think fit." (1 Laws U. S. 667.) After this, the Catawbas cannot well be considered an independent nation or foreign state. In September 1783, shortly after the preliminary treaty of peace, congress, exercising the powers of acknowledged independence and sovereignty, issued a proclamation, beginning in these words: "whereas, by the ninth of the articles of confederation, it is, among other things, declared, that the United States in congress assembled, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of every state, within its own limits be not infringed or violated;" prohibiting settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving gifts of land, without the express authority and directions of the United States in congress assembled. Conventions were to be held with the Indians in the northern and middle departments, for the purpose of receiving them into the favor and protection of the United States, and of establishing boundary lines of property, for separating and dividing the settlements of the citizens from the Indian villages and hunting-grounds, &c. "Resolved, that the preceding measures of congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights, within their respective limits. Resolved, that it will be wise and necessary, to erect a district of the western territory into a distinct government, and that a committee be appointed to prepare a plan for a temporary government, until the

*37] inhabitants shall form a permanent constitution *for themselves, and as citizens of a free, sovereign and independent state, be admitted to a representation in the Union." In 1786, a general ordinance was passed for the regulation of Indian affairs under the authority of the ninth article of the confederation, which throws much light on our relations with them (page 614). It closes with a direction, that in all cases where transactions with any nation or tribe of Indians shall become necessary for the purposes of the ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent within whose district the same shall happen, shall act in conjunction with the authority of such state. After

accepting the cessions of the soil and jurisdiction of the western territory, and resolving to form a temporary government, and create new, free, sovereign and independent states, congress resolved, in March 1785, to hold a treaty with the western Indians. They gave instructions to the commissioners, in strict conformity with their preceding resolutions, both of which were wholly incompatible with the national or sovereign character of the Indians with whom they were about to treat. They will be found in pages 611, &c., and need not be particularized.

I now proceed to the instructions which preceded the treaty of Hopewell with the complainants, the treaty, and the consequent proceedings of congress. On the 15th March 1785, commissioners were appointed to treat with the Cherokees and other Indians, southward of them, within the limits of the United States, or who have been at war with them, for the purpose of making peace with them, and of receiving them into the favor and protection of the United States, &c. They were instructed to demand that all prisoners, negroes and other property, taken during the war, be given up; to inform the Indians of the great occurrences of the last war; of the extent of country relinquished by the late treaty of peace with Great Britain; to give notice to the governors of Virginia, North and South Carolina and Georgia, that they may attend, if they think proper; and were authorized to expend $4000 in making presents to the Indians; a matter well understood in making Indian treaties, but unknown, at least, in our treaties with foreign nations, princes *or states, unless on the Barbary coast. A treaty was accordingly made, in November following, between the commissioners [*38 plenipotentiaries of the United States, of the one part, and the head-men and warriors of all the Cherokees, of the other. The word nation is not used in the preamble, nor any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation, or foreign state, or a tribe of Indians, from the terms of the treaty, its stipulations and conditions. "The Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States." (Art. 3, 1 Laws U. S. 322.) "The boundary allotted to the Cherokees for their hunting-grounds between the said Indians and the citizens of the United States, within the limits of the United States, is and shall be the following," viz. (as defined in Art. 4.) "For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper." (Art. 9.) "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to congress." (Art. 12.)

This treaty is, in the beginning, called "article:" the word "treaty" is only to be found in the concluding line, where it is called "this definitive treaty." But article or treaty, its nature does not depend upon the name given it. It is not negotiated between ministers on both sides, representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting-grounds; give to congress the exclusive right of

regulating their trade, and managing all their affairs, as they may think proper. So it was understood by congress, as declared by them in their proclamation of 1st September 1788 (1 U. S. Laws 619), and so understood at the adoption of the constitution.

*39] *The meaning of the words "deputy to congress" in the twelfth article, may be as a person having a right to sit in that body, as, at that time, it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister. But if the former was the meaning of the parties, it is conclusive to show, that he was not and could not be the deputy of a foreign state, wholly separated from the Union. If he sat in congress as a deputy from any state, it must be one having a political connection with, and within the jurisdiction of, the confederacy; if as a diplomatic agent, he could not represent an independent or sovereign nation, for all such have an unquestioned right to send such agents, when and where they please. The securing the right, by an express stipulation of the treaty; the declared objects in conferring the right, especially, when connected with the ninth article; show beyond a doubt, it was not to represent a foreign state or nation, or one to whom the least vestige of independence or sovereignty as to the United States appertained. There can be no dependence so anti-national, or so utterly subversive, of national existence, as transferring to a foreign government the regulation of its trade, and the management of all their affairs, at their pleasure. The nation or state, tribe or village, head-men or warriors of the Cherokees, call them by what name we please; call the articles they have signed a definitive treaty, or an indenture of servitude; they are not, by its force or virtue, a foreign state, capable of calling into legitimate action the judicial power of this Union, by the exercise of the original jurisdiction of this court, against a sovereign state, a component part of this nation. Unless the constitution has imparted to the Cherokees a national character, never recognised under the confederation; and which, if they ever enjoyed, was surrendered by the treaty of Hopewell; they cannot be deemed, in this court, plaintiffs in such a case as this.

In considering the bearing of the constitution on their rights, it must be borne in mind, that a majority of the states represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that congress asserted, as to the ceded, and the states, as to the unceded territory, their right to the

*40] soil absolutely, and the dominion in full sovereignty, *within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on, and appendant to the state governments; that before the convention acted, congress had erected a government in the north-western territory, containing numerous and powerful nations or tribes of Indians, whose jurisdiction was contemned, and whose sovereignty was overturned, if it ever existed, except by permission of the states or congress, by ordaining, that the territorial laws should extend over the whole district; and directing divisions for the execution of civil and criminal process in every part; that the Cherokees were then dependents, having given up all their affairs to the regulation and management of congress, and that all the regulations of congress over Indian affairs, were then in force over an immense territory, under a solemn pledge to the inhabitants, that

whenever their population and circumstances would admit, they should form constitutions, and become free, sovereign and independent states, on equal footing with the old compenent members of the confederation ; that by the existing regulations and treaties, the Indian tenure to their land was their allotment as hunting-grounds, without the power of alienation, that the right of occupancy was not individual, that the Indians were forbidden all trade or intercourse with any person, not licensed, or at a post not designated by regulation ; that Indian affairs formed no part of the foreign concerns of the government, and that though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right, acknowledged by congress or reserved by treaty, but because congress did not think proper to exercise the sole and exclusive right, declared and asserted in all their regulations from 1775 to 1788, in the articles of confederation, in the ordinance of 1787, and the proclamation of 1788 ; which the plaintiffs solemnly recognised and expressly granted by the treaty of Hopewell, in 1785, as conferred on congress, to be exercised as they should think proper.

To correctly understand the constitution, then, we must read it with reference to this well-known existing state of our relations with the Indians; the United States asserting the right of soil, sovereignty and jurisdiction, in full dominion ; the Indians, occupancy of allotted hunting-grounds.

We can thus expound the constitution, without a reference *to the definitions of a state or nation by any foreign writer, hypothetical reasoning, or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the Union, in a written fundamental law. Whether it is the emanation from the people or the states, is a moot question, having no bearing on the supremacy of that supreme law which, from a proper source, has rightfully been imposed on us by sovereign power. Where its terms are plain, I should, as a dissenting judge, deem it judicial sacrilege to put my hands on any of its provisions, and arrange or construe them according to any fancied use, object, purpose or motive, which, by an ingenious train of reasoning I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide to my faith, my reason and judicial oath. In taking out, putting in, or varying the plain meaning of a word or expression, to meet the results of my poor judgment, as to the meaning and intention of the great charter, which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. I will not add unto these things ; I will not take away from the words of this book of prophecy ; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of names ; the decisions of foreign courts ; or a reference to books or writers. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages and settled principles of this government, as administered by its fathers, before the adoption of the constitution ; and refer to the received opinion and fixed understanding of the high parties who adopted it ; the usage and practice of the new government, acting under its authority ; and the solemn decisions of this court, acting under its high powers and responsibility ; nothing fearing, that in so doing, I can discover some sound and [*41

safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and state governments, and all tribunals acting under their authority. They will, at
*42] least, enable me to judge of the true meaning and *spirit of plain words, put into the forms of constitutional provisions, which this court, in the great case of *Sturges* v. *Crowninshield*, say, "is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, constructions become necessary, and a departure from the obvious meaning of words is justifiable." But the absurdity and injustice of applying the provision to the case, must be so monstrous, that all mankind would, without hesitation, unite in rejecting the application. 4 Wheat. 202–3. In another great case, *Cohens* v. *Virginia*, this court say, "the jurisdiction of this court then, being extended, by the letter of the constitution, to all cases arising under it, or under the laws of the United States, it follows, that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." 6 Wheat. 379–80. The principle of these cases is my guide in this. Sitting here, I shall always bow to such authority; and require no admonition to be influenced by no other, in a case where I am called on to take a part in the exercise of the judicial power over a sovereign state.

Guided by these principles, I come to consider the third clause of the second section of the first article of the constitution; which provides for the apportionment of representatives and direct taxes "among the several states which may be included within this Union, according to their respective numbers, excluding Indians not taxed." This clause embraces not only the old but the new states to be formed out of the territory of the United States, pursuant to the resolutions and ordinances of the old congress, and the conditions of the cession from the states, or which might arise by the division of the old. If the clause excluding Indians not taxed had not been
*43] inserted, or should be stricken out, the whole free Indian *population of all the states would be included in the federal numbers, co-extensively with the boundaries of all the states included in this Union. The insertion of this clause conveys a clear definite declaration, that there were no independent sovereign nations or states, foreign or domestic, within their boundaries, which should exclude them from the federal enumeration, or any bodies or communities within the states, excluded from the action of the federal constitution, unless by the use of express words of exclusion. The delegates who represented the states in the convention well knew the existing relations between the United States and the Indians, and put the constitution in a shape for adoption, calculated to meet them; and the words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article shows most distinctly the sense of

the convention in authorizing congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usuage, under the old government; characterized by the names of nations, towns, villages, tribes, head-men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule, and applying the word nation to the Catawbas as well as the Cherokees. The framers of the constitution have thought proper to define their meaning to be, that they were not foreign nations nor states of the Union, but Indian tribes; thus declaring the sense in which they should be considered, under the constitution, which refers to them as tribes only, in this clause. I cannot strike these words from the book; nor construe Indian tribes, in this part of the constitution, to mean a sovereign state, under the first clause of the second section of the third article. It would be taking very great liberty, in the exposition of a fundamental law, to bring the Indians under the action of the legislative power as tribes, and of the judicial, as foreign states. The power conferred to regulate commerce with the Indian tribes, is the same given to the old congress, by the ninth article of the old confederation, "to regulate trade with the Indians." The raising the word "trade" to the dignity of commerce, *regulating it with Indians or Indian tribes, is only a change of words. Mere [*44 phraseology cannot make Indians nations, nor Indian tribes, foreign states.

The second clause of the third section of the fourth article of the constitution is equally convincing. "The congress shall have power to dispose of, and make all needful regulations and rules respecting, the territory of the United States." What that territory was, the rights of soil, jurisdiction and sovereignty claimed and exercised by the states and the old congress, has been already seen. It extended to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction. It is the same power which was delegated to the old congress, and according to the judicial interpretation given by this court in *Gibbons* v. *Ogden*, 9 Wheat. 209, the word "to regulate" implied, in its nature, full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory, leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations respecting the territory of the United States—they necessarily include complete jurisdiction. It was necessary to confer it, without limitation, to enable the new government to redeem the pledge given by the old, in relation to the formation and powers of the new states. The saving of "the claims" of "any particular states," is almost a copy of a similar provision, part of the ninth article of the old confederation; thus delivering over to the new congress the power to regulate commerce with the Indian tribes, and regulate the territory they occupied, as the old had done, from the beginning of the revolution.

The only remaining clause of the constitution to be considered is the second clause in the sixth article. "All treaties made, or to be made, shall be the supreme law of the land." In *Chirac* v. *Chirac*, this court declared, that it was unnecessary to inquire into the effect of the treaty with France in 1778, under the old confederation, because the confederation had yielded

to our present constitution, and this treaty had been the supreme law of the land. 2 Wheat. 271. I *consider the same rule as applicable to Indian *45] treaties, whether considered as national compacts between sovereign powers, or as articles, agreements, contracts, or stipulations on the part of this government, binding and pledging the faith of the nation to the faithful observance of its conditions. They secure to the Indians the enjoyment of the rights they stipulate to give or secure, to their full extent, and in the plenitude of good faith; but the treaties must be considered as the rules of reciprocal obligations. The Indians must have their rights; but must claim them in that capacity in which they received the grant or guarantee. They contracted, by putting themselves under the protection of the United States, accepted of an allotment of hunting-grounds, surrendered and delegated to congress the exclusive regulation of their trade, and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the right of sending a deputy of their own choice to congress. If, then, the Indians claim admission to this court, under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity.

The legislation of congress under the constitution, in relation to the Indians, has been in the same spirit, and guided by the same principles, which prevailed in the old congress, and under the old confederation. In order to give full effect to the ordinance of 1787, in the north-west territory, it was adapted to the present constitution of the United States in 1789 (1 U. S. Stat. 50); applied as the rule for its government to the territory south of the Ohio in 1790, except the sixth article (Ibid. 123); to the Mississippi territory in 1798 (Ibid. 549); and with no exception, to Indiana in 1800 (2 Ibid. 58); to Michigan in 1805 (Ibid. 309); to Illinois in 1809 (Ibid. 514).

In 1802, congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations. (2 U. S. Stat. 139.) In the same year, Georgia ceded her lands west of her present boundary to the United States; and by the *sec- *46] ond article of the convention, the United States ceded to Georgia whatever claim, right or title they may have to the jurisdiction or soil of any lands south of Tennessee, North or South Carolina and east of the line of the cession by Georgia. So that Georgia now has all the rights attached to her by her sovereignty, within her limits, and which are saved to her by the second section of the fourth article of the constitution, and all the United States could cede either by their power over the territory, or their treaties with the Cherokees.

The treaty with the Cherokees, made at Holston, in 1791, contains only one article which has a bearing on the political relations of the contracting parties. In the second article, the Cherokees stipulate "that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state." (7 U. S. Stat. 39.) This affords an instructive definition of the words nation and treaty. At the treaty of Hopewell, the Cherokees, though subdued and suing for peace, before divest-

ing themselves of any of the rights or attributes of sovereignty which this government ever recognised them as possessing by the consummation of the treaty, contracted in the name of the head-men and warriors of all the Cherokees; but at Holston, in 1791, in abandoning their last remnant of political right, contracted as the Cherokee nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual: this consideration will divest words of their magic.

In thus testing the rights of the complainants as to their national character, by the old confederation, resolutions and ordinances of the old congress, the provisions of the constitution, treaties held under the authority of both, and the subsequent legislation thereon, I have followed the rule laid down for my guide by this court, in *Foster* v. *Neilson*, 2 Pet. 307, in doing it "according to the principles established by the political department of the government." "If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. However individual judges may construe them (treaties), it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." That the existence of foreign states cannot be known to this court judicially, except by some *act or recognition of the other departments of this government is, I think, fully established in the case of *United States* [*47
v. *Palmer*, 3 Wheat. 634–5; *The Divina Pastora*, 4 Ibid. 63; and *The Anna*, 6 Ibid. 193.

I shall resort to the same high authority as the basis of my opinion on the powers of the state governments. "By the revolution, the duties as well as the powers of government devolved on the people of (Georgia) New Hampshire. It is admitted, that among the latter were comprehended the transcendent powers of parliament, as well as those of the executive department." *Dartmouth College* v. *Woodward*, 4 Wheat. 651; 4 Ibid. 192; *Green* v. *Biddle*, 8 Ibid. 98; *Ogden* v. *Saunders*, 12 Ibid. 254, &c. "The same principle applies, though with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal regulations, are to each other foreign." *Buckner* v. *Findley*, 2 Pet. 591. The powers of government, which thus devolved on Georgia by the revolution, over her whole territory, are unimpaired by any surrender of her territorial jurisdiction, by the old confederation or the new constitution, as there was in both an express saving, as well as by the tenth article of amendments.

But if any passed to the United States by either, they were retroceded by the convention of 1802. Her jurisdiction over the territory in question is as supreme as that of congress, over what the nation has acquired by cession from the states, or treaties with foreign powers, combining the rights of the state and general government. Within her boundaries, there can be no other nation, community or sovereign power, which this department can judicially recognise as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognised by the constitution, and every department of this government acting under its authority. Foreign states cannot be created by judicial construction; Indian sovereignty cannot be roused from its long slumber, and awakened

to action by our *fiat.* I find no acknowledgment of it by the legislative or executive power. *Until they have done so, I can stretch forth no *48] arm for their relief, without violating the constitution. I say this with great deference to those from whom I dissent; but my judgment tells me, I have no power to act, and imperious duty compels me to stop at the portal, unless I can find some authority in the judgments of this court, to which I may surrender my own.

Indians have rights of occupancy to their lands, as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right, without permission from the government. 8 Wheat. 592. In *Fletcher* v. *Peck*, this court decided, that the Indian occupancy was not absolutely repugnant to a seisin in fee in Georgia; that she had good right to grant land so occupied; that it was within the state, and could be held by purchasers under a law, subject only to extinguishment of the Indian title. 6 Cranch 88, 142; 9 Ibid. 11. In the case of *Johnson* v. *McIntosh*, 8 Wheat. 543, 571, the nature of the Indian title to lands on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that, from the time of discovery under the royal government, the colonies, the states, the confederacy and this Union, their tenure was the same occupancy, their rights occupancy, and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

By the treaty of peace, the powers of government, and the rights of soil, which had previously been in Great Britain, passed definitively to these states. 8 Wheat. 584. They asserted these rights, and ceded soil and jurisdiction to the United States. The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society. They are not named or referred to in any part of the opinion of the court, as nations or states, and nowhere declared to have any national capacity or attributes of sovereignty, in their *relations to the general or state governments. The principles estab- *49] lished in this case have been supposed to apply to the rights which the nations of Europe claimed to acquire by discovery, as only relative between themselves, and that they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians. But the language of the court is too explicit to be misunderstood. "This principle was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Those relations which were to subsist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees,

subject only to the Indian rights of occupancy. The history of America, from its discovery to the present day proves, we think, the universal recognition of these principles. 8 Wheat. 574. I feel it my duty, to apply them to this case. They are in perfect accordance with those on which the governments of the united and individual states have acted in all their changes; they were asserted and maintained by the colonies, before they assumed independence. While dependent themselves on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state, within the limits of a state. If their jurisdiction within their boundaries has been unquestioned, until this controversy; if rights have been exercised, which are directly repugnant to those now claimed; the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by *mere judicial power, upon [*50
the other departments of this government, and the states of this Union, the recognition of the existence of nations and states, within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown; unacknowledged by any department of the government; denied by all, through all time; unclaimed till now; and now declared to have been called into exercise, not by any change in our constitution, the laws of the Union or the states; but pre-existent and paramount over the supreme law of the land.

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme; so plain to my judgment and reason. Those who have brought public opinion to bear on this subject, act under a mere moral responsibility; under no oath, which binds their movements to the straight and narrow line drawn by the constitution. Politics or philanthropy may impel them to pass it; but when their objects can be effectuated only by this court, they must not expect its members to diverge from it, when they cannot conscientiously take the first step, without breaking all the high obligations under which they administer the judicial power of the constitution. The account of my executorship cannot be settled before the court of public opinion, or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.

THOMPSON, Justice. (*Dissenting.*)—Entertaining different views of the questions now before us in this case, and having arrived at a conclusion different from that of a majority of the court, and considering the importance of the case and the constitutional principle involved in it; I shall proceed, with all due respect for the opinion of others, to assign the reasons upon which my own has been formed.

In the opinion pronounced by the court, the merits of the *contro- [*51

versy between the state of Geoegia and the Cherokee Indians have not been taken into consideration. The denial of the application for an injunction has been placed solely on the ground of want of jurisdiction in this court to grant the relief prayed for. It became, therefore, unnecessary to inquire into the merits of the case. But thinking as I do, that the court has jurisdiction of the case, and may grant relief, at least, in part; it may become necessary for me, in the course of my opinion, to glance at the merits of the controversy; which I shall, however, do very briefly, as it is important only so far as relates to the present application.

Before entering upon the examination of the particular points which have been made and argued, and for the purpose of guarding against any erroneous conclusions, it is proper that I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed by the bill may be beyond the reach of this court. Much of the matter therein contained, by way of complaint, would seem to depend for relief upon the exercise of political power; and as such, appropriately devolving upon the executive, and not the judicial, department of the government. This court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed.

It would very ill become the judicial station which I hold, to indulge in any remarks upon the hardship of the case, or the great injustice that would seem to have been done to the complainants, according to the statement in the bill, and which, for the purpose of the present motion, I must assume to be true. If they are entitled to other than judicial relief, it cannot be admitted, that in a government like ours, redress is not to be had in some of its departments; and the responsibility for its denial must rest upon those who have the power to grant it. But believing as I do, that relief to some extent falls properly under judicial cognisance, I shall proceed to the examination of the case under the following heads. 1. Is the Cherokee nation of
*52] Indians a competent party to sue in this court? 2. *Is a sufficient case made out in the bill, to warrant this court in granting any relief? 3. Is an injunction the fit and appropriate relief?

1. By the constitution of the United States it is declared (Art. 3, § 2), that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, &c.; to controversies between two or more states, &c., and between a state or the citizens thereof, and foreign states, citizens or subjects. The controversy in the present case is alleged to be between a foreign state, and one of the states of the Union; and does not, therefore, come within the 11th amendment of the constitution, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state. This amendment does not, therefore, extend to suits prosecuted against one of the United States by a foreign state. The constitution further provides, that in all cases where a state shall be a party, the supreme court shall have original jurisdiction. Under these provisions in the constitution, the complainants have filed their bill in this court, in the character of a foreign state, against the state of Georgia;

praying an injunction to restrain that state from committing various alleged violations of the property of the nation, claimed under the laws of the United States, and treaties made with the Cherokee nation.

That a state of this Union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution, to admit of doubt; and the first inquiry is, whether the Cherokee nation is a foreign state, within the sense and meaning of the constitution. The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage, by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral *person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient, if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease, on this account, to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, is left in the administration of the state. Vattel, c. 1, pp. 16, 17. [*53

Testing the character and condition of the Cherokee Indians by these rules, it not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the goverment of the United States; both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs, within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self-government over what remained unsold. *And this has been the light in which they have, until recently, been considered, from the earliest settlement of the country, by the white people. And indeed, I do not understand, that it is denied by a majority of the court, that the Cherokee Indians form a sovereign state, according to the doctrine of the law of nations; [*54

but that, although a sovereign state, they are not considered a foreign state, within the meaning of the constitution.

Whether the Cherokee Indians are to be considered a foreign state or not, is a point on which we cannot expect to discover much light from the law of nations. We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it. That numerous tribes of Indians, and among others the Cherokee nation, occupied many parts of this country, long before the discovery by Europeans, is abundantly established by history; and it is not denied, but that the Cherokee nation occupied the territory now claimed by them, long before that period. It does not fall within the scope and object of the present inquiry, to go into a critical examination of the nature and extent of the rights growing out of such occupancy, or the justice and humanity with which the Indians have been treated, or their rights respected. That they are entitled to such occupancy, so long as they choose quietly and peaceably to remain upon the land, cannot be questioned. The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world; not having any connection, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?

They have never been, by conquest, reduced to the situation of subjects to any conqueror. and thereby lost their separate national existence, and the rights of self-government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed *55] by regular treaties of peace, containing stipulations on each side, according *to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognise the right of the Indians to transfer the absolute title of their lands to any other than ourselves, the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection, so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.

In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character, and in that sense must the term foreign be understood, as used in the constitution. It can have no relation to local, geographical or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be

considered a foreign country, in reference to the United States. It is the political relation in which one government or country stands to another, which constitutes it foreign to the other. The Cherokee territory being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived, that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians. Suppose, the *Cherokee territory had been occupied by Spaniards, or any other civilized people, instead of [*56 Indians, and they had, from time to time, ceded to the United States portions of their lands, precisely in the same manner as the Indians have done, and in like manner, retained and occupied the part now held by the Cherokees, and having a regular government established there; would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States? If we look to lexicographers, as well as approved writers, for the use of the term foreign, it may be applied with the strictest propriety to the Cherokee nation. In a general sense, it is applied to any person or thing belonging to another nation or country. We call an alien a foreigner, because he is not of the country in which we reside. In a political sense, we call every country foreign, which is not within the jurisdiction of the same government. In this sense, Scotland, before the Union, was foreign to England; and Canada and Mexico, foreign to the United States. In the United States, all transatlantic countries are foreign to us.

But this is not the only sense in which it is used. It is applied, with equal propriety, to an adjacent territory, as to one more remote. Canada or Mexico is as much foreign to us, as England or Spain. And it may be laid down as a general rule, that when used in relation to countries, in a political sense, it refers to the jurisdiction or government of the country. In a commercial sense, we call all goods coming from any country, not within our own jurisdiction, foreign goods. In the diplomatic use of the term, we call every minister a foreign minister, who comes from another jurisdiction or government. And this is the sense in which it is judicially used by this court, even as between the different states of this Union. In the case of *Buckner* v. *Finley*, 2 Pet. 590, it was held, that a bill of exchange, drawn in one state of the Union, on a person living in another state, was a foreign bill, and to be treated as such in the courts of the United States. The court says, that in applying the definition of a foreign bill, to the political character of the several states of this Union, in relation to each other, we are all clearly of opinion, *that bills drawn in one of these states upon persons living in another of them, partake of the character of foreign [*57 bills, and ought to be so treated. That, for all national purposes embraced by the federal constitution, the states and the citizens thereof are one; united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of, each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. So, in

the case of *Warder* v. *Arell*, decided in the court of appeals of Virginia, 2 Wash. 298, the court, in speaking of foreign contracts, and saying that the laws of the foreign country where the contract was made must govern, add, the same principle applies, though with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignty; and, with respect to their municipal regulations, are to each other foreign.

It is manifest from these cases, that a foreign state, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its territorial position. This is the marked distinction, particularly in the case of *Buckner* v. *Finley*. So far as these states are subject to the laws of the Union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not, I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered. It is governed by its own laws, usages and customs; it has no connection with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations. And this seems to be the view taken of them by Mr. Justice JOHNSON in the case of *Fletcher* v. *Peck*, 6 Cranch 146. In speaking of the state and condition of the different Indian nations, he observes, "that some have totally extinguished their national fire, and submitted themselves to the laws of the states; others
*58] have by treaty acknowledged that they hold *their national existence at the will of the state, within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia, among which are the Cherokees. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them, acknowledge them to be an independent people; and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their rights of soil."

Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state. But no doubt can be entertained, that such an action might be sustained, upon a proper case being presented. It is expressly provided for in the constitution; and this provision is certainly not to be rejected as entirely nugatory. Suppose, a state, with the consent of congress, should enter into an agreement with a foreign power (as might undoubtedly be done, Constitution, Art. 1, § 10), for a loan of money; would not an action be sustained in this court to enforce payment thereof? Or suppose, the state of Georgia, with the consent of congress, should purchase the right of the Cherokee Indians to this territory, and enter into a contract for the payment of the purchase-money; could there be a doubt, that an action could be sustained upon such a contract? No objection would certainly be made for want of competency in that nation to make a valid contract. The numerous treaties entered into with the nation would be a conclusive answer to any such objection. And if an action could

be sustained in such case, it must be under that provision in the constitution which gives jurisdiction to this court in controversies between a state and a foreign state. For the Cherokee nation is certainly not one of the United States.

And what possible objection can lie to the right of the complainants to sustain an action? The treaties made with this nation purport to secure to it certain rights. These are not gratuituous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the *Indians, by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it [*59 would seem to me, to be a strange inconsistency, to deny to them the right and the power to enforce such a contract. And where the right secured by such a treaty forms a proper subject for judicial cognisance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction, in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States, upon such treaty, because no possible case can exist, where the United States can be sued. But not so with respect to a state: and if any right secured by treaty has been violated by a state, in a case proper for judicial inquiry, no good reason is perceived, why an action may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorized to enforce all rights that may be recognised and secured by treaty. In many instances, these are mere political rights with which the judiciary cannot deal. But when the question relates to a mere right of property, and a proper case can be made between competent parties, it forms a proper subject for judicial inquiry.

It is a rule, which has been repeatedly sanctioned by this court, that the judicial department is to consider as sovereign and independent states or nations, those powers that are recognised as such by the executive and legislative departments of the government; they being more particularly intrusted with our foreign relations. 4 Cranch 241; 3 Wheat. 634; 4 Ibid. 64. If we look to the whole course of treatment by this country of the Indians, from the year 1775, to the present day, when dealing with them in their aggregate capacity as nations or tribes, and regarding the mode and manner in which all negotiations have been carried on and concluded with them; the conclusion appears to me irresistible, that they have been regarded, by the executive and legislative branches of the government, not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction, nor under the government of the states within which they were located. This remark is to be *understood, of course, as referring only to such as live together as a distinct community, under [*60 their own laws, usages and customs; and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country; their national character extinguished, and their usages and customs in a great measure abandoned; self-government surrendered; and who have, voluntarily, or by the force of circumstances which surround them, gradually become subject to the laws of the states within which they are situated. Such, however, is not the case with the Cherokee nation. It retains its usages and customs and self-

government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them. All negotiations carried on with the Cherokees and other Indian nations have been by way of treaty, with all the formality attending the making of treaties with any foreign power. The journals of congress, from the year 1775, down to the adoption of the present constitution, abundantly establish this fact. And since that period, such negotiations have been carried on by the treaty-making power, and uniformly under the denomination of treaties.

What is a treaty, as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the constitution, or in the practice of the government, for making any distinction between treaties made with the Indian nations, and any other foreign power? They relate to peace and war; the surrender of prisoners; the cession of territory; and the various subjects which are usually embraced in such contracts between sovereign nations.

A recurrence to the various treaties made with the Indian nations and tribes, in different parts of the country, will fully illustrate this view of the relation in which our government has considered the Indians as standing. It will be sufficient, however, to notice a few of the many treaties made with this Cherokee nation. By the treaty of Hopewell, of the 28th of November 1785 *(1 Laws U. S. 322), mutual stipulations are entered into, to restore all prisoners taken by either party, and the Cherokees stipulate to restore all negroes and all other property taken from the citizens of the United States; and a boundary line is settled between the Cherokees and the citizens of the United States, and this embraced territory within the chartered limits of Georgia. And by the sixth article, it is provided, that if any Indian, or person residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation or tribe to which such offender may belong, shall deliver him up, to be punished according to the ordinances of the United States. What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgment, that this territory was under a foreign jurisdiction. If it had been understood, that the jurisdiction of the state of Georgia extended over this territory, no such stipulation would have been necessary. The process of the courts of Georgia would have run into this, as well as into any other part of the state. It is a stipulation analogous to that contained in the treaty of 1794 with England, (8 U. S. Stat. 129), by the 27th article of which it is mutually agreed, that each party will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other. Upon what ground can any distinction be made, as to the reason and necessity of such stipulation, in the respective treaties? The necessity for the stipulation in both cases must be, because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been

*61]

shown, is what makes governments and nations foreign to each other in their political relations.

The same stipulation, as to delivering up criminals who shall take refuge in the Cherokee nation, is contained in the treaty of Holston, of the 2d of July 1791. (7 U. S. Stat. 39.) And the 11th article fully recognises the jurisdiction of the Cherokee nation over the territory occupied by them. It provides, that if any citizen of the United States shall go into *the territory belonging to the Cherokees, and commit any crime upon, or [*62 trespass against, the person or property of any friendly Indian, which, if committed within the jurisdiction of any state, would be punishable by the laws of such state, shall be subject to the same punishment, and proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state. Here is an explicit admission that the Cherokee territory is not within the jurisdiction of any state. If it had been considered within the jurisdiction of Georgia, such a provision would not only be unnecessary but absurd. It is a provision looking to the punishment of a citizen of the United States, for some act done in a foreign country. If exercising exclusive jurisdiction over a country is sufficient to constitute the state or power so exercising it, a foreign state, the Cherokee nation may assuredly, with the greatest propriety, be so considered.

The phraseology of the clause in the constitution, giving to congress the power to regulate commerce, is supposed to afford an argument against considering the Cherokees a foreign nation. The clause reads thus, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (Constitution, Art. 1, § 8.) The argument is, that if the Indian tribes are foreign nations, they would have been included, without being specially named, and being so named, imports something different from the previous term "foreign nations." This appears to me to partake too much of a mere verbal criticism, to draw after it the important conclusion, that Indian tribes are not foreign nations. But the clause affords, irresistibly, the conclusion, that the Indian tribes are not there understood as included within the description of, the "several states;" or there could have been no fitness in immediately thereafter particularizing "the Indian tribes." It is generally understood, that every separate body of Indians is divided into bands or tribes, and forms a little community within the nation to which it belongs; and as the nation has some particular symbol, by which it is distinguished from others, so each tribe has a badge from which it is denominated, and each tribe may have rights applicable to itself. Cases may arise, where the trade with a particular tribe may *require [*63 to be regulated, and which might not have been embraced under the general description of the term nation, or it might at least have left the case somewhat doubtful; as the clause was intended to vest in congress the power to regulate all commercial intercourse, this phraseology was probably adopted to meet all possible cases; and the provision would have been imperfect, if the term Indian tribes had been omitted. Congress could not then, have regulated the trade with any particular tribe that did not extend to the whole nation. Or, it may be, that the term tribe is here used as importing the same thing as that of nation, and adopted merely to avoid the repetition of the term nation: and the Indians are specially named, because there was a provision somewhat analogous in the confederation;

and entirely omitting to name the Indian tribes, might have afforded some plausible grounds for concluding that this branch of commercial intercourse was not subject to the power of congress.

On examining the journals of the old congress, which contain numerous proceedings and resolutions respecting the Indians, the terms "nation" and "tribe" are frequently used indiscriminately, and as importing the same thing; and treaties were sometimes entered into with the Indians, under the description or denomination of tribes, without naming the nation. See Journals 30th June and 12th of July 1775; 8th March 1776; 20th October 1777; and numerous other instances.

But whether any of these suggestions will satisfactorily account for the phraseology here used, or not, it appears to me, to be of too doubtful import, to outweigh the considerations to which I have referred, to show that the Cherokees are a foreign nation. The difference between the provision in the constitution and that in the confederation on this subject, appears to me, to show very satisfactorily, that so far as related to trade and commerce with the Indians, wherever found in tribes, whether within or without the limits of a state, was subject to the regulation of congress. The provision in the confederation, Art. 9 (1 U. S. Stat. 7), is, that congress shall have the power of regulating the trade and management of all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.

*64] *The true import of this provision is certainly not very obvious: see Federalist, No. 42. What were the legislative rights intended to be embraced within the proviso, is left in great uncertainty. But whatever difficulty on that subject might have arisen, under the confederation, it is entirely removed, by the omission of the proviso in the present constitution; thereby leaving this power entirely with congress, without regard to any state right on the subject; and showing that the Indian tribes were considered as distinct communities, although within the limits of a state.

The provision, as contained in the confederation, may aid in illustrating what is to be inferred from some parts of the constitution (Art. 1, § 1, par. 3), as to the apportionment of representatives, and acts of congress in relation to the Indians, to wit, that they are divided into two distinct classes. One composed of those who are considered members of the state within which they reside, and the other not: the former embracing the remnant of the tribes who had lost their distinctive character as a separate community, and had become subject to the laws of the states; and the latter, such as still retained their original connection as tribes, and live together under their own laws, usages and customs, and, as such, are treated as a community independent of the state. No very important conclusion, I think, therefore, can be drawn from the use of the term "tribe," in this clause of the constitution, intended merely for commercial regulations. If considered as importing the same thing as the term "nation," it might have been adopted, to avoid the repetition of the word nation.

Other instances occur in the constitution, where different terms are used, importing the same thing. Thus, in the clause giving jurisdiction to this court, the term "foreign states" is used, instead of "foreign nations," as in the clause relating to commerce. And again, in Art. 1, § 10, a still different phraseology is employed. "No state, without the consent of

congress, shall enter into any agreement or compact with a 'foreign power.'" But each of these terms, nation, state, power, as used in different parts of the constitution, imports the same thing, and does not admit of a different interpretation. In the treaties made with the Indians, they are sometimes designated under the name of tribe, and sometimes that *of nation. In the treaty of 1804, with the Delaware Indians, they are denominated the "Delaware tribe of Indians." (7 U. S. Stat. 81.) And in a previous treaty with the same people, in the year 1778, they are designated by the name of "the Delaware nation." (Ibid. 13.) [*65

As this was one of the earliest treaties made with the Indians, its provisions may serve to show in what light the Indian nations were viewed by congress at that day. The territory of the Delaware nation was within the limits of the states of New York, Pennsylvania and New Jersey. Yet we hear of no claim of jurisdiction set up by those states over these Indians. This treaty, both in form and substance, purports to be an arrangement with an independent sovereign power. It even purports to be articles of confederation. It contains stipulations relative to peace and war, and for permission to the United States troops to pass through the country of the Delaware nation. That neither party shall protect, in their respective states, servants, slaves or criminals, fugitives from the other; but secure and deliver them up. Trade is regulated between the parties. And the sixth article shows the early pledge of the United States to protect the Indians in their possessions, against any claims or encroachments of the states. It recites, that whereas, the enemies of the United States have endeavored to impress the Indians in general with an opinion, that it is the design of the states to extirpate the Indians, and take possession of their country; to obviate such false suggestions, the United States do engage to guaranty to the aforesaid nation of Delawares and their heirs, all their territorial rights, in the fullest and most ample manner, as it has been bounded by former treaties, &c. And provision is even made for inviting other tribes to join the confederacy; and to form a state, and have a representation in congress, should it be found conducive to the mutual interest of both parties. All which provisions are totally inconsistent with the idea of these Indians being considered under the jurisdiction of the states, although their chartered limits might extend over them. The recital, in this treaty, contains a declaration and admission of congress of the rights of Indians in general; and that the impression which our enemies were *endeavoring to make, that it was the design of the states to extirpate them, and take their lands, was false. And the same recognition of their rights runs through all the treaties made with the Indian nations or tribes, from that day down to the present time. [*66

The twelfth article of the treaty of Hopewell contains a full recognition of the sovereign and independent character of the Cherokee nation. To impress upon them full confidence in the justice of the United States respecting their interest, they have a right to send a deputy of their choice to congress. No one can suppose, that such deputy was to take his seat as a member of congress, but that he would be received as the agent of that nation. It is immaterial, what such agent is called, whether minister, commissioner or deputy; he is to represent his principal. There could have been no fitness or propriety in any such stipulation, if the Cherokee nation

had been considered in any way incorporated with the state of Georgia, or as citizens of that state. The idea of the Cherokees being considered citizens, is entirely inconsistent with several of our treaties with them. By the eighth article of the treaty of the 26th December 1817 (7 U. S. Stat. 159), the United States stipulate to give 640 acres of land to each head of any Indian family residing on the lands now ceded, or which may hereafter be surrendered, to the United States, who may wish to become citizens of the United States; so also, the second article of the treaty with the same nation, of the 10th of March 1819, contains the same stipulation in favor of the heads of families, who may choose to become citizens of the United States; thereby clearly showing that they were not considered citizens, at the time those stipulations were entered into, or the provision would have been entirely unnecessary, if not absurd. And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. And it was, therefore, very aptly asked, on the argument, and I think not very easily answered, how a nation composed of aliens or foreigners can be other than a foreign nation.

The question touching the citizenship of an Oneida Indian came under
*67] the consideration of the supreme court of New *York in the case of *Jackson* v. *Goodell*, 20 Johns. 193. The lessor of the plaintiff was the son of an Oneida Indian, who had received a patent for the lands in question, as an officer in the revolutionary war; and although the supreme court, under the circumstances of the case, decided he was a citizen, yet Chief Justice Spencer observed, we do not mean to say, that the condition of the Indian tribes (alluding to the Six Nations), at former and remote periods, has been that of subjects or citizens of the state; their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon, and subject to, our government. But the cause being carried up to the court of errors, Chancellor Kent, in a very elaborate and able opinion on that question, came to a different conclusion as to the citizenship of the Indian, even under the strong circumstances of that case.

"The Oneidas," he observed, and "the tribes composing the Six Nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people, and become completely incorporated with us, to point out the time when that event took place. In my view, they have never been regarded as citizens, or members of our body politic. They have always been, and still are, considered by our laws, as dependent tribes, governed by their own usages and chiefs; but placed under our protection, and subject to our coercion so far as the public safety required it, and no further. The whites have been gradually pressing upon them, as they kept receding from the approaches of civilization. We have purchased the greater part of their lands, destroyed their hunting-grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still, they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes. Through the whole course of our colonial history, these Indians were considered dependent allies. The colonial authorities uniformly negotiated with them, and made and observed treaties

with them, as sovereign communities exercising the right of free deliberation and action; but, in consideration of protection, owing *a qualified [*68
subjection, in a national capacity, to the British crown. No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown; such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. Vattel, lib. 1, c. 16, § 194. The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. There is nothing in the proceedings of the United States, during the revolutionary war, which went to impair, and much less to extinguish, the national character of the Six Nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations; but placed in the same state of dependence, and calling for the same protection, which existed before the war. In the treaties made with them, we have the forms and requisites peculiar to the intercourse between friendly and independent states; and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require, of existing and acknowledged sovereignty?"

If this be a just view of the Oneida Indians, the rules and principles here applied to that nation may, with much greater force, be applied to the character, state and condition of the Cherokee nation of Indians; and we may safely conclude, that they are not citizens, and must, of course, be aliens: and if aliens in their individual capacities, it will be difficult to escape the conclusion, that, as a community, they constitute a foreign nation or state, and thereby become a competent party to maintain an action in this court, according to the express terms of the constitution.

And why should this court scruple to consider this nation a competent party to appear here? Other departments of the government, whose right it is to decide what powers shall be recognised as sovereign and independent nations, have treated this nation as such. They have considered it competent, in its political and national capacity, to enter into contracts of the most solemn character; and if these contracts contain matter proper for judicial inquiry, *why should we refuse to entertain jurisdiction of [*69
the case? Such jurisdiction is expressly given to this court, in cases arising under treaties. If the executive department does not think proper to enter into treaties or contracts with the Indian nations, no case with them can arise calling for judicial cognisance. But when such treaties are found, containing stipulations proper for judicial cognisance, I am unable to discover any reasons satisfying my mind that this court has not jurisdiction of the case.

The next inquiry is, whether such a case is made out in the bill, as to warrant this court in granting any relief? I have endeavored to show, that the Cherokee nation is a foreign state; and as such, a competent party to maintain an original suit in this court against one of the United States. The injuries complained of are violations committed and threatened upon the property of the complainants, secured to them by the laws and treaties of the United States. Under the constitution, the judicial power of the United States extends expressly to all cases in law and equity, arising under

the laws of the United States, and treaties made or which shall be made, under the authority of the same.

In the case of *Osborn* v. *United States Bank*, 9 Wheat. 819, the court say, that this clause in the constitution enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form presented by law. It then becomes a case, and the constitution authorizes the application of the judicial power. The question presented in the present case is, under the ordinary form of judicial proceedings, to obtain an injunction to prevent or stay a violation of the rights of property claimed and held by the complainants, under the treaties and laws of the United States; which, it is alleged, have been violated by the state of Georgia. Both the form and the subject-matter of the complaint, therefore, fall properly under judicial cognisance.

*70] What the rights of property in the Cherokee nation are, *may be discovered from the several treaties which have been made between the United States and that nation, between the years 1785 and 1819. It will be unnecessary to notice many of them. They all recognise, in the most unqualified manner, a right of property in this nation, to the occupancy, at least, of the lands in question. It is immaterial, whether this interest is a mere right of occupancy, or an absolute right of the soil. The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of which they are entitled to protection, according to the doctrine of this court in the cases of *Fletcher* v. *Peck*, 6 Cranch 87, and *Johnson* v. *McIntosh*, 8 Wheat. 592. By the fourth article of the treaty of Hopewell, as early as the year 1785 (7 U. S. Stat. 18), the boundary line between the Cherokees and the citizens of the United States within the limits of the United States is fixed. The fifth article provides for the removal and punishment of citizens of the United States, or other persons, not being Indians, who shall attempt to settle on the lands so allotted to the Indians; thereby not only surrendering the exclusive possession of these lands to this nation, but providing for the protection and enjoyment of such possession. And it may be remarked, in corroboration of what has been said in a former part of this opinion, that there is here drawn a marked line of distinction between the Indians and citizens of the United States; entirely excluding the former from the character of citizens.

Again, by the treaty of Holston, in 1791 (7 U. S. Stat. 39), the United States purchase a part of the territory of this nation, and a new boundary line is designated, and provision made for having it ascertained and marked. The mere act of purchasing and paying a consideration for these lands, is a recognition of the Indian right. In addition to which, the United States, by the seventh article, solemnly guaranty to the Cherokee nation, all their lands not ceded by that treaty. And by the eighth article, it is declared, that any citizens of the United States, who shall settle upon any of the Cherokee lands, shall forfeit the protection of the United States; and the

*71] Cherokees may punish them or not as they shall please. *This treaty was made soon after the adoption of the present constitution. And in the last article, it is declared, that it shall take effect, and be obligatory

upon the contracting parties, as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate; thereby showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations; and which has been the mode of negotiating in all subsequent Indian treaties. And this course was adopted by President Washington, upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states, that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power intrusted to him by the constitution to carry that into faithful execution; unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlements, and compensating the Cherokees therefor. And he puts to the senate this question: shall the United States stipulate solemnly to guaranty the new boundary which shall be arranged? Upon which, the senate resolve, that in case a new, or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, the senate do advise and consent solemnly to guaranty the same. (1 Executive Journal, 60.) In consequence of which, the treaty of Holston was entered into, containing the guaranty.

Further cessions of land have been made at different times, by the Cherokee nation to the United States, for a consideration paid therefor; and, as the treaties declare, in acknowledgment for the protection of the United States (see treaty of 1798, 7 U. S. Stat. 62), the United States always recognising, in the fullest manner, the Indian right of possession: and in the treaty of the 8th of July, 1817, art, 5 (Ibid. 156), all former treaties are declared to be in full force; and the sanction of the United States is given to the proposition of a portion of the nation, to begin the establishment of fixed laws and a regular government; thereby recognising in the nation a political existence, capable of forming an* independent government separate and distinct from, and in no manner whatever under the [*72 jurisdiction of, the state of Georgia; and no objection is known to have been made by that state. And again, in 1819 (7 U. S. Stat. 195), another treaty is made, sanctioning and carrying into effect the measures contemplated by the treaty of 1817; beginning with a recital that the greater part of the Cherokees have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, of the 8th of July 1817, might, without further delay, be finally adjusted, have offered to make a further cession of land, &c. This cession is accepted, and various stipulations entered into, with a view to their civilization, and the establishment of a regular government, which has since been accomplished. And by the fifth article, it is stipulated, that all white people who have intruded, or who shall thereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act of 1802, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." (2 U. S. Stat. 139.) By this act, the boundary

lines, established by treaty with the various Indian tribes, are required to be ascertained and marked ; and among others, that with the Cherokee nation, according to the treaty of the 2d of October 1798.

It may be necessary here briefly to notice some of the provisions of this act of 1802, so far as it goes to protect the rights of property in the Indians ; for the purpose of seeing whether there has been any violation of those rights by the state of Georgia, which falls properly under judicial cognisance. By this act, it is made an offence, punishable by fine and imprisonment, for any citizen, or other person resident in the United States, or either of the territorial districts, to cross over or go within the boundary line, to hunt or destroy the game, or drive stock to range or feed on the Indian lands, or to go into any country allotted to the Indians, without a passport, or to commit therein any robbery, larceny, trespass, or other crime, against the person or property of any friendly *Indian, which would be punishable, *73] if committed within the jurisdiction of any state, against a citizen of the United States ; thereby necessarily implying that the Indian territory secured by treaty was not within the jurisdiction of any state. The act further provides, that when property is taken or destroyed, the offender shall forfeit and pay twice the value of the property so taken or destroyed. And by the fifth section, it is declared, that if any citizen of the United States, or other person, shall make a settlement on any lands belonging, or secured or guarantied, by treaty with the United States, to any Indian tribe ; or shall survey or attempt to survey, such lands, or designate any of the boundaries, by marking trees or otherwise ; such offender shall forfeit a sum not exceeding $1000 and suffer imprisonment not exceeding twelve months. This act contains various other provisions for the purpose of protecting the Indians in the free and uninterrupted enjoyment of their lands ; and authority is given (§ 16) to employ the military force of the United States to apprehend all persons who shall be found in the Indian country, in violation of any of the provisions of the act ; and deliver them up to the civil authority, to be proceeded against in due course of law.

It may not be improper here to notice some diversity of opinion that has been entertained with respect to the construction of the 19th section of this act, which declares, that nothing therein contained shall be construed to prevent any trade or intercourse with the Indians, living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual states. It is understood, that the state of Georgia contends, that the Cherokee nation come within this section, and are subject to the jurisdiction of that state. Such a construction makes the act inconsistent with itself, and directly repugnant to the various treaties entered into between the United States and the Cherokee Indians. The act recognises and adopts the boundary line as settled by treaty. And by these treaties, which are in full force, the United States solemnly guaranty to the Cherokee nation all their lands, not ceded to the United States ; and these lands lie within the chartered limits of Georgia : and this was a subsisting guarantee, under the *treaty of 1791, when the act of *74] 1802 was passed. It would require the most unequivocal language to authorize a construction so directly repugnant to these treaties. But this section admits of a plain and obvious interpretation, consistent with other parts of the act, and in harmony with these treaties. The reference

undoubtedly is, to that class of Indians which has already been referred to, consisting of the mere remnants of tribes, which have become almost extinct, and who have, in a great measure, lost their original character, and abandoned their usages and customs, and become subject to the laws of the state, although, in many parts of the country, living together, and surrounded by the whites. They cannot be said to have any distinct government of their own, and are within the ordinary jurisdiction and government of the state where they are located.

But such was not the condition and character of the Cherokee nation, in any respect whatever, in the year 1802, nor at any time since. It was a numerous and distinct nation, living under the government of their own laws, usages and customs, and in no sense under the ordinary jurisdiction of the state of Georgia; but under the protection of the United States, with a solemn guarantee by treaty of the exclusive right to the possession of their lands. This guarantee is to the Cherokees in their national capacity. Their land is held in common, and every invasion of their possessory right is an injury done to the nation, and not to any individual. No private or individual suit could be sustained: the injury done being to the nation, the remedy sought must be in the name of the nation. All the rights secured to these Indians, under any treaties made with them, remain unimpaired. These treaties are acknowledged by the United States to be in full force, by the proviso to the 7th section of the act of the 28th of May 1830, which declares, that nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any Indian tribes.

That the Cherokee nation of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question, and that the United States are bound, under their guarantee, to protect the nation in the enjoyment of such *occupancy, cannot, in my judgment, admit of a doubt; and that some of the laws of Georgia set out in the bill are in violation of, and in conflict with, those treaties, and the act of 1802, is, to my mind, equally clear. But a majority of the court having refused the injunction, so that no relief whatever can be granted, it would be a fruitless inquiry for me to go at large into an examination of the extent to which relief might be granted by this court, according to my own view of the case. I, certainly, as before observed, do not claim, as belonging to the judiciary, the exercise of political power; that belongs to another branch of the government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognisance, or a remedy is not to be had here. [*75

The laws of Georgia, set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character. Although the whole of these laws may be in violation of the treaties made with this nation, it is probable, this court cannot grant relief to the full extent of the

complaint. Some of them, however, are so directly at variance with these treaties and the laws of the United States, touching the rights of property secured to them, that I can perceive no objection to the application of judicial relief. The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed, in any manner whatever, as acts of war; but merely as an assertion of what is claimed as a legal right: and in this light ought they to be considered by this court.

The act of the 2d of December 1830, is entitled "an act to authorize the governor to take possession of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called
*76] the Cherokee *country, and those upon all other unappropriated lands of the state, and for punishing persons who may be found trespassing on the mines." The preamble to this act asserts the title to these mines to belong to the state of Georgia; and by its provisions, $20,000 are appropriated, and placed at the disposal of the governor, to enable him to take possession of those mines; and it is made a crime, punishable by imprisonment in the penitentiary of Georgia, at hard labor, for the Cherokee Indians to work these mines. And the bill alleges, that under the laws of the state in relation to the mines, the governor has stationed at the mines an armed force, who are employed in restraining the complainants in their rights and liberties in regard to their own mines, and in enforcing the laws of Georgia upon them. These can be considered in no other light than as acts of trespass; and may be treated as acts of the state, and not of the individuals employed as the agents. Whoever authorizes or commands an act to be done, may be considered a principal, and held responsible, if he can be made a party to a suit; as the state of Georgia may undoubtedly be. It is not perceived, on what ground, the state can claim a right to the possession and use of these mines. The right of occupancy is secured to the Cherokees by treaty, and the state has not even a reversionary interest in the soil. It is true, that by the compact with Georgia of 1802, the United States have stipulated to extinguish, for the use of the state, the Indian title to the lands within her remaining limits, "as soon as it can be done, peaceably, and upon reasonable terms." But until this is done, the state can have no claim to the lands.

The very compact is a recognition by the state of a subsisting Indian right; and which may never be extinguished. The United States have not stipulated to extinguish it, until it can be done "peaceably, and upon reasonable terms;" and whatever complaints the state of Georgia may have against the United States for the non-fulfilment of this compact, it cannot affect the right of the Cherokees. They have not stipulated to part with that right; and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of the territory.

*77] Again, by the act of the 21st December 1830, surveyors *are authorized to be appointed to enter upon the Cherokee territory, and lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia; reserving to the Indians only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and even excepting from such reservation, improvements recently made near the

gold mines. This is not only repugnant to the treaties with the Cherokees, but directly in violation of the act of congress of 1802 ; the fifth section of which makes it an offence, punishable with fine and imprisonment, to survey or attempt to survey or designate any of the boundaries, by marking trees or otherwise, of any land belonging to or secured by treaty to any Indian tribe ; in the face of which, the law of Georgia authorizes the entry upon, taking possession of, and surveying, and distributing by lottery, these lands guarantied by treaty to the Cherokee nation ; and even gives authority to the governor to call out the military force, to protect the surveyors in the discharge of the duty assigned them.

These instances are sufficient to show a direct and palpable infringment of the rights of property secured to the complainants by treaty, and in violation of the act of congress of 1802. These treaties, and this law, are declared by the constitution to be the supreme law of the land ; it follows, as matter of course, that the laws of Georgia, so far as they are repugnant to them, must be void and inoperative. And it remains only very briefly to inquire, whether the execution of them can be restrained by injunction according to the doctrine and practice of courts of equity.

According to the view which I have already taken of the case, I must consider the question of right as settled in favor of the complainants. This right rests upon the laws of the United States, and treaties made with the Cherokee nation. The construction of these laws and treaties are pure questions of law, and for the decision of the court. There are no grounds therefore, upon which it can be necessary to send the cause for a trial at law of the right, before awarding an injunction ; and the simple question is whether such a case is made out by the bill, as to authorize the granting an injunction? *This is a prohibitory writ, to restrain a party from doing a wrong or injury to the rights of another. It is a beneficial [*78
process, for the protection of rights ; and is favorably viewed by courts of chancery, as its object is to prevent rather than redress injuries ; and has latterly been more liberally awarded than formerly. 7 Ves. 307. The bill contains charges of numerous trespasses, by entering upon the lands of the complainants, and doing acts greatly to their injury and prejudice, and to the disturbance of the quiet enjoyment of their land, and threatening a total destruction of all their rights. And although it is not according to the course of chancery, to grant injunctions to prevent trespasses, when there is a clear and adequate remedy at law, yet it will be done, when the case is special and peculiar, and when no adequate remedy can be had at law and particularly, when the injury threatens irreparable ruin. 6 Ves. 147 ; Eden 207. Every man is entitled to be protected in the possession and enjoyment of his property ; and the ordinary remedy by action of trespass may generally be sufficient to afford such protection. But where, from the peculiar nature and circumstances of the case, this is not an adequate protection, it is a fit case to interpose the preventive process of injunction. This is the principle running through all the cases on this subject, and is founded upon the most wise and just considerations ; and this is peculiarly such a case. The complaint is not of a mere private trespass, admitting of compensation in damages ; but of injuries which go to the total destruction of the whole right of the complainants ; the mischief threatened is great and irreparable. 7 Johns. Ch. 330. It is one of the most beneficial

powers of a court of equity to interpose and prevent an injury, before any has actually been suffered ; and this is done by a bill, which is sometimes called a bill *quia timet.* Mitford 120.

The doctrine of this court in the case of *Osborn* v. *United States Bank*, 9 Wheat. 738, fully sustains the present application for an injunction. The bill in that case was filed to obtain an injunction against the auditor of the state of Ohio, to restrain him from executing a law of that state, which was alleged to be to the great injury of the bank, and to the destruction
*79] of rights conferred by their charter. The only *question of doubt entertained by the court in that case was, as to issuing an injunction against an officer of the state, to restrain him from doing an official act enjoined by statute—the state not being made a party. But even this was not deemed sufficient to deny the injunction ; the court considered, that the Ohio law was made for the avowed purpose of expelling the bank from the state, and depriving it of its chartered privileges, and they say, if the state could have been made a party defendant, it would scarcely be denied, that it would be a strong case for an injunction ; that the application was not to interpose the writ of injunction, to protect the bank from a common and casual trespass of an individual, but from a total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. In that case, the state could not be made a party according to the 11th amendment of the constitution ; the complainants being mere individuals, and not a sovereign state. But according to my view of the present case, the state of Georgia is properly made a party defendant ; the complainants being a foreign state. The laws of the state of Georgia in this case go as fully to the total destruction of the complainants' rights, as did the law of Ohio to the destruction of the rights of the bank in that state ; and an injunction is as fit and proper in this case to prevent the injury, as it was in that.

It forms no objection to the issuing of the injunction in this case, that the lands in question do not lie within the jurisdiction of this court. The writ does not operate *in rem*, but *in personam.* If the party is within the jurisdiction of the court, it is all that is necessary, to give full effect and operation to the injunction ; and it is immaterial, where the subject-matter of the suit, which is only affected consequentially, is situated. This principle is fully recognised by this court, in the case of *Massie* v. *Watts*, 6 Cranch 157 ; where this general rule is laid down, that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person may be found, although lands not within the jurisdiction of the court may be affected by the decree. And reference is made to several cases in the English chancery recognising the same principle. In the case of *Penn* v. *Lord Baltimore*, 1 Ves. 444, a specific performance of a
*80] *contract respecting lands lying in North America was decreed ; the chancellor saying, the strict primary decree of a court of equity is *in personam*, and may be enforced in all cases when the person is within its jurisdiction.

Upon the whole, I am of opinion : 1. That the Cherokees compose a foreign state, within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia. 2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the

Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion. 3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought, therefore, to be awarded. And I am authorized by my brother STORY to say, that he concurs with me in this opinion.

Motion denied.

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*The Lessee of ROBERT G. SCOTT and SUSANNAH his wife, and JAMES C. MADISON, Plaintiffs in error, *v.* SILAS RATLIFFE, THOMAS OWINGS, JOHN OWINGS and others, Defendants in error. [*81

Hearsay evidence.—Land-law of Kentucky.

A witness testified, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, but was acquainted with his daughter only by report; that she never had seen her nor Mr. Scott, but recollected to have heard of their marriage, in Petersburg, as she thought, before the death of her father; that she could not state from whom she heard the report, but that she had three cousins, who went to college, at the time that she lived in Petersburg, and had no doubt that she had heard them speak of the marriage; that she heard of the marriage of Miss Madison, before her own marriage, as she thought, which was in 1810; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead: *Held*, that so much of this evidence as went to prove the death of Mr. Madison, was admissible on the trial, and ought not to have been excluded by the court.[1]

A patent was issued by the governor of Kentucky, for a tract of land containing 1850 acres, by survey, &c., describing the boundaries; the patent described the exterior lines of the whole tract, after which the following words were used, "including within the said bounds 522 acres entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c. Patents of this description are not unfrequent in Kentucky; they have always been held valid, so far as respected the land not excluded, but to pass no legal title to the land excluded from the grant. The words manifest an intent to except the lands of Preston and Garrard from the patent; the government did not mean to convey to the patentee lands belonging to others, by a grant which recognises the title of these others. If the court entertained any doubt on this subject, those doubts would be removed, by the construction which it is understood has been put on this patent by the courts of the state of Kentucky.[2]

The defendants claimed under a patent issued by the governor of Kentucky, on the 3d of January 1814, to John Grayham, and two deeds from him, one to Silas Ratliffe, one of the defendants, dated in August 1814, for 100 acres, the other to Thomas Owings, another defendant, for 400 acres, dated 25th March 1816; and gave evidence conducing to prove that they, and those under whom they claimed, had a continued possession, by actual settlement, more than seven years next before the bringing of this suit; the court instructed the jury, that if they believed from the evidence, that the defendants' possession had been for more than seven years before the bringing of the suit, that the act, commonly called the seven years' limitation act, of Kentucky, passed in 1809, was a bar to the plaintiffs' recovery; unless they found, that the daughter of the patentee, holding under a patent from the state of Virginia, was a *feme covert*, when her father, the patentee, died; or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham, the *patentee under the governor of Kentucky; the words, "at the time the defendants acquired their title by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title. The court cannot say, this instruction was erroneous. [*82

ERROR to the Circuit Court of Kentucky. On the 2d of April 1825, the plaintiffs commenced an action of ejectment against the defendants, assert-

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[1] Secrist *v.* Green, 3 Wall. 744.

[2] Armstrong *v.* Morrell, 14 Wall. 120.

ing a title and right of entry in and to 1850 acres of land, patented to their ancestor, James Madison, by the commonwealth of Kentucky. The grant was dated August 8th, 1798; and was in consideration of sundry land-office treasury-warrants, issued by the state of Virginia, and a survey bearing date 26th December 1796, founded on an entry made prior to the 1st of June 1792. At May term 1828, a verdict and judgment were rendered for the defendants.

On the trial, the plaintiff gave in evidence the patent to James Madison, and evidence conducing to prove the boundaries thereof; and that the defendants resided in said bounds, at the commencement of the suit. The patent recited, that in virtue of three land-office treasury-warrants, &c., "there is granted unto the Reverend James Madison, a certain tract or parcel of land, containing 1850 acres, by survey," &c.; and described the boundaries thereof, "including within said lands, 522 acres of land entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c.

They also proved by James Harvee, that he had known Bishop James Madison and his daughter Susan, the wife of one of the plaintiffs in error. He stated, that he had understood, Susan had married Mr. Scott, but he had never seen him; that Bishop Madison was dead, and he supposed, died in 1812. N. B. Beal, another witness, testified, that he had known Bishop Madison, had been to school to him, and he was well acquainted with his daughter Susan Madison, and with James C. Madison, his son, the lessors; they were the only children of Mr. Madison, living at his death; that he could not say, when Bishop Madison died, but he thought about twenty *years prior to 1828; that in 1818, he was at the house of Mr. Scott, in Virginia, saw Mrs. Scott, and they were then living as man and wife. Mrs. Eppes testified, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, and was acquainted with his daughter only by report; that she had never seen her or Mr. Scott, but recollected to have heard of her marriage with Mr. Scott, before the death of her father; that she had heard of Miss Madison's marriage, before her own marriage, which was in 1810; that she could not tell from whom she heard the report, but she had three cousins, who went to college in Williamsburg, at the time that she lived in Petersburg, and had no doubt, that she had heard them speak of the marriage; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead.

*83]

The defendants gave in evidence the patent to John Grayham, assignee of John Preston, issued by the governor of Kentucky, on the 13th day of January 1814, for 1445 acres of land; a deed from John Grayham to Silas Ratliffe, for 100 acres, by metes and bounds, dated 12th August 1814; a deed from John Grayham to Thomas Owings, for 400 acres, dated 25th of March 1816.

On the trial, the counsel for the plaintiffs took three bills of exception to the opinion of the court; the particulars of which are stated more at large in the opinion of this court. The first exception was to the instruction of the court to the jury, that if the plaintiffs did not show to their satisfaction, that the defendants resided within the plaintiffs' grant, and outside of the land claimed of Preston and Garrard, they ought to find for

the defendants. This bill of exception also set forth an objection, by the plaintiffs' counsel, to the ruling of the court as to the mode by which the location and survey should have been made. The second bill of exception stated, that the plaintiffs moved the court to instruct the jury, that the seven years' possession of the defendants was no bar to the plaintiffs' recovery; which the court overruled: and they instructed the jury, that *if they believed, from the evidence, that the defendants had been [*84 more than seven years in possession, next before the bringing the action, that the seven years' possession law of Kentucky, of 1809, was a bar to the plaintiffs' recovery; unless the jury should find, that Susan Madison was a *feme covert*, when her father died, and when the defendants acquired title under the patent of John Grayham. The third bill of exception stated, that the court, on the motion of the counsel of the defendants, overruled the evidence of Mrs. Eppes. The plaintiffs prosecuted this writ of error.

The case was argued by *Wickliffe*, for the plaintiffs in error. No counsel appeared for the defendants.

Wickliffe contended, that the evidence of Mrs. Eppes was improperly excluded in the circuit court. It was important to Mrs. Scott, and to her co-heir, to establish the facts in the knowledge of Mrs. Eppes; and such testimony to prove marriage, the death of the ancestor, and heirship, is within the rules of law and decided cases. 3 Bibb 238; 2 A. K. Marsh. 572; *Elliott v. Peirsol*, 1 Pet. 328.

As to the protection claimed under the seven years' law; the counsel for the plaintiffs contended, that it protects only those who are in under a supposed title from the commonwealth of Kentucky. This was not the fact as to all the defendants; but the instructions of the court were given as to the possession of them all. The party claiming under that act must connect himself with a legal or an equitable title. Ratliffe and Owings were the only persons who claimed in that manner. Even with such a title, it must be shown to have been adverse to the plaintiffs' title.

The instructions of the court upon the terms of the patent were also erroneous. The grant is to the whole extent of the boundaries of the land, and gives the legal title; but the equitable title of those who might be within those boundaries was not affected thereby. 1 T. B. Monr. 133. The court say the plaintiffs cannot recover, unless they prove that the defendants live outside of the undefined bounds of Preston's grant. These lines had not been run out; and it was impossible to prove the facts insisted upon, as the lines had not been ascertained.

*Marshall, Ch. J., delivered the opinion of the court.—This is a [*85 writ of error to a judgment rendered in favor of the defendants, in an ejectment brought by the plaintiffs in the court of the United States for the seventh circuit and district of Kentucky.

The plaintiffs claimed title as heirs of the Reverend James Madison, deceased, under a patent issued to him by the governor of Kentucky, on the 8th day of August 1798. A verdict and judgment having been rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error. The case depends on several bills of exception taken to certain opinions given by the court at the trial of the cause.

The plaintiffs gave in evidence the patent to their ancestor. It grants to the Reverend James Madison a certain tract or parcel of land, containing 1850 acres, by survey, &c., and "bounded as follows." It then describes the exterior lines of the whole tract, after which the following words are used; "including within said bounds, 542 acres of land entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c.

They then gave evidence conducing to prove the death of the grantee, before the institution of the suit; that the plaintiffs, Susannah and James C., were his heirs-at-law, and that the plaintiff Susannah had intermarried with the plaintiff Robert G. Scott. They then introduced Mrs. Eppes as a witness, who swore, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, and was acquainted with his daughter only by report; that she had never seen her or Mr. Scott, but recollects to have heard of her marriage in Petersburg, as she thought, before the death of her father; that she could not state from whom she heard the report, but she had three cousins, who went to college, at the time that she lived in Petersburg, and had no doubt, that she heard them speak of the marriage; that she heard of the marriage of Miss Madison, before her own marriage, as she thought, which was in 1810; that she was, *as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead. On the motion of the defendants, the court excluded this testimony as incompetent; and the counsel for the plaintiffs excepted to this opinion.

*86]

In considering this exception, some diversity of opinion has prevailed in this court, with respect to that part of it which related to the time of the intermarriage between the plaintiffs, Robert G. Scott and Susan his wife. Some of the judges think, that the evidence given by Mrs. Eppes respecting the time, as well as respecting the fact of intermarriage, comes within the general rule excluding hearsay testimony, which was laid down by this court in the case of *Mima Queen* v. *Hepburn*, 7 Cranch 290. That rule is, "that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." Others think, that the fact of the marriage being established by other testimony, the circumstance that this fact was communicated to the witness, before another event took place, becomes itself a fact, and is evidence that the marriage was anterior to that other event. It becomes unnecessary to decide on this principle, because we are all of opinion, that so much of the testimony of Mrs. Eppes as goes to prove the death of Mr. Madison was admissible, and ought not to have been excluded.

On the motion of the defendants, the court also instructed the jury, "that if the plaintiffs did not show to their satisfaction, that the defendants resided within the plaintiffs' grant, and outside of the land claimed of Preston and Garrard, they ought to find for the defendants. An exception was taken to this opinion; and the plaintiffs contend, that it is erroneous, because the grant comprehends all the land within the exterior lines of the survey; and that the exception of the equitable claims of Preston and Garrard did not impair the legal effect of the grant, but subjected the grantee to the equitable demands of those claimants.

Patents of this description are not unfrequent in Kentucky. They have been always held valid so far as respected the land not excluded, but to pass no legal title to the land excepted from the grant. The plaintiff does not controvert this general *principle, but contends, that the peculiar language of this grant forms an exception to the general rule; and [*87 exempts this patent from its operation. The language is, that the lands entered for John Preston and William Garrard are included within the same bounds, but "both claims have been excluded in the calculation of the plat, with its appurtenances," &c. We think these words manifest an intent to except the lands of Preston and Garrard from the patent. The government could not mean to convey to Madison lands belonging to others, by a grant which recognises the title of those others. If we entertained doubts on this subject, those doubts would be removed, by the construction which we understand the courts of the state have put on this patent.

The defendants claimed under a patent issued by the governor of Kentucky to John Grayham, on the 3d of January 1814, and showed two deeds from John Grayham, one to Silas Ratliffe, one of the defendants, for 100 acres of land, dated the 12th of August 1814, the other to Thomas Owings, also a defendant, for 400 acres of land, dated the 25th of March 1816. They also gave evidence conducing to prove, that they, and those under whom they claimed, had a continued possession, by actual settlement, more than seven years next before the bringing this suit. The plaintiffs then moved the court to instruct the jury, that seven years' possession, as aforesaid, was no bar to the plaintiffs' recovery; but the court overruled the motion, and instructed the jury, that if they believed from the evidence, that the plaintiffs had been more than seven years in possession, next before the bringing the action, that the act, commonly called the seven years' limitation act, of Kentucky, passed in 1809, was a bar to the plaintiffs' recovery; unless the jury should find, that Susan Madison was a *feme covert*, when her father, the patentee, died, or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham. The plaintiffs excepted to this instruction.

Their counsel admits the constitutionality of the act of limitations referred to in the opinion of the court; and that it is a bar to the action as to those defendants who show title under John Grayham; but insists, that only two of the defendants *show such title, and that the plaintiffs are [*88 entitled to judgment against the others. There is no question respecting the law as applicable to the fact; but some doubt exists respecting the fact. It is understood, to be settled in Kentucky, that their limitation act of 1809 protects those only who are connected with a patent from government, by paper title; and the record shows conveyances from Grayham to Ratliffe and Owings only; but it cannot escape us, that the object of the plaintiffs' motion and exception was, to bring into review and question the constitutionality of the act of 1809. He, therefore, does not discriminate between those who have, and and those who have not, title; his motion comprehends all the defendants. The instruction given by the judge is also in general terms; obviously not contemplating any difference of situation or right between the several defendants. We find expressions in the conclusion of the instruction, leading to the opinion, that in fact there was no distinction between the defendants. After declaring that the statute

was a bar, the judge adds, "unless the jury should find that Susan Madison was a *feme covert*, when her father, the patentee, died; or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham." The words, "at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title. The language of the judge cannot be construed to indicate, that the conveyance to Ratliffe and Owings could avail those who did not claim under them. The defendants might all claim under them. Some confusion, undoubtedly, exists in the statement of the fact, both in the motion and in the instruction; but we think both may be fairly understood as applying only to defendants claiming under John Grayham. We cannot say, that this instruction is erroneous.

The judgment is reversed, for error in the entire exclusion of the testimony of Mrs. Eppes; and the cause is to be remanded, with instructions to award a *venire facias de novo.*

*89] 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, this court is of opinion, that there is error in the proceedings and judgment of the said circuit court in this, that the testimony of Mrs. Eppes, a witness in the said cause, was totally excluded; whereas, the same ought to have been admitted, so far as it conduced to prove the death of James Madison, the ancestor of the plaintiffs: Therefore, it is considered, ordered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled; and that the cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*90] *John R. Livingston, Plaintiff in error, *v.* Moses Smith, Defendant in error.

Pleading.—Attachment.

Insufficient and defective pleading.

A sheriff, having a writ of foreign attachment, issued according to the laws of New Jersey, proceeded to levy the same on the property of the defendant in the attachment; after the attachment was issued, the plaintiff took the promissory notes of the defendant for his debt, payable at a future time, but no notice of this adjustment of the claim of the plaintiff was given to the sheriff, nor was the suit on which the attachment issued discontinued; the defendant brought replevin for the property attached, the sheriff having refused to redeliver it: *Held*, that the sheriff was not responsible for levying the attachment for the debt so satisfied, or for refusing to redeliver the property attached.

A previous attachment, issued under the law of New Jersey, of property, as the right of another, could not divest the interest of the actual owner of the property in the same; so as to prevent sheriff attaching the same property, under a writ of attachment issued for a debt of the same actual owner.

Error to the Circuit Court of New Jersey. In the court below, John R. Livingston instituted an action of replevin against Moses Smith, the defendant in error, "for that he, Moses Smith, on the 2d of November 1826, at the township of Newark, in the county of Essex, and state of New Jersey, took the goods and chattels of the plaintiff in the replevin, to

wit, the steamboat Sandusky, her engines, &c.," and unjustly detained them, &c.

To the declaration, the defendant, Smith, pleaded property in Robert Montgomery Livingston, at the time of the taking; and also made cognisance or avowry as follows:

1. That the goods and chattels mentioned in the declaration, were taken by him, on the 4th November 1826, as sheriff of the county of Essex, under a writ of attachment issued out of the court of common pleas of the county, at the suit of James W. Higgins against John R. Livingston; and that the goods were detained by him, until they were replevied by the plaintiff in this suit, on the 13th of November 1826, before the return of the writ.

2. That, as sheriff, he took the same goods and chattels, on the 2d November 1826, under a like writ of *attachment at the suit of James W. Higgins against Robert M. Livingston; in whose possession they then were. [*91

To the first cognisance, the plaintiff, John R. Livingston, pleaded, that after the taking of the goods, and before the commencement of this suit, on the 29th November 1826, on accounting with Higgins, he was found indebted to him in the sum of $896, the debt for which the attachment had issued; and on the 1st of April 1827, he tendered to Higgins the said sum of money, which he received in full satisfaction of the same; and upon the return of the attachment, there were no further proceedings thereon by Higgins or by any other person; and by means thereof, according to the practice of the court, the writ of attachment was ended, &c. The 2d plea stated, that before the commencement of this suit, and before the return of the attachment, on the 29th of November 1826, he, John R. Livingston, delivered to Higgins, the plaintiff in the attachment, two promissory notes for the whole amount of the debt due to him, payable at three and four months, which were paid by him according to the tenor thereof. The 3d plea set forth, that before the appointment of any auditors under the attachment, on the 9th of January 1828, the plaintiff, Higgins, voluntarily discontinued the same of record. 4th plea: That the goods, at the time they are supposed to be attached as the property of John R. Livingston, at the suit of Higgins, and until they were replevied, were in the possession of the defendant as sheriff, under an attachment against Robert M. Livingston, at the suit of the same Higgins.

To the second cognisance, the plaintiff, John R. Livingston, pleaded:

1. That the property, when attached, was not in the possession of the said Robert M. Livingston, as is alleged by the said second cognisance. 2. That the property, when attached, was in John R. Livingston; and traversed the property being in Robert M. Livingston.

To the first plea to the first cognisance, the defendant, Smith, demurred, and showed for cause: *1. That the tender to, and acceptance by Higgins, of the money, in satisfaction of the debt, was after the commencement of the action of replevin, and before the attachment was discontinued, 2. That the plea was argumentative. [*92

To the 2d plea to the first cognisance, the defendant, Smith, also demurred, and showed for cause: 1. That the notes stated in the plea were to be in satisfaction of the debt; yet was it not shown by the plea, that the notes

were paid off, before the commencement of the suit. 2. That it did not appear by the plea, that the plaintiff was entitled to a return or redelivery of the goods. 3. That the matters in the plea were immaterial.

To the 3d plea to the first cognisance, the defendant demurred, and showed for cause: 1. Because it appeared that when the replevin was sued out, the attachment was in full force. 2. That the matters set forth therein did not maintain the count. To the 4th plea, there was a general demurrer.

To the first plea to the second cognisance, the defendant demurred, and showed for cause, that the matters were unintelligible, uncertain, insufficient, irrelative and informal; and he put in a general demurrer. The plaintiff joined in each demurrer.

The case was argued by *Frelinghuysen*, for the plaintiff in error; and by *Coxe*, for the defendant.

Frelinghuysen said, the principal question in the case was, whether the creditors of Robert Montgomery Livingston could set up the attachment against John R. Livingston which has been discontinued; the debt for which it issued having been paid. The defence of the sheriff, Moses Smith, presents two writs of attachment, one against John R. Livingston, the other against Robert M. Livingston; and if he does not justify under one of these writs, the judgment of the circuit court must be reversed.

The attachment against Robert M. Livingston was the first. It was issued on the 2d of November; and that against John R. Livingston on the 4th of November. This constitutes the first ground of exception. The
*93] first *attachment was a proceeding against the steamboat Sandusky, alleging her to belong to Robert M. Livingston. The property was then in the custody of the law, to answer to James W. Higgins, and all the other creditors of the defendant in the attachment, according to the provisions of the attachment law of New Jersey. James W. Higgins could not, afterwards, on the 4th of November, proceed by attachment against the same property, under the allegation that it belonged to another person. There would be an inconsistency in the two proceedings which could not be reconciled. Two sets of auditors would have the distribution of the proceeds of the attachment. (Revised Laws of New Jersey, 355.) In this view of the law, the attachment against the Sandusky, as the property of John R. Livingston, was invalid. 3 Mass. 289; 5 Ibid. 319; 7 Ibid. 271; 8 Ibid. 246; 1 Show. 174.; 4 T. R. 651; 3 Mass. 295.

2. As to the matters set up under the second attachment, they cannot avail, as that proceeding was at an end, by the adjustment of the claim of the plaintiff in the same. On the 29th day of November, Mr. Livingston accounted with James W. Higgins, and gave him two notes for the balance due to him on a final settlement. All this was done, before the replevin issued, and it is a full and sufficient answer to the defence set up by the sheriff. The law of New Jersey requires, that the debt for which the attachment issues, shall be due and payable at the time of the issuing af the writ. The taking of the notes, payable at a future and distant date, was an extinguishment of the right to continue the attachment. It was a withdrawal of the suit. It is not necessary that there should have been a formal discontinuance. 2 Chit. Pl. 246. Arch. Pract. 123, 329, 330. It was not

in the power of Mr. Livingston to discontinue, or compel the plaintiff to do so. All that was in his power he did, by taking away the right of the plaintiff to prosecute the suit.

3. What is the operation of the writ of attachment against Robert Montgomery Livingston? It is said, this attachment put the property in the custody of the law; and that it must remain so. This principle applies to the defendant in the attachment, but not to third persons.

*4. As to the objection, that replevin will only apply where there is a tortious taking. It is admitted, that this is the law in some of the states, but not in all. In Massachusetts, replevin is a remedy for a lawful taking, where the detainer is contrary to law. 15 Mass. 359; 16 Ibid. 147; 17 Ibid. 606; 14 Johns. 84; Kirby 275. This is also the law in Pennsylvania. 1 Dall. 156. If the sheriff in an attachment against A., takes the property of B., he is a tortious taker. 14 Johns. 84. And these cases are in accordance with terms of the law of New Jersey, which authorizes replevin for a wrongful detainer. (1 Revised Laws of New Jersey, 212.) In Virginia, replevin would be the appropriate remedy. 1 Wash. 92; also 3 Bl. Com. 145, 151; 1 Paine 620; 20 Johns. 465. The writ of attachment being irregular against John R. Livingston, the execution of it was a tortious taking by the sheriff, no authority being lawfully delegated to him for the purpose. The sheriff's jury, which, by the attachment law, may be called by the sheriff, on a question of property, is for the protection of the officer. If the property is found to belong to the defendant in the attachment, it does not preclude the claimants from disputing the right of the defendants; but the sheriff is protected from vindictive damages. This has been the uniform decision of the state courts of New Jersey. The law of New Jersey corresponds with the principles of the English decisions. (Rev. Laws of N. Jersey, 357, § 14.) 2 H. Bl. 437; 3 Maule & Selw. 175; 6 T. R. 88. [*94

Coxe, for the defendant in error, made the following points: 1. The matters contained in the several pleas, pleaded to the first cognisance, do not constitute any bar to the same. 2. A defendant whose goods have been taken in execution, or under an attachment against him, can never have replevin against the sheriff for the goods so taken. 3. Replevin will not lie, except in cases of tortious or wrongful taking; whereas, in this case, the goods were taken under the authority of a court of competent jurisdiction, and were at the time in custody of the law. 4. Admitting, however, that an officer, who has lawfully seized goods, may, by a subsequent abuse of them, or by unlawfully detaining them, become a trespasser *ab initio*, and so liable *to trespass or replevin, yet in this case, the plaintiff has no such ground of action. 5. Payment and satisfaction to Higgins, the plaintiff in attachment, either before or after the return of the writ, would not, under the statute of New Jersey, authorize the sheriff to deliver up the goods, unless the suit was discontinued of record; and consequently, until then, at least, replevin could not be brought. 6. Admitting, however, that after payment and satisfaction to the plaintiff in attachment, the defendant in attachment might bring replevin against the sheriff, yet it does not appear by the pleadings in this case, that any such previous payment was made; but, on the contrary, it does appear, that the writ of replevin was served on the 30th of November 1826, and the payment to Higgins was [*95

not made till the 1st of April 1827. 8. Admitting that, after a regular discontinuance of the attachment, the defendant in attachment may have replevin against the sheriff for his goods, yet in this case, the replevin was sued out on or before the 30th of April 1826, and the attachment was not discontinued of record until the 7th of January 1828.

As to the pleas to the second cognisance: 1. Under the attachment law of New Jersey, goods may be attached, though not in the possession of the defendant in attachment at the time. 2. If a stranger claims property in the goods attached, he has a remedy under the 14th section of the statute of New Jersey, for the relief of creditors against absent and absconding debtors. 3. A proceeding by attachment in New Jersey is a proceeding *in rem.* In such cases, it is the possession and control of the property that gives jurisdiction to the court; and it cannot be deprived of its jurisdiction, by a co-ordinate or concurrent tribunal proceeding collaterally and taking the property out of its possession.

Mr. Coxe cited Pet. C. C. 245; 1 Paine 620, 625; *Gelston* v. *Hoyt*, 3 Wheat. 312; 3 Dall. 188; Holt 643; 1 Show. 174; Gilbert on Replevin 166; 1 Mason 322; 5 Mass. 283; 6 Binn. 2; 2 Wheat. Selw. 896; 10 Johns. 373; 7 Ibid. 143; 14 Ibid. 84; Bro. Abr., Replevin, pl. 15, 36, 39; Rolle's Abr. Replevin, B. 2.

*96] *Johnson, Justice, delivered the opinion of the court.—The facts and merits of this case lie in a very narrow compass. The action is replevin, sued out of the circuit court of the United States for the district of New Jersey. The case presented by the pleadings is this: In the year 1827, one Higgins sued out several attachments in the state court, both against this plaintiff and one R. M. Livingston. Smith is sheriff of the state, and, as such, on the 2d of November, he arrested a steamboat, as the property of R. M. Livingston; and again, on the 4th of the same month, he seized the same boat, as the property of this plaintiff, J. R. Livingston. J. R. Livingston, being a citizen of New York, brings this suit in a court of the United States, and counts in the ordinary form of the declaration in replevin. Smith avows and justifies under the two attachments; and Livingston, in a variety of replications, seeks to repel this justification:

1. On the plea of payment to the plaintiff in attachment, subsequent to the attachment, but without notice to the sheriff Smith, or any averment of discontinuance, other than what may be gathered from facts stated, from which a discontinuance might have been matter of deduction or inference. This plea is certainly insufficient in matter, and defective in form.

2. On the plea of an accord made prior to the suit; by which it was agreed by Higgins to receive certain promissory notes, which, when paid, should be in full satisfaction of the debt, which notes were duly paid at maturity. On this plea, there has been some difference of opinion: but besides that it does not aver an agreement to discontinue, admitting that, as against the plaintiff in the attachment, it would have been a good defence; the question still recurs, can a sheriff, without notice, be responsible for levying an attachment on a satisfied debt, or for not redelivering the property attached, without a discontinuance, or, at least, notice of the satisfaction? We say nothing of the rights or remedies of the defendant in attachment against the plaintiff: the question here is, whether the sheriff, under

such circumstances, is not *warranted by his writ in proceeding to act. How can he undertake to decide the question of liability between the parties; or what security has he against the plaintiff, should he act erroneously in not pursuing the exigencies of his writ? No question of property is here raised between him and the defendant; for the levy and detention and plea, all affirm the property to be in the defendant in attachment. This plea, therefore, makes out no cause of action.

3. On the plea of discontinuance of record; but this is obviously and radically insufficient, since the date of the discontinuance is expressly subsequent to the institution of the suit. This is admitting that there was no cause of action at the time of its institution. It does not raise the question, whether a subsequent unlawful act may not make the sheriff a trespasser *ab initio;* nor whether replevin nay not be brought for unlawful detention as well as unlawful taking; since, in either case, the cause of action must precede its institution.

4. On the plea that the goods, when attached as the property of this plaintiff, were in fact in posession of the sheriff under the attachment against R. M. Livingston, and the levy made thereon two days previously. But what cause of action does this make out for this plaintiff? If they were the property of another, he has nothing to complain of; and if they were his, there was the attachment against himself to justify the taking. A previous attachment, as the right of another, could not divest his interest; and the property being in the hands of the sheriff, as his bailee, or to his use, could not divest the sheriff of the right to seize or detain it under a writ against him.

These remarks dispose of the pleas to the first cognisance. To the second, the plaintiff relies on the pleas:

1. That the property was not, at the time of the attachment levied, in the possession of R. M. Livingston. But this is certainly tendering an immaterial issue; since it matters not in whose possession the property is found, if the taking be otherwise rightful.

2. That the property was his own, at the time it was attached as the property of R. M. Livingston, and not the property of R. M. Livingston. And this plea probably presents the only question intended by the suit: but unfortunately, it comes *embarrassed with circumstances which render it impossible to consider the merits in this suit. Had this plaintiff [*98 taken measures to disembarrass his case of the attachment against himself, before he brought suit, the defendant must have met him upon the question of property. But this plea does not go to the whole justification, since, admitting the truth of it, it still leaves the property liable to the attachment against himself. To this must be added, a defect in conforming the language of the traverse to the interest of R. M. Livingston; since the right of the plaintiff generally, and not as against R. M. Livingston alone, was necessary to maintain his action.

These views of the subject render it unnecessary to examine the more general question made upon the relation in which these two courts stand to each other; and we only notice it, to avoid any misapprehension that might possibly occur from passing it over unnoticed. Upon the whole, the majority of the court are of opinion, that the demurrers were rightly sustained; and the judgment below 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 New Jersey, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*99] THE UNION BANK of GEORGETOWN, Appellant, *v.* ANNA GEARY, Appellee.

Equity.—Responsive answer.—Consideration.—Authority of attorney.

It is a well-settled rule, that in a bill praying relief, when the facts charged in the bill as the ground for the decree, are clearly and positively denied by the answer, and proved only by a single witness, the court will not decree against the defendant; and it is equally well settled that when the witness on the part of the complainant is supported and corroborated by circumstances sufficient to outweigh the denial in the answer, the rule does not apply.

An injunction bill was filed, upon the oath of the complainant, against a corporation, and the answer was put in, under their common seal, unaccompanied by an oath. The weight of such answer is very much lessened, if not entirely destroyed, as it is not sworn to.

The court is inclined to adopt it, as a general rule, that an answer, not under oath, is to be considered merely as a denial of the allegation in the bill; analogous to the general issue at law, so as to put the complainant to the proof of such allegation.[1]

The attorney of the plaintiffs, in an action on a promissory note, agreed with the defendant whose intestate was indorser of the note, that if she would confess judgment, and not dispute, her liability upon the note, he, the attorney, would immediately proceed by execution to make the amount from the maker of the note, the principal debtor; who, he assured her, had sufficient property to satisfy the same; upon the faith of this promise, she did confess the judgment: *Held*, that this agreement fell within the scope of the general authority of the attorney, and was binding on the plaintiffs in the suit. The plaintiffs in the suit having failed to proceed by execution against the maker of the note, and having suffered him to remove, with his property, out of the reach of process of execution, the circuit court, on a bill filed, perpetually enjoined proceedings on the judgment confessed by the administratrix of the indorser, and the decree of the circuit court was, on appeal, affirmed by the supreme court.

The consideration alleged in the bill for the promise of the attorney, to proceed by execution against the maker of the note, and make the amount of the same, was the relinquishment of a defence which the defendant at the time considered legal and valid; by a subsequent judicial decision, it was determined, that the defence would not have been sustained. To permit this decision to have a retrospective effect, so as to annul a settlement or agreement made under a different state of things, would be sanctioning a most mischievous principle.

The general authority of an attorney does not cease with the entry of a judgment; he has, at least, a right to issue an execution; although he may not have the right to discharge such execution, without receiving satisfaction.

The suit does not terminate with the judgment; proceedings in the execution are proceedings in the suit.

Garey *v.* Union Bank, 3 Cr. C. C. 233, affirmed.

APPEAL from the Circuit Court of the district of Columbia, for the county of Washington.

*100] *Anna Geary, as administratrix of her husband, Everard Geary, filed her bill in the circuit court, in which she set forth, that her intestate, some time before his death, became surety on a note which was discounted for the accommodation of J. Merrill, at the Union Bank of Georgetown, for a large sum of money, which was continued, from time

[1] The answer of a corporation, under its corporate seal, is not evidence in its own favor, though responsive to the bill. Lovett *v.* Steam Saw-mill Association, 6 Paige 54. And see Patterson *v.* Gaines, 6 How. 588.

to time, by a renewal, in the usual way, for the accommodation of Merrill, until the death of her intestate. Subsequently to his death, suits were instituted in the circuit court, upon the note, against the maker and indorser; and she was called on by the counsel and attorney of the bank, and requested to confess a judgment on the note, and was, at the time, assured by the attorney, that if she did so, and did not dispute her liability upon the note, the bank would immediately proceed by execution to make the amount thereof from the principal debtor, Merrill; who, he assured her, had sufficient property in the county to satisfy the same; and he, advising her that she would be thus saved from liability for the debt, prevailed on her to make no defence against the suit at law, but voluntarily to confess a judgment thereon, for the amount of the debt, principal, interest and costs. The judgment was confessed for $4000 damages and costs, to be released on payment of $2000, with interest from 24th January 1815, until paid. Various payments, from May 30th, 1815, until August 6th, 1816, were made by Merrill, amounting to $753.39. The complainant charged, that at the time of confessing the judgment, a valid legal defence existed against the suit, which would have defeated the plaintiffs' right to recover on the indorsement; the plaintiffs not having made due and legal demand, and given due and legal notice, so as to bind the indorser; that the attorney of the bank well knew the same, and therefore, and to prevent complainant from contesting the suit, made the proposition before stated. The bill further charged, that when the judgments were obtained against Merrill and the complainant, on the note, Merrill resided in Georgetown, and had then and there sufficient property to satisfy and pay the judgments, and the *same might, then and for some time afterwards, have been recovered by process of execution, issued either against the body or the goods of Merrill. Complainant repeatedly and earnestly called upon the plaintiffs, and urged them to issue execution against Merrill, and recover their debt, according to the agreement and understanding upon which she had confessed judgment. The plaintiffs, however, continued to indulge Merrill, for a long space of time, and, notwithstanding all the remonstrances of the complainant, permitted him to leave the district, and take with him all his property beyond the process of the court; nor had they taken any effectual and proper means to recover the debt from said Merrill, as bound by their agreement to do. Merrill was now, as the complainant was informed and believed, in insolvent circumstances. And now, that by their misconduct and breach of faith, they had lost the means of recovering the judgment from Merrill, the plaintiffs, most unjustly and unreasonably, demanded payment of the same from the complainant, and threatened to proceed against her on said judgment, which she believed they meant to do. [*101

The answer of the defendants below, which was filed under their corporate seal, and was not sworn to, admitted, that Merrill did borrow the sum of $2200, upon his promissory note indorsed by Everard Geary, and averred, that the loan was made exclusively on the credit of the indorser; Geary having proposed himself as security of Merrill, whom he was anxious to assist and benefit by indorsing his note. The answer alleged, that the needy circumstances of Merrill were well known to the defendants and to the indorser; he never had sufficient property to pay his debts, and that

the indorser was known to be in good circumstances, and of ability and willingness to discharge his debts and responsibilities. During his lifetime, the indorser frequently promised to save and protect the bank from any loss on account of Merrill's inability to meet the note; and had he lived, he would punctually have complied with such promises. Upon the death of E. Geary, his administratrix, the complainant, refused to pay the note when it became due, and suffered the same to be protested; and it became necesssary for defendants to institute suits against the maker and indorser; *upon which suits judgments were obtained in December 1817. As to so much of the bill as charged any persuasion or agreement by the attorney of the bank, the defendants denied the same; and averred, that the judgment was not obtained voluntarily, the complainant having appeared to the suit, and contested the same in every stage, until the trial term; and when defendants were prepared with all necessary proof, and the case actually called for trial, the attorney of complainant, knowing that he had no good and valid defence, confessed the judgment. The defendants denied, that they ever authorized or directed their attorney to hold out any inducements to the complainant to confess the judgment, or to make any such persuasions and promises as were set forth in the bill; and they averred, that such persuasions and promises would have been wholly superfluous and unnecessary, as the complainant was legally and justly liable and bound to the defendants for the payment of the debt, and was then better acquainted with the situation of Merrill than the defendants or their attorney. They denied, that the complainant had any valid legal defence to the action; but averred, that payment of the note was legally demanded, and that due notice of non-payment was given. But whatever defence the complainant might have had, which was denied, the defendants insisted, that she had waived any such legal or technical defence, and omitted to protect herself thereby at law, and could not now avail herself of the same in equity. They denied, that when the judgment was obtained, or at any time afterwards, Merrill had sufficient property, unincumbered, whereon execution could have been levied and the money made; and they believed, that had they issued an execution against his body, it would have involved a useless increase of costs, as they believed, he would have taken the benefit of the insolvent law; they denied, that they have been remiss and inattentive in obtaining payment from Merrill; on the contrary, they averred, that by their active exertions, they did obtain payment from Merrill of $853, which otherwise never would have been paid. They denied ever having granted indulgences to Merrill, without the knowledge, consent and concurrence of the complainant; or that they *permitted him to leave the district and take his property with him, or refused to take proper and efficient measures to recover their judgment from him. The answer also stated, that whenever they called upon the complainant to pay the debt, they were ready and willing to make an assignment of the judgment against Merrill, and repeatedly offered to do so, before he left the district, which was refused.

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On the answer being filed, the circuit court, on motion, dissolved the injunction; and the complainant having filed a general replication, the testimony of various witnesses was taken; and upon a final hearing, the court

revived and perpetuated the injunction. From this decree, an appeal was entered.

The substance of the depositions was as follows: Daniel Renner, a director of the bank, said, that he was called on by Mrs. Geary, to get the Union Bank to have an execution issued against Merrill, before Merrill left the district; he made the application to the board. No answer was made, or, if any, to this effect: that they were not bound to press Merrill; that Mrs. Geary, if she pleased, could pay the judgment, and then adopt such course as she pleased. He was not certain, whether this suggestion came from the board, or from some of them, out of the bank. Mrs. Geary made frequent applications to him to get execution issued against Merrill, before he left town; and he several times spoke of it to the board.

G. Cloud stated, that all the knowledge he had of the judgment, was from the conversations between the cashier of the bank, Renner, Merrill and Wiley, the attorney of the bank, and Mrs. Geary. He well recollected the conversation between Mrs. Geary and Mr. Wiley, on the subject of her confessing judgment; and understood from the conversation of both of them, that if she would agree and confess judgment, she was to be cleared, and the money to be made out of Merrill's property, as he (Wiley) said, he had ascertained that Merrill had property sufficient to satisfy the debt, which was clear of incumbrances; and that it was expressly on these conditions that she confessed judgment. He heard Mrs. Geary tell Mr. Wiley, that he had promised, that if she would confess judgment, it would be better for her, as he would have the execution levied on Merrill's *property; and it would clear her from paying the debt, as Merrill had a sufficient property, clear of incumbrance; which he admitted he had told her, but that the fault was not in him, but in the directors of the bank. He did not think, that she was in danger of paying the debt; for he thought they would still get it out of Merrill. Merrill had considerable property in his possession, when he left the district; but the witness did not know his title to it. He heard Mr. Wiley say, he had ascertained, that it was clear of incumbrances; and that he had sufficient to satisfy the judgment. He heard Mrs. Geary tell Mr. Wiley, she never would have confessed judgment, if he had not told her that he would clear her, by instantly levying on Merrill's property; and that she verily believed, it was in his power to have the execution levied at his will—which he admitted. The reason assigned by Mr. Wiley was, that the directors of the bank would not suffer the execution to issue, as they knew their debt was safe, and did not wish to break up Merrill. The witness also stated, that he knew of frequent applications by Mrs. Geary to Wiley, to have execution issued, and went frequently himself on that business; but they would not suffer the execution to issue. One of the directors advised Mrs. Geary to pay off the judgment, and then the bank could not prevent her from having the execution issued; but she could not procure the money to do so. He had heard Mr. Renner say, that the directors did not use Mrs. Geary well, by withholding the execution, and suffering Merrill to leave the district; and that he had done what he could, to have the execution issued, but to no effect. [*104

E. Riggs, a director of the bank, stated, that he did not remember any agreement between the bank or its officers, and Mrs. Geary. He remembered a decision of the circuit court, exonerating indorsers upon a fourth day pro-

test. He remembered, that complainant, or some person for her, made application to the board, to call on Merrill for the debt, and press him for payment. The reply of the board (made by Dr. Magruder, as well as deponent recollected), was, that Merrill was not then able to pay, but was about to remove, where he probably would be more able to pay; but that complainant, if she chose, might pay the money, and have the judgment assigned to her; but the majority of the board did not feel *themselves called upon to distress Merrill, by complying with her request. Some of the board thought differently; and thought that if she could make anything out of Merrill's property, she should be allowed to do so. These were casual remarks, but no decision made. He thought the application was made by Mr. Renner, or by Mr. English, the cashier. He was always opposed to the loan to Merrill; but was always answered, that the indorser was sufficient.

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David English, the cashier, stated, that he never knew of the agreement, until the bill was filed, nor did he know, when the judgment was confessed, that the circuit court had delivered their opinion upon the insufficiency of a four days' protest. It was determined not to issue execution against Merrill, but upon what grounds, he did not recollect. It was said, the board were willing to assign the judgment. The note fell due, before the decision of the court relative to a four days' protest. The practice of protesting on the fourth day, was general with all the banks; and the indorser being a considerable dealer in the banks, was probably acquainted with it. The suit was in the hands of Mr. Wiley.

James A. Magruder deposed, that Mr. Wiley was the attorney or counsel for the Union Bank, at the time the judgment was confessed by the complainant. It was known to the bank, before the judgment was confessed, that many of their suits against indorsers, for trial at that term, were in jeopardy, in consequence of the late decision of the court, as to the insufficiency of the demand and notice on the fourth instead of the third day of grace. He understood from Wiley, that he was authorized and requested by the bank, or some of its officers, to adjust all such cases, and get judgments confessed by the parties, so as to avoid such defences being made by the indorsers. He was requested by said Wiley, to call on several of the indorsers, and among others, the complainant, with a view to make such adjustment; and did advise her to see Mr. Wiley, who was friendly to her, and would not advise her to do anything against her interest.

The case was argued by *Swann*, for the appellants; and by *Coxe* and *Jones*, for the appellee.

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Swann contended, that the complainant had not made out a case for the action of a court of chancery. The allegations of the bill were denied in the answer; and these allegations did not exhibit facts which entitled the complainant to relief, nor were they supported by the testimony of witnesses. The bank gave no authority to their attorney to accept a judgment on the terms stated; and the judgment was entered at the trial term, when the plaintiffs in the suit were prepared with witnesses to prove the liability of the administratrix in fact and at law; nor had the maker of the note property to pay the judgment. His inability to pay the note was known, when the loan was made; and it was made on the credit and suffi-

ciency of the indorser. The evidence by no means sustains the allegations of the bill. No two witnesses support the facts it asserts; and as the answer denies the bill, two witnesses are required to give the complainant a right to the injunction.

But if the attorney had made the promise which is averred by the complainant, such a promise would not bind the bank. As an attorney, he had no such right; and no evidence is given that the bank gave the authority. *Beecher's Case*, 8 Co. 116. If the bank had made a promise which, at the moment the judgment was entered, avoided it, such promise would be nugatory, as being without consideration. A judgment imports an absolute and unconditional obligation to pay; and the evidence of this obligation is of the highest character, that of a record; but in this case, it is to be invalidated by a parol agreement. A condition at war with a grant is void. So, a condition at war with a judgment of record, would be void.

The judgment was obtained in 1817; long before any decision relative to protests on the fourth day. The bill was filed in 1819, two years after the question was made. The complaint then was, that the judgment was not confessed on the ground that there was no defence; and the bill asks that the defence of want of legal notice may be allowed. But since that time, it has been decided by this court, that the notice was legal; and now, the complainant asks to be relieved from the debt altogether, by having the injunction perpetuated. Neither the law nor the evidence supports the claim.

**Coxe* and *Jones*, for the appellee, contended, that it was necessary to look at the time when the judgment was obtained. At that [*107 time, great doubts were entertained about the regularity of a four days' protest; and thus the arrangement made by the bank was one by which a benefit was supposed to be secured to the plaintiffs. The consideration for that judgment was the promise to proceed against Merrill, whose ability to pay the debt, was declared by the attorney of the bank to have been satisfactorily ascertained. Thus, it was not material, whether the question of the legality of the protest had been decided.

Two witnesses are not required to sustain the allegation of a bill, when one witness and circumstances confirm them. In this case, the statements of the bill are not denied on oath, the corporation having answered under its seal; and thus even the general rule cannot be applied to the case. 1 Cow. 110. Nor is the denial of the bank a denial of facts which they could have known. The bill charges the acts to have been done by the attorney. 1 Maryland 283; 9 Cranch 153.

The facts of the case present merits which fully entitle it to the relief of a court of equity. The agent of the bank agreed to take the judgment, on the condition that the debt should be collected from Merrill, who had property. It was positively stipulated, that execution should issue immediately against that property; and the question is presented, whether the attorney could make such an agreement? The bank acts only by its attorney. Wiley was the regular attorney of the bank, and is proved to have acted for them. The act done by him was within his powers in this relation to the bank. 3 Taunt. 486; 1 Esp. 178; Sayer 259; 1 Dall. 164; 1 Ld. Raym. 241; 13 Johns. 174; 17 Ibid. 324. But if there had been no ground of

defence to the suit, the case is not varied. There was a meritorious consideration for the agreement, and it was binding on the bank. 1 Ves. 408; 4 Ibid. 848; 2 Johns. Ch. 51, 60; 2 Vern. 423.

Thompson, Justice, delivered the opinion of the court.—The appellee, who was the complainant in the court below, and administratrix of her late husband, filed her bill in the circuit court for the district of Columbia,
*108] and for the *county of Washington, for the purpose of obtaining an injunction to restrain the Union Bank of Georgetown from all further proceedings on a judgment recovered against her as administratrix, upon a promissory note for $2200, bearing date the 21st of November 1814, which had been indorsed by her late husband, and discounted by the Union Bank, for the accommodation of Jeremiah Merrill, the maker. The judgment was entered in December 1817.

The bill states that suits were instituted in the circuit court upon the note, against the maker and indorser; and that the complainant was called upon by the attorney of the bank, and requested to confess a judgment on the note, and was, at the same time, assured by the attorney, if she did so, and did not dispute her liability upon the note, the bank would immediately proceed by execution, to make the amount thereof from Merrill, the principal debtor, who, he assured her, had sufficient property to satisfy the same; and advising her, that she would be thus saved from liability for the debt, prevailed on her to make no defence against the suit at law, but voluntarily to confess a judgment thereon.

The bill charges, that at the time of confessing the judgment, a valid legal defence existed against said suit, which would have defeated the plaintiffs' right to recover on the indorsement; the plaintiffs not having made due and legal demand, and given due and legal notice, so as to bind the indorser. That the attorney of the bank well knew the same, and to prevent the complainant from contesting the same, made the proposition above stated. The bill further charges, that when the judgments were obtained upon the note, Merrill resided in Georgetown, and had sufficient property to satisfy and pay the judgments; and that the same might then, and for some time afterwards, have been recovered by process of execution, issued either against the body or the goods of Merrill. And that the complainant repeatedly and earnestly called upon and urged the plaintiffs to issue execution against Merrill, according to the agreement and understanding upon which she had confessed judgment; but that the plaintiffs continued to indulge Merrill, and permitted him to leave the district, and take with him all his property, beyond the process of the court; nor have they taken
*109] any *effectual and proper means to recover the debt from Merrill, as bound by their agreement to do. The complainant further states, that she is informed and believes, that Merrill is in insolvent circumstances; and that now, the bank, having by their misconduct and breach of faith, lost the means of recovering the judgment from Merrill, unjustly and unreasonably demand payment of the complainant, and threaten to proceed against her on the judgment, which she believes they mean to do.

The defendants in the court below, in their answer, deny the agreement alleged to have been made by their attorney; and aver that the judgment was not confessed voluntarily, but contested in every stage, until the trial

term, and when the cause was actually called for trial, the complainant's attorney, knowing he had no good defence, confessed the judgment. They deny that they ever authorized or directed their attorney to hold out and inducement to complainant to confess the judgment, or to make any such persuasions and promises as are set forth in the bill; that they would have been wholly superfluous and unnecessary, as the complainant was legally and justly liable and bound for the payment of the note. They deny that the complainant had any valid legal defence to the action, but aver that payment of the note was legally demanded, and that due notice of non-payment was given. They deny that when the judgment was obtained, or at any time afterwards, Merrill had sufficient property unincumbered, whereon any execution could have been levied, and the money made. They deny that they have been remiss and inattentive in obtaining payment from Merrill.

These are the only parts of the bill and answer which it is deemed material to notice. Depositions having been taken, the cause was set down for a final hearing, upon the pleadings, exhibits and depositions, and the court decreed a perpetual injunction. From which decree, an appeal was taken to this court.

The first inquiry that seems naturally to arise in this case is, whether the agreement or contract set up in the bill, to have been made between Wiley, the attorney of the bank, and the complainant in the court below, has been established *by sufficient evidence, according to the rules and principles which prevail in courts of equity. It is denied by the answer, [*110 that such agreement was made. The agreement is certainly very fully proved by one witness. G. Cloud states in his deposition, that he well recollects the conversation between Mrs. Geary and Mr. Wiley, the attorney of the bank, on the subject of her confessing the judgment, and understood, from the conversation of both of them, that if she would agree and confess judgment, she was to be cleared, and the money to be made out of Merrill's property, as Wiley said, he had ascertained, that Merrill had property sufficient to satisfy the debt, that was clear of incumbrance; and that it was expressly on these conditions, that she confessed judgment. This witness, in his answer to another interrogatory, states that Mrs. Geary was to be cleared (as he expresses it), by instantly levying on Merrill's property. From which it is clearly to be inferred, that it was not intended, that she should be absolutely released from the judgment, but that her discharge would result from the satisfaction to be obtained from Merrill, of which, from the assurances of Wiley, little or no doubt could be entertained. Some criticisms have been made at the bar, upon the deposition of this witness. It has been supposed by the appellant's counsel, that he speaks only of one conversation; and that, after the judgment was entered. The inference that there was but one conversation is drawn from the printed statement of this deposition, where the witness is stated to have sworn that all the knowledge he had of the judgment was from a conversation between Mrs. Geary, Mr. Wiley and others. But in the deposition, as contained in the record, his knowledge is stated to have been derived from the conversation he heard between those persons. And he afterwards speaks of a multiplicity of conversations he heard on the subject, between the years 1815 and 1820, and evidently referring to periods both before and after the entry of the judgment. The agreement having been fully and satisfactorily established by this witness,

the question arises, whether there are any circumstances or other testimony disclosed in the case, to sustain the bill against the denial in the answer.

*111] It is certainly a well-settled rule, that on a bill praying *relief when the facts charged in the bill, as the grounds for obtaining the decree, are clearly and positively denied by the answer, and proved only by a single witness, the court will not decree against the defendant. And it is equally well settled, that where the witness on the part of the complainant is supported and corroborated by circumstances sufficient to outweigh the denial in the answer, the rule does not apply. 9 Cranch 160.

What are the circumstances in this case to meet and outweigh the denial in the answer? It is to be borne in mind, that the bill does not charge the agreement to have been made with the bank, but with their attorney. The denial by the bank is not, therefore, of any matter charged to have been within their own knowledge. They could, therefore, only speak of their belief, or from information received from their attorney, and not from their own knowledge of the transaction. The denial of their ever having authorized or directed their attorney to hold out any inducements to the complainant to confess judgment, or to make to her any such promise as is set forth in the bill, is not in answer to any allegation in the bill. The bank is not charged with having specially authorized or directed the agreement to be made. But it is charged as the act of their attorney; and whether this was within the scope of his authority, as attorney, in the suit, will be hereafter noticed.

There are other circumstances which go very far to take this case out of the application of the rule which requires corroborating evidence to support the testimony of a single witness, against the answer. This is an injunction bill, filed upon the oath of the complainant. An answer, in all cases, according to the course and practice of courts of chancery, must be sworn to; unless dispensed with by order of the court, under special circumstances. In the present case, the answer being by a corporation, it is put under their common seal, unaccompanied by an oath. And although the reason of the rule, which requires two witnesses, or circumstances to corroborate the testimony of one, to outweigh the answer, may be founded in a great measure upon the consideration that the complainant makes the answer evidence, by

*112] calling for it; *yet this is in reference to the ordinary practice of the court, requiring the answer to be on oath. But the weight of such answer is very much lessened, if not entirely destroyed as matter of evidence, when unaccompanied by an oath: and indeed, we are inclined to adopt it as a general rule, that an answer, not under oath, is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations. But it is not necessary, in the present case, to go thus far; for, independent of all these circumstances, the testimony of Cloud is strongly corroborated by that of Magruder. He swears, that Wiley was the attorney and counsel for the bank when the judgment was confessed. That he understood from him, that he was authorized and requested by the bank, or some of its officers, to adjust all such cases, and get judgments confessed by the parties; so as to avoid defences being made by the indorsers, with respect to the insufficiency of the demand and notice. And that Wiley requested him to call on the complainant, with a view to make such adjustment and

that he advised her to see Mr. Wiley, who was friendly to her, and would not advise her to do anything against her interest.

All these circumstances are abundantly sufficient to corroborate the testimony of Cloud, and outweigh the answer, even if it had been sworn to. The agreement, therefore, alleged in the bill to have been made by Wiley, the attorney of the bank, must be considered as fully established. And the next inquiry is, whether the attorney had authority to make such agreement, so as to bind the bank? It is necessary, here, that it should be understood with precision, what this agreement was. It seems to have been considered at the bar, by the appellants' counsel, as an agreement to release and discharge the complainant from all responsibility, if she would confess judgment upon the note. But such is not the agreement set up in the bill. It is, that if the complainant would confess judgment, and not dispute her liability upon the note, he (the attorney) would immediately proceed, by execution, to make the amount thereof from Merrill, the principal debtor, who, he assured the complainant, had sufficient property to satisfy the same; upon the faith of which promise she did confess the judgment. *It is [*113
not alleged nor pretended, that any special authority was given by the bank to their attorney, to make the agreement set up in the bill, and unless it fell within the scope of his general authority, as attorney in the suit, the bank cannot be held responsible. The general authority of the attorney does not cease with the entry of the judgment. He has, at least, a right to issue an execution, although he may not have the right to discharge such execution, without receiving satisfaction. 8 Johns. 366; 10 Ibid. 220. The suit does not terminate with the judgment. Proceedings on the execution are proceedings in the suit. It was, therefore, within the scope of the general authority of the attorney in the suits, to postpone the execution on the judgment against the indorser, and issue one on the judgment against the maker of the note; and this is the utmost extent of the alleged agreement. And indeed, it does not go thus far. The attorney only stipulated to issue an execution immediately, upon the judgment against Merrill. And if he had authority to issue an execution, of which there can be no doubt, he had authority to enter into an agreement that such execution should be issued, and thereby to bind the bank to the performance thereof. And that the bank has violated this agreement, by refusing to have an execution issued against Merrill, is abundantly proved. Repeated and urgent applications were made to them for that purpose, without effect; and the attorney, on application to him, admitted, that he had agreed to issue an execution immediatety after obtaining the judgment, and have it levied on Merrill s property; but said, the fault was not in him, but in the directors of the bank. No execution was issued, and Merrill was permitted to leave the district and remove his property beyond the jurisdiction of the court. And it may very fairly be concluded from the evidence, that had an execution been issued, the judgment might have been satisfied out of Merrill's property. It was proved by several witnesses, that he had considerable property in his possession, which he took with him, when he removed from Georgetown. That he was a housekeeper, had his house furnished, was the owner of hacks and horses, or had them in his possession. But, what is still more conclusive and satisfactory, is the declaration of Wiley, the attorney, who, for the purpose of in- [*114
ducing the complainant to confess the *judgment, assured her that

he had ascertained that Merrill's property was clear of incumbrance, and was sufficient to satisfy the judgment. This necessarily implied, that his knowledge was the result of particular inquiry on the subject.

But it is objected, that this contract was without any consideration to support it. The consideration alleged in the bill is relinquishing all defence in the action, and confessing a judgment; averring that the complainant had a valid legal defence, which would have defeated the right of the bank to recover on the indorsement, no due and legal demand having been made of the maker, and notice thereof given to the indorser. It is unnecessary to examine, whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough, that the bank considered it a doubtful question; and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and the complainant, by precluding herself from setting up the defence, waived what she supposed might have been of material benefit to her. That the bank considered it of some importance to shut out this defence, is fully shown by the testimony of Magruder. He says, it was known to the bank, before the judgment was confessed, that many of their suits against indorsers, for trial at that term, were in jeopardy, in consequence of a late decision of the court as to the insufficiency of the demand on the fourth, instead of the third day of grace. So that this question, at the time the contract was entered into, was considered by the bank, at least, doubtful. And to permit a subsequent judicial decision on this point, in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them, under a different state of things, would be sanctioning a most mischievous principle. In addition to this, there was a moral obligation resting upon the bank to do the very thing their attorney stipulated to do. Every consideration of justice and equity, in a moral, though not in a legal, point of view, called upon them to use due diligence to obtain satisfaction of the debt from the principal, before recourse was had to the surety. The decree of the circuit court granting a perpetual injunction is accordingly affirmed.

Decree affirmed.

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*115] *United States, Plaintiffs in error, *v.* Thomas Tingey, Defendant in error.

Pursers' bonds.

There is no statute of the United States expressly defining the duties of pursers in the navy; what those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this court; if they are regulated by the usage and customs of the navy, or by the official orders of the navy department, they properly constitute matters of averment, and should be spread upon the pleadings.

A bond, voluntarily given to the United States, and not prescribed by law, is a valid instrument upon the parties to it, in point of law; the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided by law; it is an incident to the general right of sovereignty; and the United States being a body politic may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own

powers, unless brought into operation by express legislation; a doctrine, to such an extent, is not known to this court, as ever having been sanctioned by any judicial tribunal.

A voluntary bond, taken by authority of the proper officers of the treasury department to whom the disbursement of public money is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department, and the United States being authorized, in a political capacity, to take it, there is no objection to its validity in a moral or a legal sense.[1]

Where the United States instituted an action for the recovery of a sum of money on a bond given, with sureties, by a purser in the navy, and the defendants, in substance, pleaded that the bond, with the condition thereto, was variant from that prescribed by law, and was, under color of office, extorted from the obligor and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of the purser's remaining in office and receiving its emoluments; and the United States demurred to this plea; it was held, that the plea constituted a good bar to the action.

No officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of his holding his office, that he should execute a bond, with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisites of the law. It would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties, for the statute bond, without any coercion or extortion by color of office.

ERROR to the Circuit Court of the district of Columbia, for the county of Washington.

*This suit was instituted in the circuit court, by the United States against Thomas Tingey, as one of the sureties of Lewis Deblois, who had been appointed a purser in the navy of the United States. The declaration first filed was in the common form of debt on a joint and several bond, and the defendants prayed *oyer* of the bond and condition, and pleaded eight several pleas. On the first, second and seventh pleas, issues in fact were joined; and to the other pleas, the United States demurred generally. The circuit court overruled the demurrers, and gave judgment against the United States, who prosecuted this writ of error. [*116

Pending the pleadings, the distict-attorney of the United States filed another count to the declaration, in which the bond and the condition were set forth, with averments that Lewis Deblois was a purser in the navy of the United States; that he received large sums of money in that capacity, and that he had refused to account for the same, according to the provisions of the laws of the United States, &c. By agreement of counsel, all the pleadings were considered as applicable to this, as well as to the first count in the declaration.

The bond was executed on the 1st day of May 1812, by Lewis Deblois, Thomas Tingey, Franklin Wharton, Elias B. Caldwell, William Brent and Frederick May, in the sum of $10,000. The condition was as follows:

"The condition of the above obligation is such, that if the said above-bound Lewis Deblois shall regularly account, when thereunto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United states as shall be duly authorized to settle and adjust his accounts; and shall moreover pay over, as he may be directed,

[1] United States *v.* Bradley, 10 Pet. 343; Hand, 7 How. 573; Neilson *v.* Lagow, 12 Id. United States *v.* Linn, 15 Id. 290; Tyler *v.* 107.

any sum or sums that may be found due to the United States upon such settlement or settlements, and shall faithfully discharge in every respect the trust reposed in him, then the obligation to be void and of no effect, otherwise to remain in full force and virtue."

The following indorsement was made upon the bond: "It is expressly understood and agreed between the secretary of the navy (acting in behalf of the United States) and the within named obligors, that the said obligors
*117] are not to be *held responsible for any loss that may be sustained in the moneys or public property committed to the care of the within named Lewis Deblois as purser, by any capture, sinking or stranding, or other unavoidable casualty; or if, by any such circumstance or event, the said purser should be deprived of his books and papers, and be thereby rendered incapable of producing the necessary evidence or means of accounting for the public money or property with which he may be charged, the said obligors shall be exonerated, on producing satisfactory evidence of the facts, unless it can be shown that the money or public property has been misapplied or diverted from the public service."

The third plea demurred to by the United States, set forth, that "every neglect, failure or omission whatsoever of the said Lewis Deblois regularly to account, as in and by the said condition is required, and to pay over such sum or sums of money as in and by the said condition is also required, or in any other manner or respect whatsoever to discharge the trust reposed in him, as in and by the said condition is also required, was caused by, and the direct consequence of, the gross and wilful neglect and wrong and illegal acts of the proper officers of the government of the United States, under whose control and direction all the public moneys and public property received by the said Lewis Deblois, and committed to his charge, at any time or times, after the sealing and delivery aforesaid, were placed, by the authority of the plaintiffs, and who were duly authorized to settle and adjust his accounts, and to superintend, direct and control the discharge of the trust reposed in him as aforesaid, to the manifest and grievous injury and defrauding of the said defendant, &c."

The fourth plea alleged, that after the 13th day of March 1812, and before the 1st day of May, in the same year, and before the execution of the bond, Lewis Deblois was duly appointed a purser in the navy, and continued in the service until the 1st of March 1817, and continued, and so continues, in the service, and to discharge the duties of purser, and that all the moneys and all public property received by him, or for which he was accountable, after the execution of the bond, were received by him and committed to his care as such purser, in virtue of his said appointment, and in discharge of
*118] the *trust reposed in him as such purser, and not otherwise, and that no money or public property was committed to him but as purser under the said appointment; and, &c.

The fifth plea alleged, that the defendant ought not to be charged with the said writing obligatory, or anything therein contained, because the act of congress of the 13th day of March 1812, required, that the pursers in the navy of the United States, shall be appointed by the president of the United States, by and with the advice and consent of the senate; and from and after the 1st day of May next, no person shall act in the character of purser, who shall not have been thus first nominated and appointed, excepting per-

sons on distant service, who shall not remain in service after the 1st day of July next, unless nominated and appointed as aforesaid. And every person, before entering upon the duties of his office, shall give bond with two or more sufficient sureties, in the penalty of $10,000, conditioned faithfully to perform all the duties of purser in the navy of the United States, which said law was in full force and unrepealed, on the 1st day of May in the said year, when the said obligation was so as aforesaid executed and delivered. And the said defendant further said, that protesting that the said Lewis Deblois was not so appointed by the president of the United States, by and with the advice and consent of the senate, as in and by said act of congress is required; yet he further said, that after the passing of the said act, and before the day of the date of the ensealing and delivery of the said writing obligatory, the navy department of the United States did cause the said writing obligatory to be prepared, and to be transmitted to the said Lewis Deblois, and did require and demand of him, that the said writing obligatory, and the condition thereunder written, should be executed by the said Lewis Deblois, with sufficient sureties, before he should be permitted to remain in the said office of purser, or to receive the pay and emoluments attached to said office of purser; and the said defendant further in fact said, that the said condition so as aforesaid underwritten was variant and wholly different from the condition required in and by the said act of congress, and varied and enlarged the duties and responsibilities of the said Lewis Deblois and his sureties, and that the same was, under color and *pretence of said act of congress, and under color of office, required and extorted from Lewis Deblois and from the defendant, as one of his sureties, against the form, &c. of the statute, by the then secretary of the navy, wherefore, he said the said writing obligatory was void and illegal; and this, &c. [*119

The sixth plea alleged, that the condition of the bond was wholly variant and different from the condition which by law ought to have been required, and imposed other and different responsibilities upon Deblois and on his sureties, and that the said writing obligatory and the condition was prepared by and under the directions of the secretary of the navy of the United States, and was by him transmitted to Deblois, and he, Deblois, was then and there required to execute the same, and the illegal condition, before he would be deemed and recognised as a purser in the navy of the United States, or permitted to receive any pay or emoluments as such, under color and pretence of law, and under color of the office of the said secretary of the navy; whereby, as the defendant averred, the said writing obligatory, and the condition thereunder written was wholly void and of no effect; and this, &c.

The eighth plea alleged, that the United States ought not to maintain their action, because by the act of congress of 13th of March 1812, it was, among other things, enacted, that every purser, before entering upon the duties of his office, should give bond, with two or more sufficient sureties, in the penalty of $10,000, conditioned faithfully to perform all the duties of purser in the navy of the United States; which said act of congress was in full force and unrepealed, at the time when the said Lewis Deblois was appointed purser in the navy, and also at the time when the said writing obligatory was sealed and delivered by this defendant, and for a long time

thereafter, to wit, until 1817; and the defendant said, that the said Deblois, before entering upon the duties of his office, or at any time thereafter, was not required to give bond in manner and form as is prescribed as aforesaid, nor did he give such bond; without this, that the said Deblois received any funds, property or money from said plaintiffs, in any other right, capacity or character, than as such purser, or was in any other right, capacity or character, bound to keep, preserve, disburse and account for the same; and this, &c.

*120] *The case was argued by *Berrien*, Attorney-General, and *Swann*, district-attorney, for the United States; and by *Coxe* and *Jones*, for the defendant.

For the *plaintiffs* in error, it was contended, that the pleadings on the part of the United States properly set forth the bond and the indorsement upon it, the indorsement being a part of the bond. 1 Wash. 14. Upon declaration, it appears, that Deblois was appointed a purser in the United States; and as such received large sums of money, for which he has failed to account.

As to the pleas to which demurrers were entered, it was argued, that the third plea alleges the failure of Deblois to account, arose from the gross and wilful negligence of the officers of the United States, under the control and direction of whom were placed the moneys and public property in the hands of Deblois. To this it is answered, that negligence cannot be imputed to the United States; and if it were so imputable, it is not sufficiently pleaded. It is not shown, in what manner, or how, the negligence arose, nor in what it consisted. The rule is, that what is alleged in pleading must be alleged with certainty. 9 Wheat. 720; 10 Ibid. 184; Steph. Plead. 342.

If the fourth plea is intended to raise the question whether Lewis Deblois was legally an officer of the United States, as purser, after the 1st of May 1817, he not having given the new bond required by the act of March 1817; it is answered, that the act is directory to the officers of the government, and their failure to comply with its requirements cannot release the sureties in the bond which they executed. *United States* v. *Vanzandt*, 11 Wheat. 184, &c.

The remaining pleas present the question of the validity of the bond, on the ground that it does not conform to the act of 1812. It may be well argued, that the fifth plea is altogether deficient in form. It is bad for duplicity; but as it was important to have the question determined which is *121] raised by it, a general demurrer was entered. A statutory *bond, the condition of which varies from the form prescribed by the statute, is not therefore altogether void. It is good, so far as it conforms to the statute; and if void, it is only so as to the residue. A voluntary bond, taken without the authority of the statute, is good; a bond required *colore officii* may be a voluntary bond, and is so, unless it be obtained by fraud, circumvention or oppression. It is admitted, that the defendant's plea alleges this bond was, under color and pretence of the act of congress, and under color of office, required and extorted from Deblois; and there is a general demurrer to this plea. But a demurrer admits only the facts which are well pleaded. This demurrer admits that the bond was required by the secre-

tary of the navy, acting under the authority given by the statute. Whether insisting on this bond was extortion, is a question of law arising on the facts, which is not admitted by the demurrer.

It is contended, that a bond voluntarily given by a public officer, conditioned for the faithful performance of the duties of his office, is valid although required by no particular statute. If this be not so, it must be: 1. Because the absence of an express statutory authority to require the bond, renders its condition unlawful; or, 2. Because the government is incompetent to become a party to such a bond. A reference to cases establishes the following positions:

1. That a bond given by or to a public officer, or to the government, is not invalid, merely because there was no law which specifically authorized the one to demand or required the other to give it; that it is only void, when the condition is against law, requiring something to be done which is *malum in se aut malum prohibitum;* or the omission of a duty; or the encouragement of such crimes or misdemeanors.

2. That although a statute which authorizes a bond to be taken may have specified the terms of the condition, it does not, therefore, render void a bond voluntarily given, though the condition be variant from, that prescribed by the statute.

3. That a bond is not less voluntary, because it has been required by a public officer, but not contrary to law. *Mitchell* v. *Reynolds*, 1 P. Wms. 181; Co. Litt. 206; Palm. 172; *Norton* v. *Sims*, Hob. 12; Fitzh. Abr. 13; Dyer 18; 2 Str. 745, 1137; *Rex* v. *Bradford*, 2 Ld. Raym. *1327; *African Company* v. *Torrane*, 6 T. R. 588; 2 Dall. 118; *Commonwealth* v. *Wolbert*, 6 Binn. 292; *Morse* v. *Hodsdon*, 5 Mass. 314; *Thomas* v. *White*, 12 Ibid. 367. [*122

It is competent to the government of the United States, to become a party to a voluntary bond, executed by one of its officers, without any authority given by a legislative act. It is essentially incident to sovereignty, without any express grant, that such a power shall exist. According to the cases which have been referred to, such a power belongs to a corporation, to a subordinate agent of the government; and, *à fortiori*, it belongs to the government itself. *Postmaster-General* v. *Early*, 12 Wheat. 136; *Dugan* v. *United States*, 3 Ibid. 172. If the government, or an officer on their behalf, can make the United States parties to a bill of exchange; can vest in them the legal title to such a bill, as indorsee, and this without legislative authority, why may they not, in like manner, become obligees in a bond? Is the capacity of the government less than that of a corporation, or of a subordinate officer, or of a private individual? It has been the constant practice of the government, to take such bonds, without express legislative authority; and it has been the understanding of congress, that such bonds were regular. In many acts, bonds are directed to be taken, without the form, or the person to whom they are to be taken, being specified. The bonds taken from marshals, registers, receivers and surveyors, are of this description.

If the United States are competent to become parties to such a bond, without legislative requisitions, it is equally true, that the right to direct or require such a bond, belongs to the executive; it is a part of its constitutional power. Nor does the circumstance that the authority of the legisla-

ture may also direct the taking of a particular bond, negative the existence of such a power. The president is enjoined "to take care that the laws be faithfully executed." In the performance of this trust, he not only may, but he is bound to avail himself of every appropriate means not forbidden by law. When a law is passed, authorizing the appointment of an officer, or appropriating money to be disbursed under the direction of the *123] *president, are not the duties of the executive such as to impose upon him the appointment of agents to perform the trusts reposed in him; and is not the authority to take security for the faithful exercise of such agencies necessarily included in the power of appointment? The subordinate agents of the executive act under the authority of the chief magistrate; their acts are presumed to be his acts. This bond was taken under the direction of the president. to secure the performance of the trust committed to the officer; in the language of the constitution, to "take care that the laws be faithfully executed." If the means be appropriate to the end, does not the injunction to use such means flow from the constitution, and is it not, therefore, imperative? Could congress increase the obligation, or give greater validity to the act, by reiterating the mandate? It is, upon these principles, claimed, that this bond is valid as a voluntary bond, although not reqired by any statute.

Is it a voluntary bond? or was it obtained by fraud, circumvention or oppression? The bond was required by the secretary of the navy, in the performance of his duty; and was voluntarily given by the parties to it. The cases which have been cited show that if parties submit to the requisition as a bond of this character, they are bound by it. The decision of this court in *Speake* v. *United States*, 9 Cranch 28, establishes the principle, that a bond required by a public officer, and given in conformity to that requisition, is still a voluntary bond, unless it be obtained by fraud, circumvention or oppression. There is no pretence, that any such means were used in this case. The government and people of the United States are interested to enforce the faithful discharge of public duty by those who are entrusted to perform it. They have a right to require it, and are entitled to be indemnified for a failure to comply with the requisition.

The bond was authorized by law. It is alleged, that there is a variance between the condition prescribed by the act, and that inserted in the bond. This is denied. It is contended, that the condition of the bond conforms substantially to that required by the act. The condition and the indorsement, taken together, clearly show, that the whole object of the bond was *124] *to provide for the full performance of those duties imposed upon Deblois by his station, and if more is required than the law authorized, the whole of the condition does not become void thereby; but that part which is lawful and authorized remains operative. Shep. Touch. 70; *Piggot's Case*, 11 Co. 27; *Yale* v. *King*, 5 Vin. Abr. 99; *Armstrong* v. *United States*, Pet. C. C. 46.

The condition prescribed by the act is "faithfully to perform the duties of purser in the navy of the United States." The condition of the bond taken is, that Lewis Deblois "shall regularly account, when thereunto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States, as shall be duly authorized to set-

tle and adjust his accounts, and shall moreover pay over, as he may be directed, any sum or sums of money that may be found due to the United States upon any such settlement, and shall also faithfully discharge in every respect the trust reposed in him." There is no one of these requisitions which is not strictly within the duties of a purser of the United States: 1. Regularly to account, when required, for all public moneys received by him from time to time, and for all public property committed to his care. 2. To account with such person or persons, officer or officers of the government, as shall be duly authorized to settle and adjust his accounts. 3. To pay over, as he may be directed, any sum or sums of money that may be found due to the United States, on any such settlement. 4. Faithfully to discharge, in every respect, the trust reposed in him. These are all the requisitions in the bond.

Coxe and *Jones*, for the defendant in error, stated, that if there was anything inapplicable in the pleas to the declaration, it arose from the circumstance that these pleas were entered to the first count; and the second count having been afterwards added, these pleas were suffered to remain, as it was not considered that any material variance in the case was presented by the additional count.

They contended: 1. That at common law, such a bond as that upon which this suit was brought has no validity, independent of the facts in avoidance set forth in the pleas. *2. That the bond varies from that authorized by the statute; and that such a variance renders it, of itself, void. 3. That having been extorted *colore officii*, it is void. 4. That sufficient facts are set forth in the pleas, to justify a non-compliance with the terms prescribed in the condition. [*125

1. At common law, the bond is void. No bond is valid, which is given to the king by an officer, for the faithful performance of his duties as an officer. 5 Com. Dig. 219, 207. If the bond is made valid by the statute, it must be by its conformity to the requisitions of the statute. But this bond does not in any part of it purport to be a statutory bond. It does not recite that Deblois was a purser; it has no reference to any public office or public duty. He is faithfully to discharge the trusts reposed in him, without designating what the same are.

2. A statutory bond, not conforming to the requisites of the statute, is void. If the principle of the common law, which has been contended for, is correctly stated, every bond required by statute must pursue its requisites. *United States* v. *Hipkin*, 2 Hall's Law Journ. 80; 3 Wash. 10; *Speake* v. *United States*, 9 Cranch 39.

3. The bond, having been extorted *colore officii*, is void. The demurrer to this plea admits the allegation that the bond was extorted. Until it was executed, Deblois could not execute the duties of purser. The United States having demurred to the plea charging the extortion of the bond, are estopped to deny it; and the defendant is entitled to the benefits of such an admission. 7 Cranch 227; 3 Inst. 149, c. 69.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting at Washington. The original action was brought by the United States upon a bond executed by Lewis Deblois, and by Thomas Tingey and others, as his sureties, on the

1st of May 1812, in the penal sum of $10,000, upon condition that if Deblois should regularly account, when thereto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government
*126] of the United States, as should be duly authorized to *settle and adjust his accounts, and should moreover pay over, as might be directed, any sum or sums that might be found due to the United States upon any such settlement or settlements, and should also faithfully discharge, in every respect, the trust reposed in him, then the obligation to be void, &c. In point of fact, Deblois was at the time a purser in the navy, though not so stated in the condition; and there is an indorsement upon the bond, which is averred in one of the counts of the declaration to have been contemporaneous with the execution of the bond, which recognises his character as purser, and limits his responsibility as such; and the bond was unquestionably taken, as the pleadings show, to secure his fidelity in office as purser.

The declaration contains two counts: one in the common form for the penalty of the bond; and a second, setting forth the bond, condition and indorsement, and averring the character of Deblois, as purser, his receipt of public moneys, and the refusal to account, &c., in the usual form. Several pleas were pleaded, upon some of which, issues in fact were joined. To the third, fourth, fifth, sixth and eighth pleas, the United States demurred, and judgment upon the demurrers was given for the defendant in the circuit court; and the object of the writ of error is to revise that judgment.

There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this court. If they are regulated by the usages and customs of the navy, or by the official orders of the navy department, they properly constitute matters of averment, and should be spread upon the pleadings. It may be gathered, however, from some of the public acts regulating the departments, that a purser, or as the real name originally was, a burser, is a disbursing officer, and liable to account to the government as such. The act of the 3d of March 1809, ch. 95, § 3, provided, that, exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, &c., no other permanent agents should be appointed, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement in any other manner of moneys for the use of the military establishment, or
*127] *of the navy of the United States; but such as should be appointed by the president of the United States, with the advice and consent of the senate. And the next section (§ 4) of the same act provided, that every such agent, and every purser of the navy, should give bond, with one or more sureties, in such sums as the president of the United States should direct, for the faithful discharge of the trust reposed in him; and that, whenever practicable, they should keep the public money in their hands in some incorporated bank, to be designated by the president, and should make monthly returns to the treasury, of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. This act abundantly shows, that pursers are contemplated as disbursing officers and receivers of public money, liable to account to the government

therefor. The act of the 30th of March 1812, ch. 47, made some alterations in the existing law, and required, that the pursers in the navy should be appointed by the president, by and with the advice and consent of the senate; and that from and after the 1st day of May then next, no person should act in the character of purser, who should not have been so nominated and appointed, except pursers on distant service, &c.; and that every purser, before entering upon the duties of his office, should give bond, with two or more sufficient sureties, in the penalty of $10,000, conditioned faithfully to perform all the duties of purser in the navy of the United States. This act, so far as respects pursers giving bond, and the import of the condition, being *in pari materia*, operates as a virtual repeal of the former act. The subsequent legislation of congress is unimportant; as it does not apply to the present case.

It is obvious, that the condition of the present bond is not in the terms prescribed by the act of 1812, ch. 47, and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially, as purser, or otherwise. Upon this posture of the case, a question has been made and elaborately argued at the bar, how far a bond, voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other *words, whether the United States have, in their political capacity, a right to [*128 enter into a contract, or to take a bond, in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion, that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. This principle has been already acted on by this court in the case of *Dugan* v. *United States*, 3 Wheat. 172; and it is not perceived, that there lies any solid objection to it. To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal.

We have stated the general principle only, without attempting to enumerate the limitations and exceptions which may arise from the distribution of powers in our government, or from the operation of other provisions in our constitution and laws. We confine ourselves, in the application of the principle, to the facts of the present case, leaving other cases to be disposed of as they may arise; and we hold, that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belong-

ing to such a department ; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view.

Having disposed of this question, which lies at the very threshold of the cause, and meets us upon the face of the *second count in the decla-
*129] ration, it remains to consider, whether any one of the pleas demurred to constitutes a good bar to the action. Without adverting to others, which are open to serious objections, on account of the looseness and generality of their texture, we are of opinion, that the fifth plea is a complete answer to the action. That plea, after setting forth at large the act of 1812 respecting pursers, proceeds to state, that before the execution of the bond, the navy department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same, with the condition, should be executed by him, with sufficient sureties, before he should be permitted to remain in the office of purser, or to receive the pay and emoluments attached to the office of purser ; that the condition of the bond is variant, and wholly different from the condition required by the said act of congress, and varies and enlarges the duties and responsibilities of Deblois and his sureties ; and " that the same was, under color and pretence of the said act of congress, and under color of office, required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form, force and effect of the said statute, by the then secretary of the navy." The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office ; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond ; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law ; that would be, not to execute, but to supersede, the requisitions of law. It would be very different, where such a bond was, by mistake *or otherwise, voluntarily substituted by the parties for the
*130] statute bond, without any coercion or extortion by color of office. The judgment of the circuit court is affirmed.

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

*United States *v.* Thomas Tingey's Administrators.

Withdrawal of demurrer, after affirmance.

The court will not, on the motion of the plaintiff in error, instruct the circuit court to permit him to withdraw his demurrer, after an affirmance of the judgment of the circuit court; although this might have been done, had the judgment been reversed.

Swann, of counsel for the plaintiff in error in this cause, moved the court to amend the judgment entered in this cause, by instructing the court below to permit him to withdraw his demurrer: On consideration whereof, this court is of opinion, that although this might have been done, upon a reversal, yet it cannot be done, where the judgment of the court has been affirmed, as this court cannot disaffirm its judgment.

Whereupon, it is ordered by the court, that the said motion be and the same is hereby overruled.

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*James Greenleaf's Lessee, Plaintiff in error, *v.* James Birth, Defendant in error. [*132

Bills of exception.—Land-law of Maryland.—Evidence.—Powers of attorney.

It is to be understood, as a general rule, that where there are various bills of exception filed, according to the local practice, if, in the progress of the cause, the matters of any of these exceptions become wholly immaterial to the merits, as they are finally made out on the trial, they are no longer assignable for error, however they have been ruled in the court below.[1]

It may be gathered from the decisions of the courts of Maryland, that on the trial of a question of title to land, no evidence can be admitted, of the location of any line, boundary, or object not laid down on the plats or re-survey; and that a witness, who was not present at the re-survey, is not competent to give evidence as to the lines, objects and boundaries laid down in such plats. These rules appear to rest on artificial reasoning, and a course of practice peculiar to Maryland.

The court do not find it to have been decided by the courts of Maryland, that no testimony is admissible, to prove a possession of the land within the lines of the party's claim, laid down in the plat, except the testimony of some witness who was present on the re-survey. Upon the general principles of the law of evidence, such testimony is clearly admissible; a party has a right to prove his possession by any competent witness; whether he was present at the re-survey or not.

In the ordinary course of things, the party offering evidence is understood to waive any objection to its competency as proof; it is not competent for a party to insist upon the effect of one part of the papers constituting his own evidence, without giving the other party the benefit of the other facts contained in the same paper.

A power of attorney was given by C., to A. and B., to make, in his name, an acknowledgment of a deed for land in the city of Washington, before some proper officer, with a view to its registration, constituting them "the lawful attorney or attorneys" of the constituent; A. and B. severally appeared before different duly-authorized magistrates, in Washington, at several times, and made a several acknowledgement, in the name of their principal: *Held*, that the true construction of the power is, that it vests a several as well as a joint authority in the attorneys; they are appointed "the attorney or attorneys;" and if the intention had been to

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[1] When it is sought to apply the rule, that a court of error will not reverse for an error that works no injury, it must be shown, beyond doubt, that the alleged error neither did, nor could have prejudiced the party against whom it was made. Deery *v.* Cray, 5 Wall. 595; Smith *v.* Shoemaker, 17 Id. 630. If it is only to be seen by a mere preponderance of evidence, and the error be substantiated, the judgment must be reversed. Smith *v.* Shoemaker, *ut supra*. And see Stokes *v.* People, 53 N. Y. 164.

give a joint authority only, the words "attorney" and "or" would have been wholly useless. To give effect, then, to all the words, it is necessary to construe them distributively, and this is done, by the interpretation before stated; they are appointed his attorneys, and each of them is appointed his attorney, for the purpose of acknowledging the deed.

ERROR to the Circuit Court of the district of Columbia, for the county of Washington. The lessee of James Greenleaf instituted an action of
*133] ejectment, in the circuit court for the county of Washington, for the recovery of lot No. 16, in square No. 75, in the city of Washington, which suit was afterwards removed to the county of Alexandria, and was there tried in the circuit court.

Upon the trial, the plaintiff gave in evidence certain duly authenticated copies of deeds, commencing in date on the 18th of June 1791, and of the allotment of the lot in question to James Greenleaf, by the commissioners of the United States, under the authority of the act of congress of 16th July 1790, establishing "a temporary and permanent seat of the government of the United States." Upon this evidence, the plaintiff prayed the court to give certain instructions to the jury, in favor of the title and possession of the lessor of the plaintiff, which were refused, and which refusal was made the ground of separate bills of exception. Subsequently, the plaintiff gave in evidence a regular chain of title from the lord proprietor of the province of Maryland, and a good title in the lessor of the plaintiff, in the month of October 1794. The case on the part of the plaintiff was, by this evidence, relieved from the difficulties presented by the evidence which was offered in the first instance, and out of which arose the exceptions taken to the refusal of the court to give instructions upon that evidence.

The plaintiff also offered in evidence, the survey, certificates, plats and explanations returned in this cause, and offered to prove that 19¼ acres were truly located on the plat by the lines designated by the letters E, S, G; that the deed from Benjamin Stoddart to Gantt and Beall, and the deed from Benjamin Stoddart and Uriah Forrest to James Greenleaf, the lessor of the plaintiff, comprised the land designated as aforesaid; and that the said lot No. 16, in square No. 75, alloted to the lessor of the plaintiff, by the said commissioners, in the said division of the said square, was also part of the land so designated; and offered parol evidence, by a competent witness, who was not present at the survey, that the lessor of the plaintiff was, in the month of October 1794, in possession of the land designated by the lines and letters E, S, G, which was now demanded, and designated on the said plat, by
*134] lot 16, in square 75, under the claim of title. *But the court refused to permit the said parol evidence to be given to the jury; the same having been objected to, on the ground of the witness not having been on the survey.

The plaintiff having established a good title in his lessor, in October 1794, the defendant offered to read in evidence to the jury, for the purpose of showing that the title to the lot in question was out of the lessor of the plaintiff, after the year 1794, a paper purporting to be a copy of certain proceedings under the bankrupt law of the United States, admitting to be duly authenticated; and a deed from the persons therein named, as commissioners of bankruptcy, to Edward S. Burd, and a deed from the said commissioners and Burd to John Miller, jr. To the admission of which in

evidence, the counsel for the plaintiff objected; and the court sustained the objection, as to the said two deeds.

And thereupon, the defendant prayed the court to instruct, and the court did instruct, the jury, that by the proceedings of bankruptcy, the said James Greenleaf, the lessor of the plaintiff, was divested of the legal title in and to the said lot No. 16, in the said square No. 75, in the declaration mentioned; and that the said legal estate was thereby vested in the said commissioners of bankruptcy; and rejected the said deeds as any evidence in said cause.

Whereupon, the plaintiff, in addition to the evidence aforesaid, offered to read in evidence to the jury, the said deeds, in the said proceedings mentioned, from the said commissioners of bankruptcy, to the said Edward S. Burd, and the said deed from the said commisssioners and the said Edward S. Burd to the said John Miller; and also a copy of a deed, duly authenticated, from the said Miller to Samuel Eliot, jr.; and a copy, duly authenticated, of a deed from the said S. Eliot, jr. to James Greenleaf, the lessor of the plaintiff; which the court refused to admit to be read in evidence.

The plaintiff excepted to those several opinions of the court, and prosecuted this writ of error, to reverse the judgment of the circuit court in favor of the defendant.

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

Story, Justice, delivered the opinion of the court.—The plaintiff [*135 in error brought an action of ejectment in the circuit court for the county of Washington, in the district of Columbia, to recover a certain lot of land in the city of Washington. The general issue was pleaded; and upon the trial, the jury found a verdict for the defendant, upon which judgment was rendered in his favor. Upon that judgment, the present writ of error has been brought.

At the trial, several exceptions were taken, by the plaintiff, to the opinions expressed or refused by the court. As to some of these exceptions, which are thus brought before us, it is unnecessary to decide, whether they are well or ill founded; because, in the progress of the cause, it is apparent, that they worked no ultimate injury to the plaintiff, since, independently of the matters therein stated, it is admitted upon the record, that the plaintiff made out a good title in his lessor, which was all which the plaintiff proposed to establish by them. And we wish it to be understood, as a general rule, that where there are various bills of exception filed, according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly immaterial to the merits, as they are finally made out at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be some injury to the party, to make the matter, generally, assignable as error. Upon this ground, we shall pass over the exceptions taken to the ruling of the court in the preliminary stages of the cause, as to the title of the lessor of the plaintiff.

Another exception is founded upon the refusal of the court to admit the parol evidence of a witness, who was not present at the survey returned in

cause, to establish the fact, that the lessor of the plaintiff was, in the month of October 1794, in possession of the land designated by certain lines and letters on the plat, and demanded in the action, under the claim of title. The ground of the decision of the court was, that such evidence was not competent, except from a witness who had been on the survey; and this decision is attempted to sustained by the local practice of Maryland in like cases. We
*136] have examined the cases, which were referred to at the bar. They *do not appear to us to be all easily reconcilable with each other. It may perhaps be gathered from them, that no evidence can be admitted, of the location of any line, boundary or object, not laid down on the plats of re-survey; and that a witness who was not present at the re-survey, is not competent to give evidence as to the lines, objects and boundaries laid down on such plats. (See McHenry on Ejectment, ch. 3, p. 208, c. 16, and cases there cited.) These rules appear to rest on artificial reasoning, and a course of practice peculiar to Maryland. But we do not find it anywhere decided, that no testimony is admissible, to prove a possession of the land within the lines of the party's claim, laid down in the plat, except the testimony of some witness, who was present at the re-survey; and some of the cases certainly show that possession may be proved, within the lines of the plat, although the particular marks or places of possession are not designated thereon. (See *Carroll* v. *Norwood*, 1 Har. & Johns. 167; *Hawkins* v. *Middleton*, 2 Har. & McHen. 119.) It is unnecessary to consider, whether, upon a general question of the competency of evidence in respect to lands in this district, this court would follow all the decisions of Maryland, introduced as part of their local practice in ejectment. We are not satisfied that any such rule exists as that contended for by the defendant in error; and upon the general principles of the law of evidence, the testimony of the witness, which was objected to, was clearly admissible. The plaintiff had a right to prove his possession, by any competent witness, whether he was present at the re-survey or not. His testimony might not on that account be so satisfactory or decisive; but it was nevertheless proper for the consideration of the jury. The court erred, therefore, in rejecting it.

The subsequent exceptions may be considered together. The language of the bill is, that the plaintiff then gave in evidence, without objection, a copy of the original patent or grant from the lord proprietor of the province of Maryland, dated the 5th of July 1686, and by sundry mesne conveyances devises and descents, gave evidence of a good title in the lessor of the plaintiff, in the month of October, in the year 1794. Whereupon, the defendant offered to read in evidence to the jury, for the purpose of showing that
*137] the title to the *lot in question was out of the lessor of the plaintiff, after the year 1794, a paper purporting to be a copy of certain proceedings under the bankrupt law of the United States, admitted to be duly authenticated (annexing the copy), and a deed from the persons therein named, as commissioners of bankruptcy, to Edward S. Burd, and a deed from the said commissioners to John Miller, jr., to the admission of which in evidence, the counsel for the plaintiff objected: and the court sustained the objection as to the two deeds. And thereupon, the defendant prayed the court to instruct, and the court did instruct, the jury, that by the proceedings in bankruptcy, Greenleaf, the lessor of the plaintiff, was divested of the legal title in and to the lot in controversy, and that the said legal estate

was thereby vested in the commissioners of bankruptcy; and rejected the said deeds as any evidence in the said cause.

Whereupon, the plaintiff, in addition to the evidence aforesaid, offered to read in evidence to the jury, the said two deeds in the said proceedings mentioned, from the said commissioners of bankruptcy to the said Edward S. Burd, and the said deed from the said commissioners and the said Edward Burd to the said John Miller, and also a copy of a deed, duly authenticated, from Miller to Samuel Eliot, and a copy of a deed, duly authenticated, from Eliot to Greenleaf (the lessor of the plaintiff), all which copies were objected to, and the court refused to permit the plaintiff to read them in evidence to the jury. It is not one of the least curious circumstances of this cause, that copies of the same deeds were alternately offered as evidence, for the same purpose, by each of the parties, and successively objected to by the other, and rejected by the court. In the ordinary course of things, the party offering such evidence is understood to waive any objection to its competency as proof. But, without insisting upon this consideration, it is manifest, that if the proceedings in bankruptcy, admitted by the court, were competent evidence at all, they establish the fact not only of the bankruptcy of Greenleaf, and the issuing of a commission against him, and the appointment of commissioners, but also of an assignment of his estate by them, first to Burd, and afterwards to Miller. The proceedings are not given at large; but among them is a transcript of the doings of *the commissioners, at a meeting held on the 11th January 1803, at which the [*138 commissioners certify, that a majority of the creditors had removed Burd, at his own request, and appointed Miller assignee of the bankrupt's effects in his stead; and also at a meeting on the 17th of March 1804, at which the commissioners certify, that they executed an assignment of all the estate and effects of the bankrupt to Miller, calling him "John Miller, jr., of the city of Philadelphia, merchant." We must take these proceedings, if at all, together; and if, in virtue of the bankruptcy of Greenleaf, his estate became *ipso facto* vested in the commissioners (on which, in our view of the case, it is unnecessary to decide), the same proceedings prove an assignment from them to Miller of the same estate. It is not competent for a party to insist upon the effect of one part of the papers constituting his own evidence, without giving the other party the benefit of the other facts contained in the same papers. We think, then, that the assignment to Burd and Miller was sufficiently in evidence, upon the defendant's own proofs, to entitle the plaintiff to deduce his title to the lot in controversy, without the introduction of the copies of the deeds of assignment, which were offered and rejected. The question, then, is reduced to this, whether the deed from Miller to Eliot was entitled to be read in evidence? for the specific objection is taken to that from Eliot to Greenleaf.

Two objections have been taken to the deed from Miller to Eliot. The first is, that it does not appear, that Miller is a non-resident, so as to entitle the deed to registration, upon an acknowledgment to be made by a letter of attorney, in the manner pointed out by the registration act of Maryland of 1766, ch. 14 § 4. But we are of opinion, that the non-residence is sufficiently apparent from the form of the papers. Miller is stated in the bankrupt proceedings to be a merchant of Philadelphia, and in his deed to Eliot, he describes himself to be "of the city of Philadelphia;" and there is not the

slightest evidence in the case to overcome the natural presumption of non-residency arising from these facts.

The next objection is, that the power of attorney given by Miller to William Brent and John G. McDonald, to make an acknowledgment of the deed before some proper magistrate, with a view to its registration, did not
*139] authorize the *acknowledgment as it was in fact made. The power of attorney constitutes them "to be the lawful attorney or attorneys" for Miller, and in his name to make the acknowledgment. They severally appeared before different magistrates (who were duly authorized), at several times, and made a several acknowledgment, in the name of their principal. The argument is, that the power was joint, and not several, and that, therefore, the execution should have been by a joint acknowledgment, before the same magistrate. In our opinion, the true construction of the power is, that it vests a several as well as a joint authority in the attorneys. They are appointed the "attorney or attorneys;" and if the intention had been to give a joint authority only, the words "attorney" and "or" would have been wholly useless. To give effect, then, to all the words, it is necessary to construe them distributively; and this is done by the interpretation before stated. They are appointed his attorneys, and each of them is appointed his attorney, for the purpose of acknowledging the deed.

Upon these grounds, we are of opinion, that the judgment of the court below ought to be reversed; and that the cause be remanded, with directions to award a *venire facias de novo*.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that there was error in the circuit court, in the refusal by the court of the parol evidence offered by a competent witness, who was not present at the survey, that the lessor of the plaintiff was, in the month of October 1794, in the possession of the land designated by the lines E, S, G, which was demanded in the action, and designated on the plat in the case, by lot number 16, in square number 75, under the claim of title as set forth in the bill of exceptions: and also in refusing to admit the copy of the deed from John Miller, jr., to Samuel Eliot, jr., and from said Eliot to James Greenleaf, the lessor of the plaintiff, in evidence, as is set forth in the bill of exceptions, after the
*140] said circuit court *had admitted in evidence the proceedings in bankruptcy, in the same bill of exceptions set forth. It is, therefore, considered, 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, with directions to the said Circuit Court to award a *venire facias de novo*.[1]

[1] For further decisions in this case, see 5 Pet. 302, and 9 Id. 292.

*John W. Simonton, Plaintiff in error, *v.* Samuel Winter and Samuel G. Bowman, survivors of Joshua Bowman, Defendants in error.

Pleading.—Issue.—Covenant.

Action of covenant on a charter-party, by which the owners of the brig James Monroe let and hired her to the plaintiff in error for a certain time; the money payable for the hire of the vessel, to be paid at certain periods, and under circumstances, stated in the charter-party; after some time, and after the vessel had earned a sum of money, while in the employment of the charterer, she was lost by the perils of the sea. The declaration set out the covenants, and averred performance on the part of the plaintiffs, and that the sum of $2734.17 was due and unpaid upon the charter-party; the defendant pleaded, that he had paid to the plaintiffs all and every such sums of money as were become due and payable from him, according to the true intent and meaning of the articles of agreement; on the trial of the issue, upon this plea, the court, at the request of the plaintiffs, instructed the jury, that the plea did not impose any obligation on the plaintiff to prove any averment in the declaration; but that the whole *onus probandi*, under the plea, was upon the defendant, to prove the payment stated in the same, as the plea admitted the demand as stated in the declaration: *Held*, that there was no issue properly joined; the breach assigned in the declaration is special, the non-payment of a certain sum of money, for particular and specified services alleged to have been rendered; the plea alleges, generally, that the defendant had paid all that was ever due and payable, according to the tenor of the agreement, and not all of the specified sum; this does not meet the allegations in the declaration, nor amount to an admission that the vessel had earned the sum demanded; and there was error in the court in instructing the jury, that the plaintiffs were not bound to prove the allegations in the declaration.

The general rule of pleading is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the fact stated in the count.

An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties; and generally, should be made up by an affirmative and negative.

If matter is not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration.

It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages and money *in numero* must be attended to.[1]

Winter *v.* Simonton, 3 Cr. C. C. 104, reversed.

Error to the Circuit Court of the district of Columbia, and county of Washington.

In the circuit court, the defendants in error, the plaintiffs below, instituted an action of covenant on a charter-party, *dated July 15th, 1820, [*142
at Bath, Maine, by which they, the plaintiffs, let and hired to the defendant, the brig James Monroe, to proceed from Bath to Havana, thence to Mobile and elsewhere, as Simonton should direct, the dangers of the seas excepted, for the term of twelve months from the 7th of July. The plaintiffs covenanted to keep the brig in good order, and well victualled, during the said term, the dangers of the seas excepted. The defendant, on his part, covenanted, *inter alia*, to pay to the plaintiff for the hire of the brig, $425 each and every month, during the said term, in manner following, to wit, $600 on the arrival of the brig at Havana; and then $600, from time to time, as often as the charter of the brig should amount to that sum; that is to say, when the brig should have earned $600 at the rate of the charter-party, it

[1] The burden of proof is upon a party who alleges a breach of covenant. Chambers *v.* Jaynes, 6 Penn. St. 39; Hubbard *v.* Wheeler, 17 Id. 425; Sartwell *v* Wilcox, 20 Id. 117.

was to be paid in Spanish dollars, in the United States, or in good and approved bills, &c.

The declaration, after setting out the covenants, and averring performance on the part of the plaintiffs, &c., in the usual form, averred, that the brig was taken into service by defendant, on the said 7th July 1820, sailed on the 16th, from Bath to Havana, where she arrived, and continued under the control and in the employment of defendant, under said charter-party, till the 20th of January then next ensuing, when, in the prosecution of a voyage under the direction of defendant, she was totally lost by the perils of the sea; that the brig, at the time of her loss, had earned the sum of $2334.17, for her hire and affreightment from the 7th of July 1820, to the 20th of January 1821, at the monthly rate stipulated by the charter-party. The refusal of the defendant to pay this sum, or any part, in any of the modes of payment stipulated in the charter-party, was the breach of covenant complained of.

The defendant pleaded four several pleas; upon the first of which issue was joined, and there was, on this plea, a trial and verdict, and judgment for the plaintiffs on the same. The plaintiffs demurred to the remaining pleas, and judgment was given for them.

The first plea, after claiming *oyer* of the charter-party, which was granted, set forth, that the plaintiffs ought not to have or maintain their action afore-
*143] said against *him, because he said, that the said defendant had paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and meaning, of the said articles of agreement; and of this he put himself on the country, &c.

The question presented to the court, on the record of the proceedings of the court below, on the trial of this issue, was contained in a bill of exceptions taken by the counsel for the defendant. The bill of exceptions, after stating certain matters of fact, which were admitted to prove, and did prove, the payment of $210, by John W. Simonton, to the agent of the plaintiffs, and for their use, proceeded to say, that the plaintiffs, without giving evidence to the jury, prayed the court to instruct the jury as follows: "The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity in supporting the issue on their part above joined, to prove any averment in their declaration; but that the whole *onus probandi*, under the affirmative plea of payment, is on the defendant, to prove such payment as he has alleged; and the plaintiffs pray the court to instruct the jury accordingly." Which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, and which the jury had been sworn to try, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel, for the time stated in the declaration, at the rate of $425 per month: to which instruction, the defendant, by his counsel, excepted, &c.

The second plea of the defendant alleged, that the plaintiffs did not on their part keep and perform their covenants in the charter-party; that the brig did not pursue the voyage and voyages ordered and appointed for her by the defendant, and did not carry on the legal trade on which the defend-

ant employed her; but without sufficient cause, deviated therefrom, on the 27th November 1820, while under the control of the *defendant under the charter-party; omitted to proceed from Port au Prince to Crooked [*144 Island as ordered; and in violation of the agreement, proceeded to the Havana, against the orders of the defendant, by which great expense was sustained, and the voyage in which the brig was engaged was greatly delayed and defeated; and afterwards, during the charter-party, the brig, against the will of the defendant, sailed from Crooked Island to Rag Island, instead of to Mobile, where she was destined, according to orders, whereby the voyage to Mobile was defeated; and that on the 20th of January 1821, the brig was wholly lost by shipwreck, and a cargo on board, of the value of $10,000, was wholly lost and destroyed; wherefore, &c.

The third plea alleged, that while the brig was lawfully subject to the orders of the defendant, she was dispatched, in a lawful trade, from Port au Prince to Crooked Island, and under such orders, sailed, on the 27th day of November 1820, on that voyage; and according to the tenor and effect of the agreement, it was the duty of the master and crew of the brig, acting on behalf of the plaintiffs, to have carried the brig to Crooked Island: yet the master and crew, in violation of the orders of the defendant, carried the vessel to the Havana, to the great injury of the defendant, whereby the covenants in the charter-party were wholly broken by the plaintiffs; wherefore, &c.

The fourth plea stated, that on the 30th of December 1830, the brig James Monroe was at Crooked Island, for the purpose of taking on board a cargo of salt for the defendant, to carry the same from thence direct to Mobile; and the defendant, relying on the faithful performance of their duty by the master and crew, caused insurance to be effected on the cargo of salt from Crooked Island to Mobile; yet the master and crew, well knowing the same, did deviate from the voyage to Mobile, without lawful authority or excuse, and proceeded from Crooked Island to Rag Island: in consequence of which, and after the said deviation, the brig and cargo were wholly lost by shipwreck, on the 20th of January 1821, and the policy of insurance became wholly void and of no effect; and the defendant thereby sustained damages to the amount of $10,000, whereby he became discharged from all *further payments under the charter-party, and from the [*145 performance of any of the agreements contained in the charter-party; wherefore, &c.

The defendant in the circuit court prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiff in error, and by *Jones*, for the defendants.

Coxe, for the plaintiff in error, contended, as to the instructions given upon the trial of the issue under the first plea, that by the terms of the charter-party, no part of the monthly freight was due, until the end of the month. Covenants were to be performed on both sides. The plaintiff averred performance, and the defendant pleaded payment of all moneys due and payable. If this had been an action upon a bond, with a condition, the plaintiffs would have been obliged to assign specific breaches, and to prove them.

The plea does not say, that the defendant had paid the whole amount

claimed by the plaintiffs, but that payment had been made so far as freight had been earned; and if the plaintiffs claimed and were entitled to more than the sum of $210, which was paid, they should have proved that more was earned and due under the charter-party. By going to trial on this plea, the defendant need not go beyond it.

If the plea was not issuable, and if the plaintiffs had taken judgment upon it, they would have been obliged to prove their damages before a jury of inquiry. As issue was joined upon the plea, the plaintiffs should have proved that the vessel performed the charter-party, and earned the freight; and also that the amount of $600 was payable when the vessel arrived at Havana, and the same amount when it was afterwards earned. If any freight was due under the charter-party, it must have been because the vessel had delivered the goods of the charterer, and had, under his direction, performed the voyage or voyages designated or ordered by him. It was, therefore, essential, that evidence to establish these facts should have been exhibited on the trial of this issue.

*146] The substance of the second, third and fourth pleas, to which *the plaintiff demurred, is, that the owners retained the management of the brig, and the charterer was to direct the voyages to be performed by her; they engage to carry the vessel to every port required by the charterer. The pleas aver, that the master of the brig deviated from the orders of the charterer, and thereby caused her loss and that of the cargo. By demurring, the plaintiffs admit these facts. Pothier on Charter-Parties 16, &c.

Jones, for the defendants in error.—The charter-party was itself sufficient to show the amount due to the owners of this vessel. The sum payable was $425 per month, and at the same rate for a fraction of a month. The time the vessel was in the employ of the charterer being shown, or admitted by the pleadings, no evidence could be necessary to maintain the issue under the first plea.

As to the remaining pleas, he argued, that the covenants of the owners of the brig did not create conditions precedent; so that the breach of one on the part of the owners, created an excuse for the non-performance of the obligations of the charterer. If the conduct of the master of the brig had been such as to entitle the charterer to claim damages for his misconduct, they should be recovered in a distinct suit, and could not be set off in this suit. 4 Maule & Selw. 208; 5 Petersd. 301; 7 Ibid. 96–106, 404–7; 5 Ibid, 311, 314, 326, 328, 332.

Thompson, Justice, delivered the opinion of the court.—This case comes before the court upon a writ of error to the circuit court of the district of Columbia. The action is covenant, on a charter-party, dated the 15th of July 1820, by which the plaintiffs in the court below let and hired to the defendant, the brig James Monroe, to proceed from Bath, in the state of Maine, to Havana, thence to Mobile, or elsewhere, as the defendant might direct, for the term of twelve months, from the 7th day of the said month of July; at and after the rate of $425 per month. And the plaintiffs cove-

*147] nanted on their part, that the brig should be *tight, stiff, staunch and strong, well-victualled and manned, at their expense, during that period (the dangers of the seas excepted). And the defendant, on his part,

covenanted, among other things, to pay to the plaintiffs for the hire of the brig, $425 each and every month during the said term, in manner following, to wit, $600 on the arrival of the brig at Havana ; and then $600, from time to time, as often as the charter of the brig should amount to that sum ; that is to say, when the said brig earns $600 at the rate of the charter-party ; to be paid in Spanish dollars, in the United States, or in good and approved bills.

The declaration, after setting out the covenants, averring performance on the part of the plaintiffs, &c., in the usual form, avers, that the brig was taken into service by the defendant, on the said 7th of July 1820, and sailed, on the 16th of the same month, from Bath to Havana, where she arrived, and continued under the control and in the employment of the defendant, under said charter-party, till the 20th of January then next ; when, in the prosecution of a voyage, under the direction of the defendant, she was totally lost by the perils of the sea. That the brig, at the time of her loss, had earned the sum of $2734.17, for her hire and affreightment, from the 7th of July 1820, to the 20th of January 1821 ; which sum, or any part thereof, the defendant had refused to pay, in any of the modes stipulated in the charter-party.

The defendant pleaded four several pleas. The first of which, and the only one upon which issue is taken, is as follows : "And the said John W. Simonton, by his attorneys, comes and defends the wrong and injury when, &c., and craves *oyer* of the said articles of agreement of charter-party in the said declaration mentioned, and they are read to him in these words, &c. ; which being read and heard, the defendant says, as to the said breach of covenant in the said declaration assigned, that the said plaintiffs ought not to have or maintain their action aforesaid against him, because he says, that the said defendant hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and *meaning, of the said articles of agreement ; and of this he puts himself upon the country, &c." The plaintiffs demurred to the three other pleas ; upon which the court gave judgment for them. [*148

The question now to be decided arises upon a bill of exceptions taken at the trial. It was admitted on the part of the plaintiffs, that the defendant had paid $210 on account of the charter-party ; and thereupon, without giving any evidence, the plaintiffs prayed the court to instruct the jury as follows : The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what it therein demanded, nor imposes on the plaintiffs any necessity ; in supporting the issue on their part above joined, to prove any averment in their declaration ; but that the whole *onus probandi*, under the affirmative plea of payment, is on the defendant, to prove such payment as he has alleged ; and the plaintiffs pray the court to instruct the jury accordingly : which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel, for the time stated in the declaration, at the rate of $425 per month. To which instruction, the defendant excepted.

The only question arising upon this bill of exceptions is, whether the

defendant, by his plea, has admitted the cause of action as alleged in the declaration, so as to dispense with any proof on the part of the plaintiffs to establish such cause of action. The instruction given by the court to the jury was, that the defendant had, by his plea of payment, admitted the demand of the plaintiffs, as stated in the declaration. The general rule, undoubtedly, is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the facts stated in the count.[1] But these rules do not apply to this case. The answer of the defendant is not to the allegation in the declaration; there is no issue properly joined. The plea must not only be adapted to the nature and *form of the action, but must also be conformable to the count. An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and generally, should be made up by an affirmative and negative. The breach assigned in this declaration is special; the non-payment of a certain sum of money, for particular and specified services, alleged to have been rendered. If the plea had been payment of the sums of money demanded in the declaration, it would confess and avoid the count, and the affirmative would rest upon the defendant to prove payment. But the plea, instead of alleging payment of the sum demanded in the declaration, alleges generally, that the defendant had paid all such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning, of the said articles of agreement. This does not meet the allegation or breach in the declaration, or amount to an admission that the brig had earned the sum demanded, so as to dispense with the necessity of the plaintiff's proving it. The plea is certainly bad; it amounts to a general plea of performance, when the declaration contains an assignment of a particular breach. This cannot be done; the defendant was bound to meet the allegation of the particular breach. Issue cannot be taken on a general plea of performance; and the plaintiff, if driven to reply, would be obliged to repeat his declaration. When a particular breach is assigned, the defendant has an affirmative offered upon which he may take issue. 2 Johns. 413; Arch. Plead. 233, and cases there cited.

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If this matter is not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. Suppose, the plaintiff had demurred to this plea, and the court had given judgment for him upon the demurrer, a jury would have been necessary to assess the damages. The court could not have given judgment for the damages claimed in the declaration. Nor would the plea be evidence upon which the jury could assess the damages. This would be treating that as an admission of the demand, which the court had said was no answer to the allegation in the declaration. The plea being considered a nullity, the case would stand as if no plea had been put in, and the plaintiffs would be bound to prove their *cause of action. Or, if the plaintiff, instead of going to trial, had treated the plea as no answer to the declaration, and taken judgment as by *nil dicit*, the damages must have been assessed by a jury, and the plaintiffs would have been bound to prove their cause of action. This general plea of payment of all that was

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[1] The Bella, 6 Ben. 287.

due, amounts to no more than averring that nothing was due. Had the action been upon a bond, or other instrument for the payment of money, the instrument itself would show what was due. But this is an action of covenant, sounding in damages, and such damages depend upon matter *dehors* the instrument declared on, and must be ascertained by proof *aliunde*. It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages, and money *in numero*, is material to be attended to. Chit. Plead. 113. The court, therefore, erred in the instruction given to the jury, that it was not necessary for the plaintiffs to prove any of the averments in their declaration.

It is not deemed necessary to express any definitive opinion upon the validity of the pleas to which the plaintiffs have demurred. It may not be amiss, however, to intimate that, had it become material to decide those points, it is probable, the judgment of the court below, upon the demurrers, would be sustained.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to issue a *venire facias de novo*.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*Francis Henderson and wife, Plaintiffs in error, *v.* Ira Griffin, [*151
Defendant in error.

State decisions.—Statute of uses.—Ejectment.—Costs of former suit.

The supreme court of the state of South Carolina having decided, that the act of the legislature of that state, of 1744, relative to the commencement, within two years, of actions of ejectment, after nonsuit, discontinuance, &c., is a part of the limitation act of 1812, and that a suit, commenced within the time prescribed, arrests the limitation; and this being the decision of the highest judicial tribunal on the construction of a state law relating to titles and real property must be regarded by this court as the rule to bind its judgment.

That court having decided on the construction of a will, according to their view of the rules of the common law in that state, as a rule of property, this decision comes within the principle adopted by this court in Jackson *v.* Chew, 12 Wheat. 153, 167, that such decisions are entitled to the same respect as those which are given on the construction of local statutes.

Where an estate was devised to A. and B., in trust for C. and her heirs, the estate, by the settled rules of the courts of law and equity in South Carolina, as applied to the statute of uses of 27 Hen. VIII., c. 10, in force in that state, passed at once to the object of the trust, as soon as the will took effect, by the death of the testator; the interposition of the names of A. and B. had no other legal operation than to make them the conduits through whom the estate was to pass, and they could not sustain an ejectment for the land. C., the grandchild of the testator, is a purchaser under the will, deriving all her rights from the will of the testator, and obtaining no title from A. and B.; and A. and B. were as much strangers to the estate, as if their names were not to be found in the will.

The case contemplated in the law of 1744, by which a plaintiff or any other person claiming under one who had brought an ejectment for land, which suit had failed by verdict and judgment

against him, or by nonsuit or discontinuance, &c., is empowered to commence his action for the recovery of the said lands *de novo*, is clearly a case where the right of the plaintiff in the first suit passes to the plaintiff in the second; where it must depend upon some interest or right of action which has become vested in him by purchase or descent, from the person claiming the land in the former suit.

It would be quite a new principle in the law of ejectment and limitations, that the intention to assert the right was equivalent to its being actually done; it is settled law, that an entry on land, by one having the right, has the same effect in arresting the progress of the limitation as a suit; but it cannot be sustained as a legal proposition, that an entry by one having no right is of any avail.

Where the court ordered the costs to be paid, of a former ejectment brought by the plaintiffs, in the names of other persons, but for their use, before the plaintiff could prosecute a second suit, in his own name, for the same land, this was not a judicial decision that the right of the plaintiffs in the first suit was the same with that of the plaintiffs in the second suit: it was perfectly consistent with the justice of the case, that when the plaintiffs sued the same defendant, in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by the court to meet the justice and exigencies of cases as they occur;
*152] not depending solely on the interest *which those who are subjected to such rules may have in the subject-matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances, which, in the exercise of a sound discretion, may furnish a proper ground for their interference.

Error to the Circuit Court of South Carolina. This was an action of trespass, instituted in the circuit court, to try titles, according to the forms prescribed by the local law of South Carolina; by which this action is substituted for an ejectment.

The plaintiffs proved a good title to a tract of land, in Abbeville district, South Carolina, under the will of Henry Laurens, who devised the land in question to Dr. and Mrs. Ramsay, and their heirs, in trust for the use and behoof of Frances Eleanor Laurens (now the wife of Francis Henderson), during her life, &c. The jury found a verdict for the plaintiffs for a part of the said land, with damages. But the defendant having set up a claim under the statute of limitations, the plaintiffs, in reply, showed, from the records of the state court, that this action was commenced the 29th of May 1823, and on the 21st of November 1823, a rule was made and entered by the said court, against the plaintiffs, in these words: "Francis Henderson and wife *v.* John Carey, and the Same *v.* Other Defendants, to the number of forty, including Ira Griffin. On reading the affidavit of Henry Gray, it is ordered, that the plaintiffs show cause, on Monday morning, why all proceedings in these cases should not be stayed, until the costs of the actions prosecuted in the names of the heirs of David Ramsay, by the same plaintiffs, in the state court, against the same defendants, be paid." On the return of this rule, counsel were heard for and against it; and on the 20th of April 1824, the court ordered, that upon a taxed bill of costs in the state court being made out, the same be forthwith paid by the plaintiffs.

The plaintiffs in the circuit court, by their counsel, showed on the trial, that the suit in the state court, prosecuted in the name of the heirs of David Ramsay, against the defendant, was regularly discontinued in that court, on the 23d of October 1822, and they were compelled to pay the costs of that suit, before they could proceed with the present. And the plaintiffs' coun-
*153] sel contended, that the title was not barred by the *act of limitations, when the suit in the name of the heirs of Ramsay was commenced; and the act did not run against the plaintiffs since that time, inasmuch as

the present suit ought to be joined and connected with the said former suit in the state court. But the court, admitting that the plaintiffs' title was not barred at the commencement of the first suit, instructed the jury, that the present suit could not be connected with the former, and the jury found a verdict accordingly. To which instruction and finding, the plaintiffs' counsel excepted, and prosecuted this writ of error.

The counsel for the plaintiffs in error claimed to reverse the judgment in the circuit court, because the suit in the state court, in the name of the heirs of Ramsay, trustees for the plaintiffs, ought to have been connected with the present action; being for the same land, under the same title, and by the showing of the same defendant, upon the records of the court, prosecuted by the same plaintiffs, in the name of their trustees.

The case was argued by *Wirt* and *McDuffie*, for the plaintiffs in error; and by *Warren R. Davis*, for the defendant.

For the *plaintiffs*, it was contended, that the suit in the state court, and that which was subsequently instituted in the circuit court, being substantially between the same parties, and for the same tract of land, was fully within the provision of the act of assembly of South Carolina, which saved the parties to such a suit from the effect of the limitation. The 19th section of the act of 1744 declares, that if, in an action of ejectment, there shall be a nonsuit or discontinuance, or letting fall of the action, it shall not be conclusive; and the party may institute another suit, within two years, and thus have the benefit of the time in which the first suit was instituted. The object of the first suit was, to maintain the title of the *cestuis que trust*, and the names of the heirs of Mr. Ramsay were used for no purposes of their own, but only with the same object as that in the present suit. They were parties to that suit in form only; essentially, Mr. and Mrs. Henderson were the plaintiffs. The defendant, by the first suit, had notice of the plaintiffs' title; thus they were within the words, as *well as the spirit, of the exception in the law of South Carolina. 2 McCord 252; 2 Brev. Stat. of S. C. 21, 24. [*154

The order on the plaintiffs to pay the costs of the suit in the state court, showed, that there was, in the opinion of the court, a connection between the suits. One was deemed a continuation of the other. Tidd's Pract. 479, 480; 3 Bos. & Pul. 22; 2 Esp. 75, 493; 1 Str. 1192; 8 Cranch 462.

Davis, for the defendant, insisted, that the parties to the two suits were different. The legal title, asserted in the suit in the state court, was claimed to be in the plaintiffs in that suit; and in the suit now before the court, other parties sought to maintain their legal title. The provisions of the law of South Carolina applied only to cases between the same parties, and who claimed, in the second suit, the title set up by them in the first suit.

Baldwin, Justice, delivered the opinion of the court.—The action in the court below was brought to try title to a tract of land, in Abbeville district, claimed by the plaintiffs, under the will of Henry Laurens; and by the defendant, in virtue of a possession of five years, which, by the limitation law of South Carolina, gives a good title.

On the trial of the cause, it appeared, that Henry Laurens, being seised

in fee of the premises in controversy, devised the same to his daughter, Mrs. Ramsay, and to Dr. Ramsay, "to hold the same, to them and their heirs, in trust for the use and behoof of his grand-daughter, Frances Eleanor Laurens, wife of the plaintiff, during her life, &c." On the 23d of October 1822, the heirs of David Ramsay, claiming by the will aforesaid, brought their action against the defendant, in the state court of South Carolina, to recover the land claimed by him, which was part of a larger tract of land, devised to Mrs. Henderson by the will of Mr. Laurens. The supreme court, on argument, decided that the legal estate was in those for whose use it was devised, and that the action could not be sustained in the name of the heirs of Ramsay. *Ramsay and others Trustees* v. *Marsh*, 2 McCord 252. *Whereupon, the suit was discontinued, on the 23d *155] of October 1822. At the commencement of that suit, five years had not expired from the time of the defendant's entry on the land; but they had expired when the present action was brought, on the 29th of May 1823: so that the only question arising in this action is, whether the two suits can be so connected, that the present can relate back to the former one, and thus bring it, by legal intendment, within the five years. The circuit court being of opinion, that the two suits could not be connected, a verdict and judgment passed for the defendant; and this is the only error assigned.

The plaintiffs in error rest their case on the following clause of an act of assembly of South Carolina, passed in 1744. (2 Brevard's Digest 24.) "And in case verdict and judgment shall pass against the plaintiff in such action, or that he suffers a nonsuit or discontinuance, or any otherwise lets fall the same, such verdict or judgment, nonsuit or discontinuance, or other letting fall the action or suit aforesaid, shall not be conclusive and definitive on the part of such plaintiff; but at any time within two years, the said plaintiff, or any other person or persons claiming by, from and under him, shall have right, and is hereby empowered to commence his action for the recovery of the said lands and tenements *de novo*, and prosecute the same, in the manner, and with the expedition, herein-before directed."

The supreme court of that state have decided that this law is considered as a part of the limitation act of 1712, and that a suit commenced within the time prescribed arrests the limitation (*Edson* v. *Davis*, 5 McCord 555–6): and this being a decision of their highest judicial tribunal on the construction of a state law relating to titles and real property, it must be adopted by us, as the rule to guide our judgment; and this brings the merits of this case to this single question, whether the plaintiffs claim by, from or under David Ramsay's heirs?

The opinion of the court in the case of *Kennedy* v. *Marsh*, was an able and deliberate one; it was a judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that state, as a rule of property, and comes within the principle adopted by this court in *Jackson* v. *Chew*, 12 Wheat. 153, 167, that such decisions are *entitled to the same respect as those which are given on the *156] construction of local statutes. By so considering it, and adopting it as a rule by which to decide this case, it follows, conclusively, that if there was no such estate in the heirs of Dr. Ramsay as would authorize them to sustain an ejectment under this will, in their own names, the trust in the will was one clearly executed in Mrs. Henderson. By the settled rules of

courts, both of law and equity, as applied to the statute of uses of 27 Hen. VIII., c. 10, in force in South Carolina, there was, according to the principle of the decision of the state court, nothing executory in the trust. Mr. or Mrs. Ramsay were to do no act, before both the legal and beneficial interest vested in the devisee in trust. The estate never vested in them for a moment, but passed directly to the objects of the trust, as soon as the will took effect by the death of the testator. The interposition of the names of Mr. and Mrs. Ramsay, had no other legal operation than to make them the conduits through whom the estate was to pass. The application of the statute of Henry VIII. to a will, gives it the effect of a deed of bargain and sale to uses; they are only modes of passing title. Having no legal operation to vest the legal estate in the names used as the conduits or instruments of conveyance, the effect of either would be the same, if the grant or devise were made directly to the purposes and uses declared, transferring both the title and possession. "The statute conveys the possession to the use, and transfers the use into possession, thereby making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity. The possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but an actual estate." 2 McCord 254.

This decided opinion of the highest court of South Carolina renders it unnecessary for this court to express their own opinion on this will. Thus construed, neither Mr. nor Mrs. Ramsay ever had, and their heirs never could have, any right or estate in the premises so devised by Mr. Laurens, in law or equity—no right of entry, possession or ultimate enjoyment. They could not take the rents and profits, as the entire estate of the devisor vested in the devisee; they could, therefore, sustain no ejectment, which must be founded on a right of *possession. Mrs. Henderson is a purchaser, directly under the will of her grandfather, deriving all her rights [*157 from him. There being not a spark of right in the Ramsays, she could by no possibility claim by, from or under them. There was no privity of estate between them; the Ramsays formed no link in the chain of title from the person last seised to the plaintiff. They were as much strangers to the estate in law, as if their names were not to be found in the will; and there could be, in no principle of law, any connection between the present and the former suit. The case contemplated in the law of 1744 is clearly one where the right of the plaintiff in the first suit passes to the plaintiff in the second, where it must depend upon some interest or right of action, which has become vested in him by purchase or descent from the person claiming the land in the former suit.

These are the views which inevitably result from the local laws, expounded by the highest court in the state; in accordance with which, the right of Mrs. Henderson was as perfect on the death of Mr. Laurens, as it could be afterwards. She might have supported her ejectment against Griffin, at the time when the heirs of Ramsay brought theirs; and this is not the case provided for by the law; which, in our opinion, applies only to the case of a suit brought to enforce a right derived from the first plaintiff. To give the law any other interpretation would be to establish in South Carolina the principle, that an action brought by a person having no right, title or interest in land, in the actual possession of a person claiming it for

himself, would arrest the act of limitation, and prevent its running on the right of a stranger to the suit. It would be doing violence to the law, to give it this meaning.

The plaintiffs' counsel seem to consider this as a case where the first ejectment was brought by a trustee, and the second by a *cestui que trust;* but this is not such an one. If the construction given to the will is to be considered as the law of the case, the will of Mr. Laurens did not sever his interest in the estate devised to his grand-daughter; the legal was not separated from the equitable estate; but the whole passed unbroken by the will. So that the relation of trustee and *cestui que trust* never subsisted. The utmost extent of the argument drawn from this alleged analogy in
*158] favor of the *plaintiff would be, that the heirs of Ramsay brought the first suit in assertion of the title of Mr. Laurens, but for the want of privity, they could not bring it to bear on the defendant, in their names. It would be quite a new principle in the law of ejectment and limitation, that the intention to assert the right was equivalent to its being actually done.

It is settled law, that an entry on the land, by one having the right, has the same effect in arresting the progress of the limitation as a suit; but it cannot be sustained as a legal proposition, that an entry by one having no right, is of any avail. If the use or trust was executory; if the legal title had remained in the Ramsays, as trustees, until they had done some act to vest it in the devisee, as the *cestui que trust*, there would be great force in the reasoning of the plaintiffs' counsel. But here there is no estate devised to Mr. and Mrs. Ramsay in trust. The statute, according to the local law of South Carolina, operates to make the devise directly to Mrs. Henderson.

The only remaining point made by the plaintiffs, is that which arises from the following rule made by the circuit court in this cause, on the 21st of November 1823. "On reading the affidavit of Henry Gray, it is ordered that the plaintiffs show cause, on Monday morning, why all proceedings in these cases should not be stayed, until the costs of the action prosecuted in the names of the heirs of David Ramsay, by the same plaintiffs, in the state court, against the same defendants, be paid." In pursuance of which rule, the plaintiffs paid the costs in the action referred to. Assuming the fact stated in the rule to be true, that the plaintiffs brought these suits in the name of David Ramsay's heirs, it shows no more than that it was a case which, by the rules and practice of all courts, authorized the order made by the circuit court. Costs had accrued to the defendant, by a suit brought and prosecuted by the plaintiffs in this suit, in the name of those who had no right to the land. It was perfectly consistent with the justice of the case, that when these plaintiffs sued the same defendant, in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by courts to meet the justice and exigencies
*159] of cases as they occur, not depending *solely on the interest which those who are subjected to such rules may have in the subject-matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances which, in the exercise of a sound discretion, may furnish a proper ground for their interference. A rule on A., to pay the costs of a suit in the name of B., is no judicial decision that he had any

interest in the subject, or that it was identical with one afterwards brought by A., in his own name, for the same property. It was the exercise of a summary power to compel what, under the circumstances of the particular case, the court consider to be justice to a party, in defending himself against an unfounded claim. The case before the circuit court was a proper one for the exercise of their discretionary powers, but their rule can have no possible bearing on the question in issue between the parties in the action.

It is, therefore, the opinion of the court, that there is no error in the record; the judgment of the circuit court is affirmed, with costs.

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

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*John Backhouse, surviving Administrator *de bonis non* of John Backhouse, deceased, James Hunter and Martha [*160
Hunter, and James Hunter and John M. Garnett, Executors of Muscoe G. Hunter, Archibald Hunter and Adam Hunter, George W. Spotswood and William L. Spotswood, Executors of Alexander Spotswood, and Margaret Jones, Executrix of Gabriel Jones, who was Executor of Thomas, Lord Fairfax, *v.* Robert Patton, Administrator *de bonis non, cum testamento annexo* of James Hunter, deceased, Joseph Ennever, Administrator of Adam Hunter, deceased, James Hunter, son of John Hunter, deceased, who was heir of Adam Hunter, Robert Dunbar, the said Robert Dunbar, Administrator of Alexander Vass, John Strode, Robert Randolph, Executor of William Fitzhugh, deceased, Hugh Mercer and Robert Hening.

Legal and equitable assets.—Application of payments

In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets. By the law, the executor or administrator is required, out of the legal assets, to pay the creditors of the estate, according to the dignity of their demands but the equitable assets are applied equally to all the creditors, in proportion to their claims.

Legal and equitable assets were in the hands of an administrator, he being also commissioner to sell the real estate of a deceased person; and by decree of the court of chancery he was directed to make payment of debts due by the intestate, out of the funds in his hands, without directing in what manner the two funds should be applied; payments were made under this decree, to the creditors, by the administrator and commissioner, without his stating, or in any way making known, whether the same were made from the equitable or legal assets—a balance remaining in his hands, unpaid to those entitled to the same, the sureties of the administrator, after his decease, claimed to have the whole of the payments made under the decree credited to the legal assets, in order to obtain a discharge from their liability for the due administration of the legal assets: *Held*, that their principal having omitted to designate the fund out of which the payments were made, they could not do so.

Where debts of different dignities are due to a creditor of the estate of an intestate, and on specific application of the payment made by an administrator is directed by him, if the creditor

applies the payment to either of his debts, by some unequivocal act, his right to do so cannot be questioned. *Quære?* Whether the application must be made by the creditor, at the time, or within a reasonable time afterwards?

*161] * There may be cases where no indication having been given as to the application of the payment, by the debtor or creditor, the law will make it; but it cannot be admitted, that in such cases, the payment will be uniformly applied to the extinguishment of a debt of the highest dignity; that there have been authorities which favor such an application, is true; but they have been controverted by other adjudications. Where an administrator has had a reasonable time to make his election, as to the appropriation of payments made by him, it is too late to do so, after a controversy has arisen; and it is not competent for the sureties of the administrator to exonerate themselves from responsibility, by attempting to give a construction to his acts, which seems not to have been given by himself.

This cause came before the Court on a certificate of a division of opinion in the Circuit Court of the United States for the eastern district of Virginia. In that court, a bill was filed on the equity side of the court, for the recovery of debts, by John Backhouse's administrator and others. The facts of the case, as agreed on the argument, were:

James Hunter died testate and insolvent, charging his estate, both real and personal, with the payment of debts. This suit was originally brought by Rebecca Backhouse, administratrix of John Backhouse, deceased, one of the creditors, in the circuit court of the United States for the middle circuit of Virginia, against said Hunter's executor; who dying during its pendency, Robert Patton, the defendant, was appointed administrator *de bonis non*, with the will annexed, and gave bond and security accordingly. The suit having abated by the death of the executor, was revived against Patton. In 1803, it was decreed, that the real estate should be sold for the payment of debts, and Patton and others were appointed commissioners for that purpose, to hold the proceeds of such sale, subject to the order of court.

In the management of the estate, divers sums of money came into the hands of Patton, both as commissioner and administrator. After various alterations of the parties, by death and otherwise, and divers interlocutory decrees, ordering payments to be made ratably to creditors, as their claims were ascertained by the court, a decree was made, on the 12th of June 1820, against Patton, as commissioner and administrator; whereby it was ordered and adjudged, that he should pay a certain sum, to be ratably apportioned

*162] among certain creditors therein mentioned. *It was also ordered by said decree, that a commissioner of court should examine and report upon the administration accounts of said defendant. This examination was had, and a report made, on the 24th of November 1820. After the return of this report, to wit, on the 15th of June 1821, it was decreed, that the said defendant should pay a further sum, to be apportioned among the creditors as therein directed. Upon this decree, executions were issued and returned "*nulla bona.*" Whereupon, a supplemental bill was filed, seeking to make the sureties for the faithful administration of Patton accountable for his waste.

One of the sureties failed to appear and answer, and the bill, as to him, was taken *pro confesso;* the other appeared and answered. When the cause came on for hearing against the sureties, the insolvency of Patton, and the amount of assets which came to his hands to be administered on, were not controverted. Patton having made satisfactory arrangements to

secure the payment of the sum adjudged against him by the decree of the 12th day of June 1820, as to the present question, it was considered as paid. It was contended by the defendant, that the whole sum adjudged to be paid by Patton, under the decree of the 12th of June 1820, amounting to $23,322.56, should go to his credit as administrator.

At the hearing in the circuit court, the questions presented by the counsel of the parties, and argued before the court were the following, to wit:

1. Whether the whole of the said payments made by the said Robert Patton, under the said decree of the 12th of June 1820, was to be applied entirely to the debt due from him as commissioner of the court for the sale of the real estate, so as to leave his sureties for due administration liable for the whole balance in his hands as administrator *de bonis non?* or—

2. Whether the payment ought to be applied to the debt due from R. Patton, as administrator, on his administration account? or—

3. Whether the payment ought to be applied to the debts due by him in both characters, as commissioner of the court, and as administrator *de bonis non*, ratably, in proportion to the amounts of those responsibilities?

*The court holding the negative on the first question, and being divided on the second and third, they were adjourned to the supreme court. [*163

The complainants, by their counsel, contended, in the circuit court, that the whole sum of $23,322.56, adjudged against Patton by the decree of the 12th of June 1820, ought not to go to the credit of his responsibility as administrator; and that his sureties cannot claim more than its ratable apportionment, according to the amount of their respective responsibilities of commissioner and administrator.

Haynes, for the complainants, argued:—1. That the sureties of Patton as administrator could not avail themselves of any defence which could not avail their principal. 2. If the whole amount of the decree of 1820 should be placed to the credit of Patton's responsibility as administrator, it would give his sureties an illegal and inequitable priority over the other creditors. 3. It would virtually repeal the law requiring bonds and security for administrators. 4. It would make the realty a guarantee for the faithful administration of the personalty, by releasing the sureties for such administrators.

Patton, on the part of the representatives and sureties, read the argument of Mr. *Chapman Johnson.*

The argument urged, that the true question before the court is, whether the payment as made shall be applied first in satisfaction of the balance due from the administrator; and next, in satisfaction of that due from the commissioner; or shall be applied ratably to the satisfaction of both. The rule for the decision of this question must be found either in the decrees of the circuit court, or in the general principles of law governing the application of payments. It was admitted, that the court had the whole fund under its control, as well the legal asserts, which, under the law of Virginia, are the personal estate of the intestate, as the equitable assets, the proceeds of the real estate; and could have directed *the payment out of either fund. But it was argued, that no directions had been given by the court on [*164

this point; and therefore, the inquiry was as to the manner the amount of the decree should be applied by the law.

The authorities from the common and civil law, and the general doctrine as to the appropriation of payments, established the following principles by an entire harmony between those codes. 1. The debtor making the payment has the primary right to direct its application. 2. If he does not exercise this right, it devolves on the creditor. 3. If neither exercises it, within the time allowed by law, the law itself makes the application. 1 Evans's Pothier on Obligations (Lond. ed.), part 3, art. 7, rules 1–5, and notes, page 363–74; Comyn on Contracts, part 2, ch. 2, § 8, page 216–28; 16 Vin. Abr. Payment, M, 277; 1 Meriv. 585; 2 Str. 1195. The debtor's right to make the application, however limited in point of time, is not restrained as to the manner. It is not necessary, that he should declare the application in express terms; it is sufficient, if, from circumstances, it may be fairly inferred, that the payment was made in satisfaction of one of the debts. *Newmarch* v. *Clay*, 14 East 239; *Tayloe* v. *Sandiford*, 7 Wheat. 14. Although, by the civil law, as stated by Pothier, the debtor is required to make the application, at the time of the payment, this is not the doctrine and rule of the common law. This has been so decided by this court in the *Mayor of Alexandria* v. *Patton*, 4 Cranch 317; see also, 1 Wash. 128; *United States* v. *Kirkpatrick*, 9 Wheat. 720; 2 Barn. & Cres. 65.

It cannot be contended, that Patten was indebted to the creditors of Hunter, as administrator and as commissioner of the court. The only debt due by him, before the decree, was as administrator. As commissioner of the court, he owed them nothing, and was not authorized to pay them anything, except as directed by the decree of the court.

*165] When the decree of 1820 directed him, the administrator *and commissioner, to pay specific sums, this was a personal decree, and he became indebted to them as an individual; his fiduciary character was merged in the decree, and to each creditor, he became indebted separately. When the debts so made due were paid, the creditor had no election to make, no application to declare. The right of the creditors to appropriate the payments had then nothing to do with the case; and the right of the debtor to appropriate continued, on the authorities referred to, up to the period of the decrees in the circuit court.

As to the rule, "that if both the debtor and creditor omit to appropriate payments, the law will apply them according to its own notions of justice," the following cases were referred to: 1 Vern. 24; 2 Brownl. 207; 12 Mod. 559; 1 Ld. Raym. 287. The application contended for is warranted by the situation in which the administrator was placed. He was bound to appropriate the fund to the discharge of his obligations as administrator, in preference to any claims on him as commissioner; and the law will look at these considerations, and make the same application. As administrator, he had given bond, which subjected him to many actions. Duties as administrator, exposed him to heavier responsibilities than as commissioner; his oath of office obliged him to pay the debts of the intestate out of the legal assets. It was also contended, that the fifth rule in Pothier (374), which declares, "that if different debts are of the same date, and in other respects equal, the application should be made proportionably to each," was applicable to this case. For this rule was also cited, 1 Vern. 34; 2 Ch. Cas. 83.

Backhouse v. Patton.

McLEAN, Justice, delivered the opinion of the court.—This cause is brought before the court on a certificate of a division of opinion, in the circuit court of the United States for the eastern district of Virginia. The question presented for decision relates to the application of certain payments made by Patton, one of the defendants. The facts in the case are, substantially, as follows:

James Hunter, by his last will, devised his estate, real and *personal, to certain relatives, subject to the payment of his debts. [*166 Patrick Home, one of the devisees and executors, being the surviving executor named in the will, having taken upon himself the execution of it, sold a part of the real estate to one Dunbar. The complainants, creditors of Hunter, brought their suit in the circuit court against Home, as executor and devisee, and against others, to set aside the sale to Dunbar, and obtain satisfaction of their debts. After having answered, Home died, in the spring of 1803; and administration *de bonis non*, on Hunter's estate, was granted to Patton. Being made defendant, he filed his answer in 1803, and a decree was made, appointing him, John Minor, and another, commissioners, to sell, on twelve months' credit, the unsold lands of Hunter, and to hold the proceeds subject to the order of the court. As administrator, Patton received personal property to a considerable amount; and in June 1803, sold such part of it as was salable, on a credit of twelve months. The remaining lands of Hunter's estate, he and Minor, acting as the commissioners of the court, sold on the same credit, in December 1803. In the progress of the cause, an amended bill was filed by the complainants, waiving all objections to Dunbar's purchase.

Patton, as commissioner, in 1813, reported a balance on the administration account of about 3312*l.*, including interest. On this report, in June 1815, the court directed payment by Patton and Minor, as commissioners, of one dollar in the pound to the creditors named; and on the 3d of December following, ordered a provisional payment to the complainants to be made out of the moneys in the hands of Patton, as administrator, if any he hath, and that he and Minor, as commissioners, do pay, &c. This decree seems not to have been acted on. On the 12th of June 1820, the claims of the complainants having been established, the court, with a view, as expressed, to put them on an equality with the creditors named in the decree of 1815, ordered, "that out of the funds of the estate of James Hunter, at the disposition of the court, *Robert Patton, one of the commissioners, and [*167 administrator *de bonis non*, do pay the sum of $23,322.56." This sum was paid. The decree of 1820 having directed a further account, it was taken, and the sums in the hands of Patton, as commissioner and administrator, were stated. After the correction of various errors by the court, in the reports made, it was ascertained, in 1821, that after paying the sum of $23,322.56, there was still a balance in the hands of Patton of 6040*l.* 4*s.* 4*d.*; and the court decreed, that he should pay that sum to the creditors of the estate, as administrator, and as one of the commissioners of the court.

Patton had given security as administrator, but none as commissioner. To make the securities liable, he being insolvent, a supplemental bill was filed against them, and by the answer of one of them, the question of liability is raised. The point presented for consideration is, whether the payment shall first be applied to the credit of the administration fund, or

ratably to both funds? If the payment shall be decided to have been made out of the administration fund, the sureties are discharged; as the sum paid was greater than the amount Patton held in his hand as administrator. The payment also exceeded the sum he held as commissioner, though this fund was larger than the other. It is earnestly contended, in the learned and able argument in writing submitted to the court by the defendants' counsel, that the administration fund must first be exhausted. To determine the question raised, it is not important to ascertain the precise sum which Patton held in his hands in each capacity; as the amount paid exceeded his liability in either.

In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets. By the law, the executor or administrator is required, out of the legal assets,
*168] *to pay the creditors of the estate, according to the dignity of their demands; but the equitable assets are applied equally to all the creditors, in proportion to their claims. The payment was made under the decree of 1820; and if the court did not direct specifically in what manner the two funds should be applied, it is contended, that Patton had a right himself to determine; and consequently, by applying first the legal assets, to discharge his sureties. If the correctness of this argument were admitted, it would still be important to show, that the payment was made by Patton, as administrator. This fact might be established by an unequivocal act, or by circumstances.

This is clearly not a case in which the creditor may apply the payment, no specific directions having been given by the debtor. To each of the creditors, there was but one debt due, on which the payment was made; it could, therefore, be applied only to the payment of such debt. Had debts of different dignities been due to each creditor, and no specific application of the payment had been directed by Patton, and the creditor had applied it by some unequivocal act, his right to do so would not, perhaps, be questioned. Whether the application must be made by the creditor, at the time the money is received, or within a reasonable time afterwards, it can be of no importance in this case to inquire. There may be cases, where no indication having been given, as to the application of the payment by the debtor or creditor, the law will make it. But it cannot be admitted, that in such cases, the payment will be uniformly applied to the extinguishment of a debt of the highest dignity. That there are authorities which favor such an application is true, but they have been controverted by other adjudications.

From the terms of the decree of December 1815, the court undoubtedly intended, that the legal assets should first be applied in making the payments directed; and then the equitable assets. But no such direction is given in the decree of 1820. The payment is directed to be made out of both funds in the hands of Patton, without any indication that either should
*169] be first applied in preference to the other. *If, in making the payment, Patton could exercise his discretion, in first applying the legal assets, has he afforded any evidence of having done so? Has he, by any entry in his accounts, or by a return to the court, or in any other manner, shown a special application of the money? Within what time, was it necessary for him to make his election? His intention is attempted to be adduced

from his interest, aided by the principles of law referred to. As administrator, it is said, he was responsible for the funds in his hands, by various modes of proceeding, summary in their character; and from this, it is inferred, that he intended to relieve himself from such a responsibility. To relieve his securities, it is urged, must have formed an additional motive, to which might be superadded, the oath he had taken as administrator. But, on the other hand, it may be urged, that the motives were not less strong; as commissioner, if unfaithful to his trust, he was subject to the penalties which a court of chancery might impose. It would seem, therefore, that the circumstances of the case do not authorize an inference that any determination was made by Patton on the subject.

When, in 1821, the decree was rendered against him, as administrator and as commissioner, for the payment of the balance which appeared to be in his hands, no objection seems to have been made to the decree. It could not have been entered, without giving a construction to the decree of 1820; for if the $23,322.56 had been paid, by first applying the legal assets, the decree of 1821 must have directed the balance to be paid as commissioner. This decree, therefore, goes very strongly to show in what light the above payment was considered by the court and the administrator. Can it be supposed, that when the decree of 1821 was about being entered against Patton, holding him responsible in both capacities, that he would have remained silent, if his liability as administrator had ceased? The rendition of this decree must clearly refute any presumption, attempted to be raised either from the facts or circumstances of the case, that the legal assets were considered as having been first applied by the administrator in making the payment.

*Having had a reasonable time to make his election, is it not too late to do so, after the controversy has arisen? And is it competent for the sureties of the administrator, to exonerate themselves from responsibility, by attempting to give a construction to his acts, which seems not to have been given by himself? They first raise the question as to the fund out of which the payment was made. If, then, Patton did no act which showed an intention to apply first the legal assets, in making the payment; and if it was not the right of the creditor to make the application; does the law make it, as contended for, under all the circumstances of the case? Had Patton made the application, a question might have been raised, whether it was competent for him to do so. [*170

Jurisdiction over the legal fund was assumed by a court of chancery. It was for that court, by its decree, to make the application of the fund as the law required; and having done so, the administrator could exercise no discretion over it. The same may be said as to the priorities of the claims set up by the complainants, and established by a decree of the court. That the administrator was limited in making payment, by the terms of the decree, will not be denied. It was not for him to pay more in the pound than was directed, nor to give a preference to one of the claims over another, on account of its higher dignity. The decree placed them on an equality, as to the payment; and this was clearly within the province of the court, the estate of Hunter being insolvent. The entire fund, in the hands of Patton, was subject to the distribution of the court. That part of the fund which,

in the hands of the administrator, constituted legal assets, and under the law, was directed to be applied in a special manner to the extinguishment of debts, was taken from his control by the court of chancery. The fund was applied by the court, and not by the administrator. His official capacity was only noticed, to ascertain the extent of his responsibility, and the payment was directed accordingly. He had no discretion to exercise, no rule to observe, but that which the decree laid down. As administrator and commissioner, he was directed to make the payment, because in these capacities, he had received an amount greater than the sum directed to be paid. The payment was made in pursuance of the decree.

*171] *Suppose, Patton, as commissioner, had given sureties, who were now before the court, and objecting to the application of the money as contended for. This would present a question between sureties. The insolvency of their principal renders a loss inevitable, and the inquiry would be, how shall this loss be sustained? Under such circumstances, could any substantial reason be given, why the sureties to the administration bond should be exonerated, in preference to the others? No distinguishing quality exists, either in the fund as it now stands, or the debts to be paid, to determine this preference. It is not found in the act of Patton, if his discretion might have been exercised on the subject. The law has fixed no rule applicable to the case. By the decree, both funds are placed on an equality; payment is directed to be made from both. Although Patton gave no security as commissioner, yet the question, in principle, is the same. A loss must be sustained, and by whom shall it be borne? The sureties on the administration bond, as has been shown, cannot claim an exemption from responsibility, under the payment made in pursuance of the decree; nor can the creditors escape a portion of the loss.

If this were a question of responsibility between sureties, under the decree of the court, the payment would be considered as having been made from each fund, in the hands of Patton, in proportion to its amount. This rule will apply, with the same justice, to the parties interested, under the circumstances of this case. Indeed, it would seem, that no other construction could be given, with equal propriety, to the decree of the court. It is consonant to the principles of justice, and within the equitable powers of the court. On a view of the facts and circumstances of this case, the court think, that the payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time it was made.

*172] This cause came on to be heard, on the transcript of the *record from the circuit court of the United States for the eastern district of Virginia, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, in pursuance of the act of congress for that purpose made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time the decree of the 12th day of June, in the year of our Lord 1820, was made. Whereupon, it is ordered and decreed by this court to be certified to the judges of the said circuit court for the eastern district of Virginia, that the

payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time the decree of the 12th day of June, in the year of our Lord 1820, was made.

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*William Hunter, Appellant, *v.* United States, Appellees. [*173

Priority of the United States.—Assignments in insolvency.—Discharge of debt.—Release from imprisonment.—Laches of public officer.

In the original bill, filed by the United States in the circuit court of Rhode Island, the claim of the United States to payment of a debt due to them, was asserted, on the ground of an assignment made to the United States by an insolvent debtor, who was discharged from imprisonment, on the condition, that he should make such an assignment; the debtor had been previously discharged under the insolvent law of Rhode Island, and had made, on such discharge, a general assignment for the benefit of his creditors. Afterwards, an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States, by the act of congress, against their debtors who have become insolvent; it was objected, that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case; but the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing, they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains.

The same right of priority which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government.

The assignment under the insolvent law of Rhode Island could only take effect from the time it was made; until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party; it is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If, before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, as though he had not applied for the benefit of the law; and if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution.

The property placed in the inventory of an insolvent may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor who obtains a judgment before the assignment.

The United States obtained a judgment against Smith, an insolvent debtor, previous to his assignment under the insolvent laws of Rhode Island; under his assignment, debt for money paid by him to the United States, as surety on duty bonds for the Crarys, passed to his assignee; the Crarys had claims upon Spain, which were afterwards paid under the Florida treaty; and the assignee of Smith received the amount of the said Spanish claim, in satisfaction of the payments made for the duty bonds by Smith. The judgment by the United States against Smith, having preceded the assignment, and the receipt and distribution of the money received from the Spanish claim, under the insolvent law; the government having an unquestionable right of priority on all the property of Smith, it extended to the claim of Smith on the Crarys; if the right of *the United States to a priority of payment covers any part of the property [*174
of an insolvent, it must extend to the whole, until the debt is paid.

The claim of Smith on the Crarys was properly included in his assignment under the insolvent laws, however remote the probability may have been, at the time, of realizing the demand; it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the general government; if, under such circumstances, the priority of the government does not exist, it would be difficult to present a stronger case for the operation of this prerogative.

By a special act of congress, the principal debtor was discharged from imprisonment, and the expression was omitted in this act, which is used in the general act passed June 6th, 1798, "pro-

viding for the relief of persons imprisoned for debts due to the United States," that "the judgment shall remain good and sufficient at law;" in the special act, it was declared, that any estate which the debtor "may subsequently acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and discharged." The special act did not release the judgment, and did not affect the rights of the United States against the surety.

That the same rules of contract are applicable, where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear.

The act of government in releasing both the principal and surety from imprisonment, was designed for the benefit of unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy; if the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be, that the principal must remain in jail, until the process of the law was exhausted against the surety; this would operate against the liberty of the citizen, and should be avoided, unless required to secure the public interest.

A discharge from prison, by operation of law, does not prevent the judgment-creditor from prosecuting his judgment against the estate of the defendant. To this rule, a discharge under the special provisions of the bankrupt law, may form an exception.

The secretary of the treasury was authorized to deduct from the sum payable to a debtor to the United States, the sum due to the United States, and he paid to his assignee the whole sum which was awarded to him under the Florida treaty, omitting to make the deduction of the debt due to the United States. It cannot be admitted, that an omission of duty of this kind, as a payment, by mistake, by an officer, shall bar the claim of the government. If, in violation of his duty, an officer shall knowingly, or even corruptly, do an act injurious to the public, can it be considered obligatory? He can only bind the government by acts which come within the just exercise of his official powers.

Where a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment, in such a case, proceedings at law might not be adequate, and it was proper to proceed in equity.

United States *v.* Hunter, 5 Mason 62, affirmed.

*175] Appeal from the Circuit Court of Rhode Island. *The appellant, William Hunter, was the assignee of Archibald Crary and Frederick Crary, under the insolvent law of Rhode Island; the Crarys obtained the benefit of that law, in June 1809; William Hunter was duly appointed one of their assignees, and was the sole surviving assignee. One Jacob Smith had, as surety in a custom-house bond, been compelled to pay to the United States, for the Crarys, about $2125; this payment was made in May 1808. Jacob Smith soon afterwards became himself insolvent, viz., in October 1809; obtained the benefit of the same insolvent law; and William Hunter was his sole surviving assignee. Jacob Smith and one William McGee were sureties for William Peck, as collector of taxes for the Rhode Island district, and the United States obtained a judgment for a large sum, viz., $13,508, against the principal and sureties, in August 1811; the suit was commenced in May of the same year. Upon his commitment to prison, by force of the execution issued in this case, Smith petitioned the then secretary of the treasury for relief; in which petition, he stated, that he was reduced to poverty, that he had obtained the benefit of the Rhode Island insolvent law, and surrendered all his property, as compelled by that law, to his assignee. He stated in that petition, that his own insolvency was hurried, if not occasioned, by his having paid considerable sums on account of suretyship at the custom-house; and in particular, this very sum of two thousand some hundred dollars for the Crarys, in the year 1809. Upon this full statement of the case, relief was granted him, and he was dis-

charged from prison, in compliance with a warrant from the treasury, on the 17th day of October 1811.

Before his discharge, Smith executed an assignment of his property to the United States. The assignment purported to convey all and the same property, which was conveyed by his previous assignment under the insolvent law. He recited and included his sworn inventory under the insolvent law, and referred to his demand against the Crarys. After the release of Smith, the surety, the United States, in 1812, imprisoned Peck, the delinquent principal; and congress discharged him from that imprisonment, upon his assignment and conveyance of all his estate, real and personal, *which he then owned or might be entitled to; this was done on the 12th of June 1812. In July 1824, under the peculiar circumstances [*176 of delay, difficulty and embarrassment, set forth in the answer, the assignee of the Crarys recovered and received from the United States, under their treaty with Spain, and in conformity to statutes by them enacted, the sum of money as stated in the bill, and as admitted in the answer.

The appellant, in his answer, contended, that so much of this sum as by operation of law belonged to Smith, he, as the assignee of Smith, was bound to pay over to the ascertained creditors of Smith, for whose benefit the assignment, under the state insolvent law, was made. In the original bill, the claim of the United States was rested upon the assignment made to them by Smith; but afterwards, an amended bill was filed, in which their right to payment of the whole amount of the judgment against Smith was asserted, on their right of priority under the laws of the United States.

The circuit court of Rhode Island made a decree in favor of the United States, and the defendant appealed to this court.

The case was argued by *Hunter*, for the appellant; and by *Berrien*, Attorney-General, for the United States.

For the appellant, it was contended: 1. That so far as the claim of the United States rests upon the assignment made to them by Smith, it is unavailing; as Smith had, when the same was executed, nothing to convey. That assignment was nominal and voluntary, and is opposed to a previous assignment, well known to the United States, and referred to in the assignment to the United States. 2. So far as the claim of the United States is made to depend on the law of priority, that law is not applicable to this case. 3. If the law of priority is applicable to such a case as this, it has been, by various, deliberate and definite acts on the part of the United States, waived and renounced. 4. The release of Peck, the principal, by the act of congress, is, combined with the circumstance of the case, a release of Smith, the surety. 5. The absence of all demand on the part of the United States for so many years, implies a relinquishment of their *claim, and subjects it to such imputations of staleness and after-thought as are [*177 incompatible with the principles of benignity, policy and justice which actuate courts of justice. There is no equity in the plaintiff's bill, and an unwarrantable resort to a chancery jurisdiction.

Hunter argued, that the original bill and the amended bill set up different grounds of claim. The original bill cannot be suppressed, and must be taken into view by the court; as it shows the ground of the claim of the

United States to have been exclusively the assignment made by Jacob Smith in 1811, under the law authorizing the discharge of Smith by the secretary of the treasury. The suit by the United States against Smith, as surety of Peck, was commenced in May 1811, and judgment obtained and execution issued, the same year. The bill states the insolvency of Smith in 1811. Smith had paid for the Crarys the amount which the United States ask to recover, and this was one of the known causes of his insolvency, and so represented in his petition for a discharge. The bond of Peck to the United States, in which Smith was surety, was signed some years before; and when Smith was discharged by the state insolvent code, nothing was due to the United States by him. Thus, when the claim of the United States was established, the claim of Smith on the Crarys had passed under his assignment made in 1808, and belonged to his creditors at the time of his discharge.

The acts of congress, which gave the United States a right to priority of payment, apply to debts due at the time of the insolvency of their debtors; to sustain the right of priority there must be a debt actually due. When the judgment against Jacob Smith was obtained by the United States, he had no property upon which this ascertained, and not until then existing, debt to the United States could attach; all his property had passed from him, under the insolvent law of Rhode Island, and belonged to his creditors. The date of the inventory, 1809, fixes the period of the insolvency; and from that time, in judgment of law, as well as according to the provisions of the Rhode Island statute, the assignee of the insolvent is deemed in possession. These prin-
*178] ciples are also recognised in *United States* v. **Bryan and Woodcock*, 9 Cranch 374; *United States* v. *Fisher*, 2 Ibid. 258.

There was no notice to the assignee under the insolvent law, of the claim of the United States. The want of notice of this claim is fatal. The lien of the United States is a latent invisible claim. The act of taking the assignment is evidence that the claim of priority did not exist; it superseded the right of priority; both cannot stand together. The priority of the United States was also waived, by the payment of the money to the assignee of Crary, under the award of the commissioners of the United States, acting under the Florida treaty. The lien of the United States was at common law, and the act of congress relative to payments made under the Florida treaty, authorized the United States to retain for money due to them, by those whose claims were allowed by the commissioners. They did not retain this money, and thus they relinquish their rights. They had a full knowledge of this claim belonging to their debtor Smith, and that it had passed to his assignee under the insolvent law; and therefore, no allegation of mistake can be made. Jac. & Walk. 262; 1 Gallis. 392.

The release of Peck, the principal, was a release of Smith, as his surety; after that release, the surety could not proceed against him. After the judgment on the bond, the parties to that judgment became co-debtors; and the release of Peck from imprisonment was an extinguishment of the whole debt due upon the judgment. 2 Dane's Abr. 651; 2 Dall. 373; 3 Serg. & Rawle 465–6; 13 Mass. 148; 16 Ibid. 581; 8 Ibid. 40; 6 T. R. 525; 2 Bro. C. C. 164; 2 Ves. jr. 540; 17 Johns. 384; 13 Ibid. 174; 16 Ibid. 77; 10 Ibid. 587, 174, 383; 15 Ibid. 435; 6 Ves. 607; 6 Dow 238.

The delay of the United States to proceed against their principal debtor,

Peck, discharges the surety. The principle of *nullum tempus*, will not protect the claim of the United States. Here, there has been more than delay; acts have been done, which show the purposes of the delay, and that it was the purpose to discharge the surety. The bond was executed in 1802; no suit was instituted until 1811, and this bill was not *filed until 1825. [*179
On principles of peace, acquiescence and security, a release will be presumed. Then, all these combine with *laches* and positive acts; the assignee of Smith has been permitted to procure the payment of the claim under the treaty.

The United States have a clear remedy at law, and cannot, therefore, proceed in a court of chancery. By this proceeding, the defendant is deprived of a trial by jury, and is subjected to heavy expenses. No discovery was required, as the claim of the United States rests upon testimony in their own possession; as all they seek to recover would be obtained, if any claim exists, in an action for money had and received, that form of action should have been resorted to. The provisions of the judiciary act, which require that the jurisdiction of courts of law shall be resorted to, in all cases in which such courts afford a remedy, was not without meaning, and should be applied to this case. In any stage of a cause in which a want of chancery jurisdiction is discovered, the bill will be dismissed.

Berrien, Attorney-General, for the United States.—The claim of the United States does not rest on the assignment of Smith. It is presented under the sanction of the right of priority, which, if it existed, could not be affected by the first proceedings in the case. The fund which the United States ask to have appropriated for their payment, is in the hands of the assignee of the Crarys, for distribution; and Smith, being a creditor of the Crarys, is entitled to a preference, for the extent of payments made by him on custom-house bonds. By the 65th section of the duty act, he is substituted in place of the United States. This preference passed to the United States. Peck and Smith were debtors to the United States in 1805. Judgment was obtained against them in August 1811, and the assignment to the appellant was in September of that year. The right of Smith was thus vested in the appellant, for his creditors; and attached on this fund which he held liable to distribution among the creditors of Smith. The United States, being a priority creditor, claim their preference; the *assignment made by Smith was an act of insolvency, which con- [*180
summated the rights of the United States. *United States* v. *Fisher*, 2 Cranch 358.

There was a debt due from Peck and Smith in 1805. That debt existed, and was acknowledged, when the bond was executed, and the judgment in 1811 did no more than ascertain the amount of the debt. But if the court do not adopt this view of the facts, a debt was fully established in 1811, and the priority of the United States would, from that time, attach upon any fund which was in the hands of the assignee of Smith for distribution, or which might afterwards come into his hands, with notice of the claim of the United States.

The law of the United States, which authorized the secretary of the treasury to retain for the payments to be made under the Florida treaty, did not apply to this case. The provision is made for cases in which the

person to whom the award is made, is a debtor ; and in this case, the award was in favor of the Crarys. Thus, no waiver can be asserted. It was not a case for the action of the officers of the treasury.

The release of Peck was not a discharge of Smith. Peck was only discharged from imprisonment, reserving a right against his property ; for the debt to the United States, his property continued liable. The judgment against him was continued in force ; and the provisions of the special act for his discharge do not vary from those of the general act of 1798, authorizing the secretary of the treasury to discharge in similar cases. 5 East 147 ; 1 Gallis. 32. The proper inquiry is, what was the intention of the legislature? It was a mere release from imprisonment, which was not to affect the rights of the United States, but against the person of their debtor.

This is not a stale demand. There is nothing in the case which shows, that from 1809 to 1825, Smith had any funds out of which payment of the debt could have been made ; unless the secretary of the treasury could have retained, which could not be. A demand is considered stale in equity, where there has been *laches* in enforcing the claim. But no such
*181] *laches* are to be imputed to the government. As to *laches*, he cited 1 Sch. & Lef. 413 ; 2 Meriv. 171. The defendant stands precisely in the same situation as Smith himself, and he could not set up laches.

The case is one peculiarly proper for a court of equity. The appellant is a trustee to distribute funds among creditors ; and the case is not the ordinary one of money had and received. The United States do not claim a distributive share, but their claim is an exclusive right to the fund, as the creditor of Smith, who was the creditor of the Crarys. The case of the *United States* v. *Howland and Allen*, 4 Wheat. 108, is very much in point in this case.

McLean, Justice, delivered the opinion of the court.—This is a suit in chancery, brought to this court, by an appeal from the decree of the circuit court of Rhode Island. The material facts in the case are these :

William Hunter, the defendant in the court below, is the surviving assignee of Archibald and Frederick Crary, who, in June 1809 obtained the benefit of the insolvent law of Rhode Island. One Jacob Smith, as surety on a custom-house bond, had been compelled to pay to the United States, in May 1808, for the Crarys, about $2125. In February 1810, Smith filed his petition for the benefit of the insolvent law, and in August 1811, Hunter and one Littlefield, now deceased, were appointed assignees. On the 3d day of September following, Smith made to them an assignment of his property. Smith and one McGee were sureties for William Peck, as marshal of the Rhode Island district, who became a defaulter to the government, and against whom and his sureties, in August 1811, a judgment was recovered for $13,500. Upon his being afterwards committed to prison, on an *alias* execution, issued in pursuance of this judgment, Smith petitioned the secretary of the treasury for relief ; and stated, that he was reduced to poverty, and had assigned all his property under the insolvent law. His
*182] insolvency, he alleged, had been accelerated, if not produced, by his having paid large sums, *as surety, on certain custom-house bonds,

and particularly the above sum for the Crarys. He was discharged by the secretary, on the 17th day of October 1811, on his making a formal assignment of all his effects to the United States. This assignment purports to convey the same property which he had previously assigned. In 1812, the United States imprisoned Peck, the principal, on execution, and in the month of June, in the same year, he was discharged by act of congress. In July 1824, Hunter, as the assignee of the Crarys, obtained from the United States, under their treaty with Spain, the sum of $8158.81. Out of this sum, Smith was entitled to the amount he paid for the Crarys; and the United States claim the same from Hunter, as assignee, in part satisfaction of their judgment against Smith. Hunter claims this sum in behalf of the creditors of Smith, under his first assignment.

By the original bill, the government rested its claim on the second assignment. This clearly cannot be sustained. Smith, under the insolvent law of Rhode Island, having assigned all his property for the benefit of his creditors, could not, by a subsequent assignment to the United States, affect the first transfer. The government can set up no right, under the second assignment, which might not be claimed by any other creditor. This ground is abandoned by the amended bill, and the claim of the government is placed on its priority, under the act of congress. By this act, a preference is given to a government debt over all others; and if the debtor be insolvent, such debt must first be satisfied. It is true, as the defendant insists, that the original bill still remains in the record, and forms a part of the case. But the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing, they may rely upon the whole case made in the bill, or may abandon some of the special prayers it contains.

The same right of priority, which belongs to the government, attaches to the claim of an individual, who, as surety, has paid money to the government. Under this provision, Smith could claim a preference to other creditors, for the *money he paid as surety for the Crarys; and on his right, the priority of the government is asserted. [*183

The defendant resists this demand, on various grounds. He contends, in the first place, that the doctrine of priority is not applicable in this case. This prerogative of the government can only operate, it is insisted, on a debt due at the time. That it cannot reach a debt which depends upon a future contingency; and such was the claim of the Crarys, under the Spanish treaty. It was not realized until in June 1824, nearly thirteen years after the benefit of the insolvent law had been extended to the claimants. It is also contended, that the first assignment of Smith had relation back, and took effect, from the date of his inventory, which was prior to the judgment obtained against him, by the United States. This being the case, the priority of the government could not attach, it is urged; for it can only act on a debt, and there was no debt, in this case, as against Smith, until judgment was entered.

The assignment under the insolvent law could only take effect from the time it was made. Until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party. It is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If,

before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, the same as though he had not applied for the benefit of the law. And if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution. The property placed upon the inventory of an insolvent, may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor, who obtains a judgment, before the assignment. If this Spanish claim had passed into the hands of the assignee of Smith, and been distributed by him, before the debt of the United States was established, or notice of its existence had been given to him, no controversy could have arisen on the subject. *The
*184] defendant, as assignee, could not have been held responsible, under such circumstances; nor could the creditors who received payment, have been compelled to refund to the government.

If the judgment of the government had not preceded the assignment of Smith, there might have been some ground to question the right of priority which is contended for. But the judgment preceded the assignment, which gave the government an unquestionable right of priority on all the property of Smith. Did not this right extend to the claim on the Crarys? It would seem, that no doubt can exist on this subject. If the right cover any part of the property of the insolvent, it must extend to the whole, until the debt is satisfied. It was proper for Smith to include in his assignment the claim on the Crarys. However remote the probability may have been, at that time, of realizing this demand, still, under the insolvent law, it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the government. If, under such circumstances, the priority of the government does not exist, it cannot be said to exist in any case. It would be difficult to present a stronger case for the operation of this prerogative.

But it is contended by the defendant below, that if the doctrine of preference or priority be applicable to this case, the United States, by various acts, have waived it. The release of Peck from imprisonment by the act of congress, under the circumstances of the case, it is urged, was a release of Smith, the surety. This act was passed the 24th of June 1812, and it provided, that before his discharge, Peck, should assign "all his estate, real and personal, which he may now own or be entitled to, for the use and benefit of the United States." And it also provided, "that any estate, real or personal, which the said William Peck may hereafter acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and discharged." *By the act providing for the relief of persons imprisoned
*185] for debt due to the United States, passed June 6th, 1798, the secretary of the treasury is authorized to discharge, in certain cases, and the individual so discharged, it is declared, "shall not be liable to be imprisoned again for the same debt, but the judgment shall remain good and sufficient in law." As in the act of 1798, there is an express provision that "the judgment shall remain good," which is omitted in the act discharging Peck, a doubt has been raised, whether the judgment against him can be further prosecuted. If, by this act, the judgment be released against Peck, as a matter of course, his surety is discharged. This act specially provides,

"that any estate which Peck may subsequently acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and discharged." From this provision, it clearly appears, that the release from imprisonment was the only object of the statute, and a proper construction of it does not release the judgment. If the property of Peck may be taken, "in the same manner as if he had not been imprisoned," it may be taken under the same judgment.

That the same rules of contract are applicable, where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear. And how can such a release discharge the surety? Does it embarrass his recourse against the principal? In this case, if Smith had paid the debt to the government, he might have resorted to all the remedies against Peck, which the law allows in any case. The recourse of the government against the property of Peck still remains unimpaired; consequently, the judgment remains unsatisfied, and no act has been done to the prejudice of the surety. The cases in 2 Dane's Abr. 155; 3 Serg. & Rawle 465, 466; and 2 Dall. 373, were cited, to show that while a defendant is charged in execution, the debt is considered as satisfied; and that a discharge of one co-debtor is a discharge of all. The imprisonment of a defendant is a means to enforce the payment of the judgment, and is only considered a satisfaction *of it, so far as to suspend all other process. If, by the operation of law, by an escape, or by any other means, without the [*186 assent of the plaintiff, the defendant be released from prison, the judgment still remains in full force against him. The imprisonment of Peck, the principal, was no bar to an execution against the body of his surety. In the case under consideration, Smith had been imprisoned and discharged, before Peck was confined. These proceedings were all regular, however great the hardship may have been to the surety; and did not, in any manner, lessen the responsibility of either principal or surety. The authorities read on the argument, going to show a release of the sureties, where the creditor, without their assent, enlarges the time of payment, &c., are not considered as opposed to the doctrines here laid down.

The act of the government, in releasing both the principal and surety from imprisonment, was designed for the benefit of the unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy. If the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be, that the principal must remain in jail, until the process of the law was exhausted against his surety. This would operate against the liberty of the citizen; and should be avoided, unless required to secure the public interest. A discharge from prison by operation of law, does not prevent the judgment-creditor from prosecuting his judgment against the estate of the defendant. To this rule, a discharge under the special provisions of a bankrupt law, may form an exception. In the cases under consideration, the defendants were discharged under laws which expressly reserved the right to the government to enforce the judgment against the property of the defendants. In 1 Pet. 573, this court decided, on a full consideration of the case, that a discharge of the principal, under an act of congress, did not release the debt against the surety.

By an act of congress of the 24th of May 1824, respecting payments under the Spanish treaty, it is provided, "that in all *cases where
*187] the person or persons in whose name, or for whose benefit and interest, the aforesaid awards shall be made, shall be in debt and in arrears to the United States, the secretary of the treasury shall retain the same out of the amount of the aforesaid awards," &c. Under this provision, it is contended, that it was the duty of the secretary to retain the amount of Smith's demand against the Crarys; and not having done so, the payment must be considered as an abandonment of the claim. That the secretary must have had notice of Smith's claim, is insisted on, because it was stated on his schedule which was assigned to the United States; and also in his petition to the secretary of the treasury, on which he was released from imprisonment. Having a knowledge of this claim of Smith's against the Crarys, it was in the power of the secretary, under the law, to withhold it, and appropriate it in part discharge of the judgment. The priority which first attached to Smith, and through him to the Crarys, would have enabled the government, without the aid of the other provision, to retain the money. But can the payment of it, under such circumstances, operate as a release to Smith?

It might be dangerous, to give the same effect to a voluntary payment by an agent of the government, as if made by an individual in his own right. The concerns of the government are so complicated and extensive, that no head of any branch of it can have the same personal knowledge of the details of business, which may be presumed in private affairs. And if, in the case under consideration, some clerk in the treasury department, or even the secretary, did pay to the assignee of the Crarys the amount claimed by Smith, which might, and perhaps ought to have been, retained, is it an abandonment of the claim? Where an officer of the government is in arrears, his salary is required to be withheld, until the sum in arrears shall be paid. In such a case, the books of the treasury would furnish its officers with notice of the delinquency; and yet, would it be contended, that a payment of the salary, which ought to have been retained, would release the debt? It cannot be admitted, that an omission of duty of this kind, as a payment through mistake, by an officer, shall bar *the claim of the
*188] government. If, in violation of his duty, an officer shall, knowingly, or even corruptly, do an act injurious to the public, can it be considered obligatory? He can only bind the government by acts which come within a just exercise of his official power. The payment to the assignee of the Crarys can in no respect affect the claim now set up against the assignee of Smith.

An objection is urged, on the ground that the United States have failed to prosecute their claim with sufficient diligence, and that it is subject to the imputation of staleness. Until the sum of money in controversy was received by the assignee of Smith, in 1824, the United States could not be charged with a want of diligence in prosecuting their claim against Smith. They had obtained a judgment in 1811, and there was no property within the reach of any process on that judgment, by which it could be satisfied. To subject the above claim to this judgment, the bill in the present case was filed, in 1824. If, therefore, a want of diligence could in any case be

charged against the government, there is no ground to make the charge in this case.

The last objection urged by the defendant is, that there was full and ample relief to be obtained at law; and consequently, chancery cannot take jurisdiction of the case. In his capacity as trustee, the government seeks to make Hunter liable; he bears the same relation to the creditors of Smith. It was proper in him, conceiving as he did, that the fund in his hands should be paid to these creditors, to resist the claim of the government. Until its right of priority, under all the circumstances of the case, was judicially established, he, in the exercise of his discretion, might withhold the payment. The trustee can only be desirous of making the payment, as the law requires. How is this liability to be enforced? What process at law would be adequate to give the relief prayed for in the bill? It is the peculiar province of equity, to compel the execution, of trusts. In this case, it is conceived, the proceeding at law would not be adequate; the fund to be reached was in the hands of a trustee; and it was important that it should not pass from his hands to the creditors of Smith; the amount of the claim against the Crarys might be *disputed; the trustee was entitled to his commissions, and other difficulties were likely to arise, [*189 in the progress of the investigation, which could only be fully adjusted, at the instance of the United States, by a court of chancery. No doubt exists, therefore, that a resort to the equity jurisdiction of the circuit court in this case was proper and necessary. The judgment of the circuit court must be affirmed, but without costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, without costs.

Ex parte Nathaniel Crane and Samuel Kelly: In the matter of James Jackson, *ex dem.* John Jacob Astor and others, *v.* Nathaniel Crane; and James Jackson, *ex dem.* John Jacob Astor and others, *v.* Samuel Kelly. [*190

Mandamus.—Bills of exception.

The supreme court has power to issue a *mandamus* directed to a circuit court of the United States, commanding the court to sign a bill of exceptions, in a case tried before such court.[1]

In England, the writ of *mandamus* is defined to be a command issuing, in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or, at least, supposes, to be consonant to right and justice; it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, wherever the same is delayed. It is apparent, that this definition, and this description of the purposes to which it is applicable, by the court of king's beach, as supervising the conduct of inferior tribunals, extends to the case of a refusal by an inferior court to sign a bill of excep-

[1] See notes to Ex parte Bradstreet, 4 Pet. 102.

tions, where it is an act which appertains to their office and duty, and which the court of king's bench supposes "to be consonant to right and justice."

The judiciary act, § 13, enacts, that the supreme court shall have no power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices, under the authority of the United States. A *mandamus* to an officer is said to be the exercise of original jurisdiction, but a *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction; a bill of exceptions is a mode of placing the law of the case on a record, which is to be brought before this court by a writ of error.

That a *mandamus* to sign a bill of exceptions is "warranted by the principles and usages of law," is, we think, satisfactorily proved, by the fact that it is given in England by statute; for the writ given by the statute of Westm. II., is so, in fact, and is so termed in the books. The judiciary act speaks of usages of law, generally, not of common law; in England, it is awarded by the chancellor, but in the United States, it is conferred expressly on this court; which exercises both common law and chancery powers, is invested with appellate power, and exercises extensive control over all the courts of the United States. We cannot perceive a reason why the single case of the refusal of an inferior court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of *mandamus* to inferior courts, which is conferred by statute.

The judiciary act confers expressly the power of general superintendence of inferior courts on this court; no other tribunal exists, by which it can be exercised.

Exceptions taken on the trial of a cause before a jury, for the purpose of submitting to the revision of this court questions of law decided by the circuit court, *during the trial cannot be taken in such a form as to bring the whole charge of the judge before this court—a charge in which he not only states the results of the law from the facts, but sums up all the evidence.

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The decision of this court in the case of Carver *v.* Jackson, *ex dem.* Astor, 4 Pet. 80, re-examined and confirmed.

Hoffman moved the court for a writ of *mandamus*, to be directed to the Circuit Court of the United States for the southern district of New York, in the second circuit, commanding that court to review its settlement of certain bills of exceptions, which were tendered on the part of the defendants, on the trials of those cases in the circuit court, and to correct, settle and allow, and insert in the said bills, the charges to the jury in each case, or the substance thereof; and also for such other and further order and relief in the premises, as the court shall deem just and proper.

This motion was made, after notice to the plaintiffs in the ejectments, and was founded on an affidavit made by Greene C. Bronson, Esq., the attorney-general of New York, who was of counsel for the defendants in the circuit court, a copy of which affidavit had been served upon the counsel for the plaintiffs in the suits. The facts set forth in the affidavit and the papers referred to, are fully stated in the opinion of the court.

The case was submitted to the court, without argument, by *Hoffman* and *Webster*, for the relators; and by *Ogden* and *Wirt*, for the plaintiffs in the circuit court.

Marshall, Ch. J., delivered the opinion of the court.—These suits were decided in the court of the United States for the second circuit and southern district of New York, in May term 1830. At the trial, the court gave opinions on several points of law, which were noted at the time, and a right to except to them reserved. According to the practice in New York, bills of exception were prepared by counsel in vacation, and tendered to the circuit judge for his signature. The bills comprehend not only the points of law

made at the trial, but the entire charge to the jury. The judge corrected the bills by striking out his charge to the jury. This motion is *made for a writ of *mandamus* "to be directed to the circuit court of the [*192 United States for the southern district of New York, in the second circuit, commanding the said circuit court to review its settlement of the proposed bills of exceptions," "and to correct, settle, allow and insert, in the said bills, the charge delivered to the said jury in each case, or the substance thereof."

A doubt has been suggested, respecting the power of the court to issue this writ. The question was not discussed at the bar, but has been considered by the judges. It is proper that it should be settled, and the opinion of the court announced. We have determined, that the power exists. Without going extensively into this subject, we think it proper to state, briefly, the foundation of our opinion. In England, the writ of *mandamus* is defined to be a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office or duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. Blackstone adds, "that it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice." 3 Bl. Com. 110.[1]

It is, we think, apparent, that this definition, and this description of the purposes to which it is applicable by the court of king's bench, as supervising the conduct of all inferior tribunals, extends to the case of a refusal by an inferior court to sign a bill of exceptions, when it is an act which "appertains to their office and duty," and which the court of king's bench supposes "to be consonant to right and justice." Yet we do not find a case in which the writ has issued from that *court. It has rarely issued from any [*193 court; but there are instances of its being sued out of the court of chancery, and its form is given in the register. It is a mandatory writ, commanding the judge to seal it, if the fact alleged be truly stated: "*si ita est.*"

There is some difficulty in accounting for the fact, that no *mandamus* has ever issued from the court of king's bench, directing the justice of an inferior court to sign a bill of exceptions. As the court of chancery was the great *officina brevium* of the kingdom, and the language of the statute of Westm. II. was understood as requiring the king's writ to the justice, the application to that court for the writ might be supposed proper. In 1 Sch. & Lef. 75, the chancellor superseded a writ which had been issued by the cursitor, on application; declaring that it could be granted only by order of the court. He appears, however, to have entertained no doubt of his power to award the writ, on motion. Although the course seems to have been to

[1] See Ex parte United States, 16 Wall. 699; Ex parte Newman, 14 Id. 152.

apply to the chancellor, it has never been determined that a *mandamus* to sign a bill of exceptions may not be granted by the court of king's bench.

It is said by counsel, in argument, in *Bridgman* v. *Holt*, Show. P. C. 122, that by the statute of Westm. II., c. 31, in case the judge refuses, then a writ to command him, which is to issue out of chancery, *quod apponat sigillum suum.* The party grieved by denial, may have a writ upon the statute, commanding the same to be done, &c. "That the law is thus, seems plain, though no precedent can be shown for such a writ : it is only for this reason, because no judge did ever refuse to seal a bill of exceptions ; and none was ever refused, because none was ever tendered like this, so artificial and groundless."

The judiciary act, § 13, enacts, that the supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction ; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States. A *mandamus* to an officer is held to be the exercise of original jurisdiction ; but a *mandamus* to an inferior court of the United States, is in the nature of appellate jurisdiction. *A bill of exceptions is a mode of placing the law of the case on a record, which is to be brought before this court by a writ of error.

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That a *mandamus* to sign a bill of exceptions is "warranted by the principles and usages of law," is, we think, satisfactorily proved by the fact, that it is given in England by statute ; for the writ given by the statute of Westm. II., is so, in fact, and is so termed in the books. The judiciary act speaks of usages of law generally, not merely of common law. In England, it is awarded by the chancellor ; but in the United States, it is conferred expressly on this court, which exercises both common law and chancery powers ; is invested with appellate power, and exercises extensive control over all the courts of the United States. We cannot perceive a reason, why the single case of a refusal by an inferior court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of *mandamus* to inferior courts, which is conferred by statute.

In New York, where a statute exists, similar to that of Westm. II., an application was made to the supreme court for a *mandamus* to an inferior court to amend a bill of exceptions, according to the truth of the case. The court treated the special writ given by the statute as a *mandamus*, and declared, that it was so considered in England ; and added, that "though no instance appears of such a writ issuing out of the king's bench, where an inferior court refused to seal a bill of exceptions, there is no case denying to that court the power to award the writ." "It ought to be used, where the law has established no specific remedy, and where in justice and good government there ought to be one." "There is no reason why the awarding of this particular writ does not fall within the jurisdiction of this court, or why it should be exclusively confined to the court of chancery." In the opinion, then, of the very respectable court, which decided the motion made for a *mandamus*, in *Sikes* v. *Ransom*, 6 Johns. 279, the supreme court of New York possesses the power to issue this writ, in virtue of its general superintendence of inferior tribunals. The judiciary act confers the power

expressly on this court. No other tribunal exists by which it can be exercised.

*We proceed to the inquiry, whether a proper case has been made out, on which the writ ought to be issued? The affidavit of Mr. [*195 Bronson, the attorney for the defendants in the circuit court, is the evidence on which the motion is to be sustained. He says, "that the suits were tried, on a full understanding, that each party was to be considered as excepting to any decision or opinion of the said court which he might desire to review on a writ of error, whether such exception was formally announced at the trial or not; and it was also fully understood, in the event of verdicts for the plaintiff, that the deponent would, after the trials, prepare bills of exception, and carry the cases by writs of error to the supreme court of the United States." The charge of the judge was formally excepted to, in one of the cases, before the jury left the bar. In the case of Nathaniel Crane, the counsel for each party submitted certain written points or questions of law for the decision of the court, which were decided; after which, the presiding judge delivered a charge to the jury, in which he went at large into the law and facts of the case. In the case of Samuel Kelly, the counsel for the defendant submitted certain legal questions, growing out of the facts of the case, and requested the court to decide them, before the cause should be argued to the jury; to the end, that he might know what questions would be left to the jury. This was not done, and the cause was argued; after which, the court delivered its opinion on the said questions of law, and then the presiding judge delivered a charge on the law and facts of the case. That, in each case, the decision of the proposed points of law consisted, as to most of the questions, in giving an affirmative or negative answer to the propositions; but in the charge subsequently delivered in each case, the judge went at large into the law of the cases, and commented upon it to an extent and in a manner much more likely to impress the minds of the jury, than in the brief answers previously given. That in the judgment of the deponent, the remarks of the judge in his charge, did, in effect, present the law of the case to the jury, differently from what it had been given to them in answer to some of the points submitted; and in such a manner that a full and fair review of the judgments of the circuit court cannot be had, without putting the charge in each case upon the *record. He, there- [*196 fore, in each case, inserted the substance of the charge in the bill of exceptions. That in the charge, the remarks of the judge upon the law and facts of each case were so blended, that the deponent did not, and does not, believe it practicable, to separate the remarks upon the law from those upon the facts of the case, in such a manner as to give the defendants a full and fair opportunity to review the judgments of the circuit court.

The bills of exceptions, which had been offered, in December, to the presiding judge for his signature, were returned; the whole of the charge in each case being stricken out. The subject was again brought before the judge, who returned the following answer to the application.

"Dear Sir:—I have read the letter you put into my hands this morning, which you had received from Mr. Bronson, in relation to the bills of exceptions in the Astor causes. The charge, as contained in the bills of exception, was stricken out, in conformity to what I understand to be the rule laid down in the supreme court in the case of *Carver*. It purports to

set out at length the whole charge (how far this is correctly done, I do not stop to inquire), which I understand the supreme court to say is a practice they decidedly disapprove. There can be no doubt, that a party is entitled to his exception, if he sees fit to take one, upon every question of law stated to the jury. I have not the bill of exceptions now before me. I am not aware of any question of law arising upon the charge, which is not embraced within some one of the points specifically submitted to the court, and upon which the court gave an opinion; all which are contained in the bill of exceptions. If this is not the case, and it is pointed out, it ought to be added to the bill of exceptions, and I will again look at it. But the exception must be confined to some matter of law."

The counsel for the defendants still insisted that the whole scope and bearing of the charge, rather than any particular expression in it, tended to lead the jury to a different result from what they would have been likely to attain from the law, as laid down in answer to the points made at the bar. He designed to complain, that, "though it may not in terms have departed from the instructions given in answer to those points, yet it did so in effect."

*197] *The judge still refusing to sign the bill of exceptions containing the whole charge, this motion is made.

The affidavit of Mr. Lord, counsel for the plaintiff in the circuit court, is also exhibited. He states the proceedings at the trial. The counsel for the defendants requested the opinion of the court on various propositions of law, "and the court did, then and there, in presence of the jury and of counsel, pronounce distinctly its opinion and decision upon every such proposition;" after which the judge proceeded to charge the jury on the evidence. After the conclusion of his remarks, in the case against Crane, some discussion arose between the defendants' counsel and the court, in presence of the jury, in which some passages of the charge appearing not to have been rightly understood by the defendants' counsel, or not to have been clearly stated, the court again stated to the jury its charge on the points thus stated anew. The bills of exception, prepared by the counsel for the defendants, were submitted to the deponent, as counsel for the plaintiff, who objected to the insertion of the charge, and stated his reasons for the objection. The counsel on both sides attended the judge, who said, "that he considered that which in the bills of exceptions is called the charge, and which purports to contain all the remarks of the judge on the evidence, improper to be inserted in the bills of exception, and not permitted by law or the practice of the court; that it was incumbent on the party excepting, to specify the matters of law complained of, and that if anything could be specified, which was not expressed in the decisions aforesaid, of the points submitted (which decisions are stated in the bills of exception), he would allow the same to be exerted in the bills of exception; but if that were not done, he should allow the amendment of the plaintiff, and the statement called the charge, to be stricken out."

The judge then was willing to allow exceptions to his opinions on the questions of law which were made in the cause. He was also willing to sign exceptions to any matter of law advanced by him to the jury, which was not contained in the points reserved at the trial. The counsel for the

*198] defendants insisted on spreading the whole charge upon the record.

*It appears to be customary in New York, as in several other

states, for the judge, after the arguments are closed, to sum up the evidence at length to the jury, and to state the law applicable to facts; leaving it to the jury, however, to decide what facts that evidence proved. Such a charge must necessarily consist chiefly of a compendium of the testimony. To spread the charge upon the record, is to bring before the appellate court the view taken by the judge of the testimony given to the jury. If any law was mixed with this summary of evidence, the right of either party to except is admitted. The question is, whether an exception is allowable, which brings before the superior court so much of the charge as relates to evidence?

In *Carver's Case*, 4 Pet. 80, this court said, "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. They neither are, nor are they understood to be, binding upon them, as the true and conclusive exposition of the evidence. If, indeed, in the summing up, the court should mistake the law, that justly furnishes 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 examining the general bearing of such charges." After such an expression of the opinion of this court, it could not be expected, that a judge, on his circuit, would so *utterly disregard it, as to allow an exception to his whole charge. If, however, the opinion be unsupported by law, [*199 it ought to be reconsidered and reversed.

At common law, a writ of error lay for error in law, apparent on the record, but not for an error in law, not apparent on the record. If a party alleged any matter of law at the trial, and was overruled by the judge, he was without redress, the error not appearing on the record. 2 Inst. 42. To remedy this evil, the statute was passed, which gives the bill of exceptions. It is to correct an error in law. Blackstone, speaking of this subject, says, "and if either in his directions or decisions, he (the judge) mistakes the law, by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err." "This bill of exceptions is in the nature of an appeal." 2 Bl. Com. 372. It is also stated in the books, that a bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law, arising upon a fact not denied, in which either party is overruled by the court. A bill of exceptions is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted, after the bill is sealed. The judges in

Bridgman v. *Holt*, speaking of evidence to be left to a jury, say, but no bill of exceptions will lie, in such a case, by the statute, when the evidence is admitted and left to the jury. Show. P. C. 120 ; Bull. N. P. 316 ; Bac. Abr., tit. Bill of Exceptions. If an exception may be taken in such form as to bring the whole charge of the judge before the court, a charge in which he not only states the results of law from the facts, but sums up all the evidence, the exception will not be on a single point ; it will not bring up some matter of law arising upon a fact not denied ; it will draw the whole matter into examination again.

The affidavit in support of the motion gives us the strongest reason for the course the mover has pursued, that the remarks of the judge upon the law and facts were so blended, that it was believed to be impracticable to separate the remarks upon the law from those upon the facts of the case, in such a *manner as to give the defendants a full and fair opportunity to review the judgment of the circuit court. The difficulty, then, which appeared to the counsel to be insurmountable, must be overcome by this court. We must perform the impracticable task of separating the remarks on the law from those on the facts of the case, and thus draw the whole matter into examination again. The inconvenience of this practice has been seriously felt and has been seriously disapproved. We think it irregular and improper. The motion is denied.

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Baldwin, Justice. (*Dissenting.*)—The common-law definition of a *mandamus*, which is adopted in this court, is, " a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominion, requiring them to do some particular thing therein specified, which appertains to their office or duty, and which the court of king's bench has previously determined, or, at least, supposes, to be consonant to right and justice." *Marbury* v. *Madison*, 1 Cranch 168.

As the first question which this motion presents is one of the jurisdiction and power of this court to grant the writ prayed for in this case, it will be following the rule established, to consider it first (3 Cranch 172 ; 5 Ibid. 221 ; 10 Wheat. 20 ; 1 Cranch 91 ; 9 Wheat. 816), a rule which never ought to be disregarded, where a question of power arises. Though the question of jurisdiction may not be raised by counsel, it can never escape the attention of the court ; for it is one which goes to the foundation of their authority to take judicial cognisance of the case ; if they cannot, in the appropriate language of the law, hear and determine it, the cause is *coram non judice*, and every act done is a nullity. If I take this case into judicial consideration, this is an assumption of jurisdiction, that necessarily results from a decision whether this is or is not a proper case for a *mandamus*, for the court to hear and determine the motion on its merits. Their refusal to grant the motion, is not on the ground that they have not power to consider it, but that, on consideration, they reject it. *This is as much an exercise of jurisdiction, as to issue the writ ; as, by examining the grounds of the motion, the court assume the power to decide on it, as the justice of the question may seem to require. In my opinion, no new question of jurisdiction ought to be acted on, without an inquiry into the power of this court to grant the motion, or to issue the process. The silent

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uncontested exercise of jurisdiction may induce the profession to claim it as a right founded on precedent, though the judgment of the court may never have been given on the question of power, or their intention have been drawn to it by the counsel. If, then, process should issue improvidently, and the court should find itself called upon, for the first time, to examine its jurisdiction and power to issue it, when obedience should be refused by the court to which it was directed, and the question, came before us on this return, "the court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that the writ of *mandamus* in this case was improvidently issued, under the authority of the 25th section of the judiciary act of 1789; that the proceedings thereon in the supreme court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court;" this court would find itself in a very unenviable predicament, if, on a careful revision of the constitution and laws, they should be compelled to sanction the open contempt of their process or decree, by an inferior court, to whom an order had been sent from this high tribunal, which it found itself forced to declare null and void. It is hard to say, which would be most fatal to its influence and authority, the example, or the consequences.

The judicial history of this court presents one instance of such a return, on its records, and another, in which the military force of a state was in actual array, in obedience to a law for opposing the execution of a mandate; and a very recent occurence might have furnished a third incident, had not a writ of error abated by the death of the party suing it out. The proceedings which have attended the assertion of the unquestionable jurisdiction of the court over cases which, after having been discussed and considered in all their *bearings, have been solemnly decided, afford no uncertain [*202
indication of the results to be expected from the exercise of their power, without discussion or inquiry into its existence, and over subjects on which it may, on examination, be found incapable of acting.

When questions of jurisdiction arise, they must be settled by a reference to the constitution and acts of congress. All cases embraced within the judicial power of the government, are capable of being acted upon by the courts of the Union. Those on which the original jurisdiction of this court can be exercised are defined, and cannot be enlarged. 6 Wheat. 395, 396, 399. It has no inherent authority to assume it over any others, and congress are incapable of conferring it by law. 1 Cranch 173. Where the constitution has declared the jurisdiction shall be original, congress cannot give it in its appellate form, and *vice versâ*. *Marbury* v. *Madison*, 1 Cranch 174; 6 Wheat. 399; 9 Ibid. 820, 821. Though the courts of the United States are capable of exercising the whole judicial power, as conferred by the constitution; and though congress are bound to provide by law for its exercise, in all cases to which that judicial power extends; yet it has not been done, and much of it remains dormant for the want of legislation to enable the courts to exercise it, it having been repeatedly and uniformly decided by this court, that legislative provisions are indispensable to give effect to a power, to bring into action the constitutional jurisdiction of the supreme and inferior courts. 5 Cranch 500; 1 Wheat. 337; 6 Ibid. 375, 604; 9 Ibid. 819–21; 12 Ibid. 117–18.

These principles remain unquestioned. They have long been settled, as the judicial exposition of the constitution, on solemn argument and the gravest consideration; and they are binding on all courts and judges. I shall ever be found among the last to oppose my opinion, in opposition to the results of the deliberate judgment of the highest judicial tribunal, when thus formed. They bind my faith, even though the reasons assigned might not carry conviction to my understanding. We must respect the solemn decisions of our predecessors and associates, as we may wish that those who succeed us should respect ours; or the supreme law of the land, so far as
*203] depends *on judicial interpretation, will change with the change of judges. There may be exceptions to this rule. When they do occur, my hope is, that my reasons for a departure will be found in the great principles of the government, which meet with general assent in their adoption, though the most able and upright may differ in their application. But in any cases which have arisen, or may arise, in which the jurisdiction and power of the court over the subject-matter of the parties is not questioned by counsel and deliberately considered by the judges, or should be unnoticed in the opinion of the court, I cannot acknowledge it as an authority, affording a rule for my decision, or a guide to my judgment. Such a decision ought neither to control my reason, or settled conviction of pre-existing rules and principles of law.

These remarks are deemed proper, as there are some cases in which writs of *mandamus* have been issued, under circumstances such as have been refered to, or refused on the merits; but "the question of jurisdiction was not moved, and still remains open," according to the rule laid down by this court in *Durousseau* v. *United States*, 6 Cranch 307, on a question whether a writ of error could issue from the supreme court to the district court of Orleans: and by the Chief Justice, in alluding to the case of the *United States* v. *Simms*, 1 Cranch 252, "no question was made in that case as to the jurisdiction; it passed *sub silentio*, and the court does not consider itself as bound by that case." 6 Cranch 172.

These are the principles on which I shall examine the question of jurisdiction. The first inquiry then will be, has this court, by law, the power to issue a *mandamus* to a circuit court to sign a bill of exceptions, under the 13th and 14th sections of the judiciary act, which have been relied on as authorizing it? So far as this act gives the power to issue a *mandamus* to executive officers, they have solemnly declared the law to be unconstitutional and void, and that the power does not exist. It being considered by the court to be an exercise of original jurisdiction, it remains to inquire, whether it can be issued to any courts appointed under the authority of the United States; and if so, in what cases?

This power is defined, in *Marbury* v. *Madison*, 1 Cranch 175, in these
*204] words: "to enable this court, then, to issue a **mandamus*, it must be shown to be an exercise of the appellate jurisdiction, or to be necessary to the exercise of appellate jurisdiction. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." In the *United States* v. *Schooner Peggy*, 1 Cranch 110, we are furnished with this as the judicial definition: "it is, in the general, true, that the province of an appellate court is only to inquire whether a judgment when rendered is erroneous

or not. That case furnished an exception in these words: "but if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation be denied." In *McClung* v. *Silliman*, they lay down the same rule: "the question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed." 6 Wheat. 603. Appellate jurisdiction being thus defined, its source can only be found in the constitution which confers it, both as to law and fact, with such exceptions and under such regulations as the congress shall make (1 U. S. Stat. 18), and the judiciary act which makes these exceptions and regulations. The 13th section provides, that the supreme court shall have appellate jurisdiction from the circuit courts, and the courts of the several states in the cases hereafter specially provided for. These are defined in the 22d section, as to the circuit courts, and in the 25th section, as to the state courts. (Ibid. 84, 85.)

This court, from its first organization until this time, have held that this enumeration of the cases in which it had appellate jurisdiction, was an exclusion of all others. 1 Cranch 174–6; 3 Ibid. 172; *United States* v. *Moore*, 6 Ibid. 313–14, 318; 7 Ibid. 32, 44, 287, 108, 110; 6 Wheat. 603; 9 Ibid. 820–21, 19; 12 Ibid. 131–33, 203. The general principle the court have acted on is this: "that they imply a legislative exception from its appellate constitutional power, in the legislative affirmative description of these powers." 6 Cranch 314. But if the appellate jurisdiction of this court is described in general terms, so as to comprehend the case, and there is no exception or regulation which would exclude it from its general provisions *(as in *Wilson* v. *Mason*, 1 Cranch 91, which was a writ of error to the district court of Kentucky, on cross-caveats, for the same tract of land), or if it was the obvious intention of the legislature to give the power, and congress have not excepted it, as on the question which arose in the case of *Durousseau* (6 Cranch 312, 318), whether this court could issue a writ of error to the district court of Orleans, they declared it "to be the intent of the legislature to place those courts precisely on the footing of the court of Kentucky in every respect, and to subject their judgments in the same manner to the revision of the supreme court," and therefore, gave the law of 1804 (page 809) a liberal construction. S. P. *Cohens* v. *Virginia*, 6 Wheat. 400. [*205

But where the law of 1803 authorized a writ of error from the circuit to the district court, and omitted to provide one from this court to the circuit court, it was held not to be within its appellate jurisdiction (*United States* v. *Goodwin*, 7 Cranch 108–10), though the law giving this jurisdiction to the supreme court authorized appeals to the supreme court from the circuit court, from all final decrees and judgments rendered, or to be rendered, in any circuit court, or any district court having circuit court jurisdiction, in any cases of equity, or admiralty or maritime jurisdiction, prize or no prize, where the sum in controversy exeeds $2000 (2 U. S. Stat. 244); and the 22d section of the judiciary act authorized it on judgments of the circuit in civil actions, in cases removed there by appeal from the district courts. This too was an action of debt, and the sum in controversy $15,000; but it being on a writ of error from the circuit court, and not an appeal, in the words of the 22d section, this court gave it its

liberal construction, which had been settled in the case of *Wiscart* v. *D'Auchy*, cited by Judge WASHINGTON in delivering the opinion of this court in *Goodwin's Case*. "An appeal is a civil-law process, and removes the cause entirely, both as to law and fact, for a review and new trial; a writ of error is a common-law process, and removes nothing for a re-examination but the law." This statute observes this distinction. 7 Cranch 110–11; 3 Dall. 324.

*206] These seem to me to be the only two cases in which the *appellate jurisdiction of the supreme court can be exercised—appeals and writs of error. This corresponds with the definition given by the court itself, as as to its own powers, and the strict construction which they have (with the two excepted cases) given to the 22d and 25th sections, which are in their terms confined to final judgments and decrees of circuit and state courts, and these are the only cases, where this court have ever exercised appellate jurisdiction. They have uniformly refused, where the judgment or decree was not final (3 Wheat. 434, 601; 6 Ibid. 603; 12 Ibid. 135), and it cannot well be contended, that a refusal of a circuit court to sign a bill of exceptions, is a final judgment or decree, or that it partakes in any degree of the character of either. The jurisdiction of circuit courts over causes removed from state courts, is considered as appellate. But the time, the process, and the manner, must be subject to the absolute legislative control of congress. 12 Wheat. 349. The same may be said of the jurisdiction of this court over causes sent from the circuit court, on a certificate of division; but this is by a special provision of the law of 1802 (2 U. S. Stat. 139), which has been construed with the same strictness as the act of 1789. 6 Wheat. 547; 10 Ibid. 20; 12 Ibid. 132; 6 Ibid. 363, 368.

The writ of *mandamus* contains no order to remove a cause or any proceedings therein to the court issuing it, nor has it that effect. The cause remains in the court below, whether the writ be obeyed or not; the sole object being to compel them to act on the matter themselves, not to remove it for revision. That can only be done by writ of error or appeal. These considerations make it evident, that the issuing a *mandamus* is not only not an exercise of appellate jurisdiction, but wholly different in its nature, object and effect. It was so considered in this court, in the case of *McIntire* v. *Wood*, 7 Cranch 499, 500, in which it was decided, "that the power of the circuit court to issue the writ of *mandamus* is confined exclusively to those cases, in which it may be necessary to the exercise of their jurisdiction;" and that cannot be the exercise of appellate jurisdiction, which, in this case, and in *Marbury* v. *Madison*, the court consider as a case wholly distinct.

*207] A *mandamus* being a writ to *compel the performance of a ministerial act by a judicial officer, is not, and cannot be a subject-matter for the cognisance of an appellate court, which acts only on the judicial acts, the judgments and the decrees of inferior courts. In the *United States* v. *Lawrence*, 3 Dall. 42, 45, 43, it was unanimously decided, that this court could not issue a *mandamus* to a district judge, acting in a judicial capacity; that they had no power to compel a judge to decide according to any judgment but his own. So, in 1 Cranch 171, where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to control in any respect his conduct would be rejected, without hesitation. In *McCluny* v. *Silliman* (2 Wheat. 369), it was determined, that this court

had not jurisdiction to issue this writ to the register of a land-office, where it had been refused by the highest court of the state in which it was located; and in the same case, in 6 Wheat. 598, it was distinctly decided, that the power existed neither in the circuit nor supreme court; and all the principles herein stated were re-affirmed and finally settled. If judicial authority is to be respected, it is useless to pursue this branch of the inquiry any further.

I think, then, that the issuing of a *mandamus* by this, or a circuit court, is not an exercise of appellate jurisdiction. There seems to be no judicial opinion in favor of the affirmative of the proposition, and the cases referred to have been decided on the true construction of the 13th section of the judiciary act, which declares, "that the supreme court shall have appellate jurisdiction from the circuit courts of the several states, in cases specially hereinafter provided for." This is a distinct clause, and does not include the power to issue a *mandamus*, as an act of appellate jurisdiction.

The next clause giving this power is, "and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." This is an express declaration of congress, that the power of this court to issue a *mandamus* is not conferred as appellate jurisdiction, in the *cases specially provided for in the subsequent part of the law, but only in cases warranted [*208 by legal principles and usages, not referring to the constitution and laws of congress, but, as will appear hereafter, to the principles and usages of courts of common law. For it cannot be the sound construction of this section, that the power to issue a *mandamus*, in a case not mentioned in the law, can be raised by implication, in a case not within the express power given in a subsequent clause of the same section.

The issuing this writ not then being an act of appellate jurisdiction, I now come to the examination of the second branch of the proposition laid down by the court in *Marbury* v. *Madison*. Is the issuing of this writ within the 14th section of the judiciary act, which provides, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law?" The words and evident meaning of this law carry its construction on its face. It enumerates two writs, but does not mention a *mandamus*. The reason is obvious; that had been provided for in the preceding section: congress could not have foreseen, in 1789, that any part of their legislation on the subject of *mandamus* would have been declared unconstitutional and void in 1803, and the decision in *Marbury* v. *Madison* can have no bearing on the 14th section. It must be construed as if the powers conferred in the preceding section had been constitutional, and in full exercise by this court, to the extent named in the law: that is, to every court appointed, and to all persons holding office, under the authority of the United States, in all cases warranted by the usages and principles of law. This is certainly an express and plenary power, ample to embrace a case where the power was necessary to exercise the jurisdiction of this court. It took away the necessity of a *mandamus*, under the power given in the 14th section, and left it without

any application to such a case as the present, if the *mandamus* was warranted by the principles and usages of law; and if it was not so warranted, then it is excluded by this section. *Besides, the 13th section gives the power expressly to issue this writ by name; the 14th gives it only by implication. I do not feel at liberty to reject a power expressly delegated, and seek for one by mere implication and construction, taken from a subsequent part of the same law, without a violation of the well-settled principles of construing statutes, and the very words of this. The authority to issue any other writs than *scire facias* and *habeas corpus* is confined to those "not specially provided for by statute;" a *mandamus* was provided for by the preceding section of the same statute, and therefore, was not within this authority. The same rule of construction which this court has applied to the 13th, must be carried to the 14th section; and the grant of an affirmative power, in a specified case or class of cases, excludes all others, according to the cases before cited.

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Construing these two sections, then, as if the power conferred by both were valid, it is apparent, that the 14th section could not have been intended to embrace a *mandamus* to a court of the United States: the very case provided for by that part of the 13th section, which has never been declared unconstitutional. It thus appears clearly to my mind, that the decisions of this court, and the act of 1789, negative both parts of the proposition, which is laid down in 1 Cranch 175, as necessary to make out a power in this court to issue a *mandamus* to a court of the United States. But if the affirmative of this proposition is admitted, the law requires something more; the power does not arise, unless in cases warranted by the principles and usages of law. Is this such a case?

This court has repeatedly declared their sense of the meaning of these terms in acts of congress, organizing and conferring powers upon the federal courts. They do not apply to the usages, principles and practice of the state courts, but to those of common law, equity and admiralty jurisdiction of England. There was an obvious reason for this: most of the states had a local common law. The English common law was a system which was intended to be applied to the exercise of the judicial power of the courts of the Union, who were vested with an appellate jurisdiction over the highest courts of every state, and the necessity is obvious, of proceeding *according to uniform principles and usages well known and defined on the subject of its powers and jurisdiction. *Bodley* v. *Taylor*, 5 Cranch 222; *Robinson* v. *Campbell*, 3 Wheat. 222; *Ex parte Kearney*, 7 Ibid. 45; *Fullerton* v. *Bank of the United States*, 1 Pet. 613; *Bank of the United States* v. *Halstead*, 10 Wheat. 56.

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The principles and usages of law, which warrant the issuing of this writ, are clearly laid down in 1 Cranch 168–9: "whenever there is a right to execute an office, perform a service, or exercise a franchise, more especially, if it be a matter of public concern, or attended with profit, and a person is kept out of possession of such right, and has no other specific legal remedy, the court ought to assist by *mandamus*, upon reasons of public policy, to preserve peace, order and good government; this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." These are the words of the court of king's bench adopted by this. They further

observe: "still to render the *mandamus* a proper remedy, the officer to whom it is to be directed must be one to whom such writ may be directed; and the person applying for it must be without another specific or legal remedy; both must concur." 1 Cranch 169.

It is a prerogative writ (Com. Dig., tit. Mandamus, A), issuing from the court of king's bench, by virtue of its general and supervising powers (3 Burr. 1265, 1267), on motion, and for cause shown. This is a court of special jurisdiction, limited in the exercise of its powers to specified cases; it has no prerogative powers, and can issue no prerogative writs; it possesses no general supervisory powers over inferior tribunals; and can in no case grant a *mandamus*, on its inherent authority. 6 Wheat. 600. Its implied powers are to fine for a contempt, imprison for contumacy, enforce the observance of order. 7 Cranch 34. It may regulate process and practice, but under an authority given by law. 10 Wheat. 22, 55, 64. This, then, is not a court which, by the principles and usages of the common law, can issue a *mandamus;* not having a general superintending jurisdiction like the king's bench; but having no power to do it, unless by express and delegated authority. In New York, the supreme court has claimed this *power, on a *mandamus* to an inferior court to sign a bill of exceptions; but the reason assigned is, "we have the general superintendence of all inferior courts, and are bound to enforce obedience to the statutes, and oblige subordinate courts and magistrates to do those legal acts which it is their duty to do. The court admits, however, that so late as 1810, the application is entirely new; that no instance appears of such a writ issuing out of the king's bench, when an inferior court refused to seal a bill of exceptions; and if complaint should be made against this court or one of its judges, for refusing to seal a bill of exceptions, then the writ must, *ex necessitate*, come from chancery, if anywhere; but in no other case can it be indispensable. *Sikes* v. *Ransom*, 6 Johns. 279–80. The writ founded on and reciting the statute of Westm. II. (13 Edw. I., c. 31), is to be found in Ruffhead 99, 100, commanding the judges to put their seals to the exceptions, as is prescribed by the statute aforesaid, and that on *periculo quod incumbit nullatores*. The writ is set forth at large in the Registrum Brevium 182, title *Brevia de Statuto*, and was devised to enforce obedience to the statute made out by the court of chancery: it is issued on special application, founded on the right of the crown to compel its officers to pay obedience to the statutes. It is a sort of prerogative writ—a mandatory writ. The judges to whom it is directed are supposed by the writ to have done wrong. They may obey the writ, by sealing the exceptions; or they may make a special return, which must be made to the king in chancery, and can be made nowhere else; and in issuing the writ, the court of chancery acts as much judicially as the court of king's bench does, in granting a *mandamus*. If the judges make a false return, an action may be brought against them. 1 Sch. & Lef. 78–9. Lord Redesdale quashed the writ which had been issued to the court of king's bench, by the decision of the court. 1 Sch. & Lef. 75, 79. [*211

In the *Rioters' Case* (1 Vern. 175), a motion was made, to grant a mandatory writ to the chief justice of the king's bench, and they produced a precedent where, in like cases, such a writ had issued out of chancery to the judge of the sheriff's court of London; "but the lord keeper denied

the motion, for that the precedent they produced was to an inferior court, *212] and he *could not presume but the chief justice of England would do what should be just in the case; for possibly, you may tender a bill of exceptions which has false allegations and the like, and then he is not bound to sign it, for that might be to draw him into a snare; and said, if they had wrong done them, they might right themselves by an action on the case."

In *Bridgman* v. *Holt*, Show. P. C. 111, a writ of error to the court of king's bench was pending in the House of Lords; an order was prayed for to the judges, to seal a bill of exceptions (which the court had refused at the trial), to the end that the said case might, as by law it ought, come entirely before their lordships for judgment, &c. The house ordered copies of this petition to be given to the judges, that they should put in their answers in writing. They replied, by protestation and saving their rights, declaring, "so that if the pretended bill was duly tendered to these respondents, and was such as they were bound to seal, these respondents are answerable for it by the course of the common law, in an action to be brought on the statute of Westm. II., c 21, which ought to be tried by a jury of twelve honest and lawful men of England, by the course of the common law, and not in any other manner." "And the respondents further show, and humbly offer to your lordships' consideration, that the petition is a complaint in the nature of an original suit, charging these respondents with a crime of a very high nature; in acting contrary to the duty of their office, and so altogether improper for your lordships' examination or consideration, not being any more triable by your lordships than every information or action for breach of any statute law is; all which matters are by the common law, and justice of the land, of common right, to be tried by a jury. And the petition is wholly of a new nature, and without any example or precedent, being to compel judges, who are, by the law of the land, to act according to their own judgments, without any constraint or compulsion whatsoever, and trenches upon all men's rights and liberties, tending manifestly to destroy all trials by jury. And it is further manifest, that this complaint is utterly improper for your lordships' examina- *213] tion, for that your *lordships cannot apply the proper and only remedy which the law hath given the party in this case, which is by awarding damages to the party injured (if any injury be done), for these are only to be assessed by a jury. And they, these respondents, are so far from apprehending they have done any wrong to the petitioners in this matter, that they humbly offer, with your lordships' leave, to waive any privilege they have, as assistants to this honorable house, and appear *gratis* to any suit which shall be brought against them in Westminster hall, touching the matter complained of. And they further, with all humility, offer to your lordships' consideration, that as they are judges, they are under the solemn obligation of an oath to do justice (without respect to persons), and are to be supposed to have acted in this matter, with and under a due regard to that sacred obligation; and therefore, to impose anything contrary upon them, may endanger the breaking of it, which they humbly believe your lordships will be tender of. And they further humbly show to your lordships, that by a statute made in 25 Edw. III., c. 4, it is enacted, that from thenceforth none shall be taken by petition or suggestion to the king or his

council, unless by indictment or presentment of good and lawful people of the neighborhood, or by process by writ original, at common law; and that none shall be put out of his franchise or freehold, but by the course of the common law. And by another statute in the 28th of Edw. III., c. 4, it is expressly provided, that no man shall be put out of his lands or tenements, or imprisoned or disinherited, but by due process at law. And by another statute, made in the 42d Edw. III., c. 3, it is enacted, that no man shall be put to answer, without presentment before justices, or matters of record on due process and original writ, according to the old law of the land. And the respondents further say, that inasmuch as the petition is a complaint in the nature of an original cause, for a supposed breach of an act of parliament, which breach (if any be) is only examinable and triable by the course of the common law, and cannot be in any other manner; and is, in the example of it, dangerous to the rights and liberties of all men, and tends to the subversion of all trials by jury; these respondents *consider themselves bound in duty (with regard to their offices, and in conscience [*214 to the oaths they have taken), to crave the benefit of defending themselves touching the matter complained of by the petitioners, by the due and known course of the common law; and to rely upon the aforesaid statutes, and the common right they have of free-born people of England, in bar of the petitioners any further proceeding upon the said petition; and humbly pray to be dismissed from the same."

This is the language of the judges of the court of king's bench to the highest court in England. I believe it to be in the true spirit of the principles and usages of the common law. It was boldly held to a court composed of the aristocracy, the clergy, the judges of the common pleas, and barons of the exchequer; in which the lord chancellor presides. It was a manly defiance of their power, and fearless appeal to their common right as free-born people of England, the common law, the guardian mother of liberty wherever adopted. The counsel for the application did not controvert a principle asserted by the judges, and did not show a precedent: the House of Lords did not grant the writ, and the case ends with four blank lines containing, "and afterwards, * * * " The blank would have been filled up, if, in so solemn a contest, the arm of power had prostrated the law of the land.

The principles of the judges are a part of that great system which our ancestors introduced, and on which our best institutions are built. They are, in my opinion, a part of the common law of every state and of every common-law court, state or federal, safe guides to the highest, or its component members sitting in a circuit court. The judges of king's bench humbly offered to their lordships' consideration, that they acted under oath, the breaking of which might be endangered, if they obeyed their order. If this court asserts and exercises this power, by directing writs of *mandamus* to every court over which they have appellate jurisdiction, an answer might a second time be entered on our records, in terms of protestation; not offered in all humility to our consideration, whether the breaking of their oaths should be endangered by obeying; we might expect disobedience to the *writ, and contempt of powerless, defied jurisdiction. [*215 I hope never to see the judges of the highest court in a republic afraid, when their judgment tells them that they stand on the

written constitution, and law of the nation, and their duty is called into action on a proper occasion, to assert and maintain those great principles of jurisprudence avowed in the highest court in a monarchy, by judges of a subordinate one, under a constitution unwritten, and which could give no control to a legislative power, which was omnipotent. The right of disobedience to a writ from a superior court to an inferior one, is not alone to be found in the courts of a foreign country. That it may and ought to be exercised by a district court of the United States, to a writ from the circuit court, which they have no power to issue, has received the deliberate sanction of this court. "The court deem it proper to take some notice of the mode of proceeding, for removing this case from the district to the circuit court; it is believed to be novel in the practice of the courts of the United States, and it certainly wants the authority of law to sanction it. There is no act of congress which authorizes a circuit court to issue a compulsory process to the district court, for the removal of a cause from their jurisdiction, before a final judgment or decree is pronounced. The district court, therefore, might and ought to have refused obedience to the writ of *certiorari* issued in this case by the circuit court; and either party might have moved the court for a *procedendo*, after the transcript of the record was removed into the circuit court, or might have pursued the cause in the district court, in like manner as if the record had not been removed. *Patterson* v. *United States*, 2 Wheat. 225–26: opinion of the court, delivered by Mr. Justice WASHINGTON.

The circuit court have unquestioned appellate jurisdiction over the district court. The 14th section of the judiciary act authorizes all the courts of the United States to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, agreeable to the principles and usages of law. The writ of *certiorari* is not specially provided for by any statute; it is a common-law writ issued by
*216] all superior appellate courts to inferior ones, and by them to *magistrates; it is the peculiar and appropriate process for ordering a record or proceeding to be certified to a superior tribunal. But being novel in practice, authorized by no act of congress, it ought to be resisted—it was a nullity. The record, though removed in fact to the circuit, remained in the district court in law, and their power to hear and determine it remained as full as before the writ was obeyed. It is not necessary for me to make a detailed application of that case to this; it applies to all cases where process is applied for to a court which has no power to issue it. In a new case, the rule laid down by the chancellor in 1 Vern. 170, is a sound and safe one: "but the lord keeper told him, that though he had the custody of the great seal, yet he would make no use thereof, but according to the course of the court."

Questions of jurisdiction and power ought neither to be sought nor avoided; a great one has arisen in a very small case, but such cases generally lead to the development of the mighty principles which subvert and found governments. We are asked to issue a *mandamus* to the circuit court of New York, under circumstances which would not justify one to a county court. This part of the case was very properly submitted, without argument, and if the application could have been rejected on its merits, without jurisdiction to hear and determine, "*oyer* and *terminer*," the mer-

its, and to refuse or issue the writ, according to the justice and law of the case, I should have required no consideration ; but as the existence of jurisdiction must precede its exercise, I have been forced to the investigation of this case, which, simple as it is on the merits, necessarily involves principles which are the foundation and corner-stones of the judicial department of this government.

I am abundantly satisfied, that the judicial power does not extend to this case ; that the constitution and acts of congress do not authorize a *mandamus* from this to a circuit court, to sign a bill of exceptions ; that it is warranted by no principle or usage of law, either the common law of this country or of England ; that the issuing of it is neither an exercise of appellate jurisdiction under the 13th, nor necessary to the exercise of the jurisdiction of this court, within the provisions of the 14th section of the judiciary act ; that *if the writ can be issued at all, it is specially provided by statute, and can in no case issue from this court, as called [*217
for by this motion, agreeable to the principles and usages of law. This court have repeatedly decided, that this means the common law of England, as administered in her courts of law and equity. In tracing their course, since the adoption of the statute of Westminster, in 1285, I find, that the court of king's bench, the only court in the kingdom which, by virtue of its high general prerogative and superintending jurisdiction, can issue the high prerogative writ of *mandamus* to any court of record, has never issued one to sign a bill of exceptions ; that such a writ is not an exercise of appellate jurisdiction, or necessary to it, but of original inherent power ; that the power to issue it to the court of king's bench was solemnly denied to the highest appellate court in England ; that the mandatory and kind of prerogative writ, which has been devised and founded on the statute of Westminster, as the only process by which its provisions are enforced, issues from the king in chancery, on application to the keeper of his conscience ; and that the high court of chancery has no appellate jurisdiction over any court of record ; that the writ, when issued, is not in virtue of appellate jurisdiction in that court, nor as necessary to its exercise. These are the only cases in which, according to the solemn opinion of this court in *Marbury* v. *Madison*, it can issue the writ ; thus adjudging and declaring that the union of the legislative and judicial power of this government was incompetent to authorize one to the secretary of state, in a case appropriate for its exercise, and warranted by the principles and usages of the common law, as defined by Blackstone and Lord Mansfield, and adopted by this court. In the absence of a solitary precedent in England, since the 13 Edw. I., or in this court, from its first organization, although this statute forms a part of the law of every state court of record, and of the federal courts in civil cases, which come here for revision, I am constrained to withhold my assent to the exercise of any power over the subject-matter of this motion. It seems to me, to be as inconsistent with our own decisions, as with the principles and usages of the common law.

There is another objection to the exercise of this power in this case, equally fatal. Two things must concur to authorize *a *mandamus*. [*218
The officer to whom it is directed must be one to whom, on legal principles, such writ can be issued ; and the person applying for it must be without any other specific or legal remedy. The cases referred to clearly

negative the first requisite. It cannot be issued to a judge of the highest court in the land; to a judge of an inferior court, to perform a judicial act, or compel him to decide according to any judgment but his own; to an executive officer who may act or not according to his own discretion, or is subject to the discretion of another.

As the matter contained in the bill of exceptions forms a part of the record, the supreme court must take it as true. It admits of no contradiction by any proof. The signing of it by the circuit court is not a ministerial act; but is in its nature judicial, relating to the admission or rejection of what is offered in evidence, or matter of law given in charge to the jury or withheld by the court. An order from a superior to an inferior court, to make that a part of the record, which they do not feel it their duty to do, is in effect to compel them to decide by the judgment of others, and not according to their own.

The next requisite which the supreme court say is necessary, is manifestly wanting. There is, by the principles and usages of the common law, a specific legal remedy provided for the very case, by a special writ from chancery, returnable before the king in chancery, reciting the mandatory parts of the statute of Westminister. Though no act of congress authorizes this writ to issue from any court, there is a specific and legal remedy, by an action on the statute for a false return, and a special action on the case, if the judges refuse to seal the bill of exceptions, when duly taken and tendered. This abundantly appears by the writ in the register, and the opinion of Lord Chancellor KING, in 1 Vernon; of Lord REDESDALE, in 1 Sch. & Lef.; of the court of king's bench in *Bridgman* v. *Holt;* of Justice BULLER in his Nisi Prius 316; and of the supreme court of New York, in 6 Johnson: and in the absence of even a *dictum* to the contrary. These opinions and cases must be taken as clearly showing the law to be well settled, that these remedies are both specific and legal; the writ in the register is alone sufficient to show this. Lord Coke declares original writs to be the foundation of the law. (Preface to 8th Reports.)

*219] *As the absence of such remedy forms a part of the definition of the only cases in which, according to the doctrine of the court of king's bench, adopted in 1 Cranch 168–9, by this court, a *mandamus* can issue; the opinions of both coincide in declaring this not to be such a case.

It may be proper to notice some cases from which it may be inferred that these principles have not been uniformly adhered to. In the *Lessee of Martha Bradstreet* v. *Daniel Thomas*, 4 Pet. 102, an application was made to direct a *mandamus* to the district judge of the northern district of New York, to sign a bill of exceptions; a rule to show cause was granted at the January term 1829, but discharged at the next term, on the merits. The question of jurisdiction was not moved, and passed *sub silentio;* thus affording, in the language of the court in 6 Cranch 317, and of the chief justice, in 3 Cranch 172, a sufficient answer to the supposed authority of *Mrs. Bradstreet's Case.*

The same answer applies to the *United States* v. *Peters*, 5 Cranch 115, 134, in which a *mandamus* was issued to the district judge of Pennsylvania, to order an attachment in the celebrated case of *Olmstead.* No objection was made to the writ; and the cause was submitted, without argument, for reasons apparent in the return of the judge, who had previously rendered a

final sentence. The case of *Livingston* v. *Dorgenois* was a writ of error to the district court of Orleans; the counsel for the appellant dismissed his writ of error, without the opinion of the court having been delivered. He then prayed a writ of *mandamus nisi*, in the nature of a *procedendo*, which was granted, without argument or question of jurisdiction. 7 Cranch 557, 589. The writ of *procedendo* to a district court is within the words of the 13th section of the judiciary act.

The decisions of state courts, deriving their authority from state constitutions or laws, are no test of the powers of the courts of the United States; nor have their usages or practice ever been adopted by any act of congress or rule of the supreme court, except so far as relates to the federal courts sitting within a state: but as much reliance has been placed on the case in 6 Johns. 278, 280, I think proper to observe, that the claim of the supreme court in that case was expressly *founded on their general controlling supervisory power over all inferior courts and tribunals, [*220 under the laws of New York, placing them on the same footing as the court of king's bench in England; a power not pretended to exist in this. If, however, this case is any authority, it is directly opposed to the power which we are now called on to exercise. If, say that court, a complaint was made against them, or one of its judges, for refusing to sign a bill of exceptions, the writ must, *ex necessitate*, come from chancery, if anywhere; but in no other case can it be indispensable. If this assertion by that court of its power to issue this writ to any inferior court, for such purpose, and for such reasons, as they assign, is to be followed in this court as a safe guide to its powers, under the constitution and laws of the United States, then we may, as representing the court of king's bench in its high perrogative character, issue a perrogative *mandamus* to any district court; and as representing the king in chancery, and the chancellor as the keeper of his conscience and the great seal of the kingdom, issue the special mandatory sort of writ prescribed by the statute of Westminister. Those who feel themselves invested with such authority, as part of the judicial power of the government, must exercise it; but for myself, I must disclaim it, as neither conferred by any act of congress, or the principles and usages of the common law. I do not feel justified in adopting them from any state court, acting under state laws and usages; especially, where that court declares the assertion of the principle to be new, more than thirty years after the federal courts were organized. Having no authority, under the 25th section, to revise that opinion, I am not disposed, extra-judicially, to question its authority in the state where it was pronounced; but believing it to be contrary to the best established rules and principles of the common law, as well as to the uniform construction which this court has given to the 13th and 14th sections of the judiciary act, in its general principles, I cannot adopt them. Though no one respects more than myself the adjudication of that court, yet I should be utterly wanting in that which is due to the constitution, the acts of congress, and the course of this court for more than forty years, by making a state decision the standard of our constitutional powers.

*I have thus searched among the fountains, and consulted the written oracles of the common law. The streams of justice which [*221 have flowed from the one, have run in one unbroken current for 546 years, without such a *mandamus* as this seen floating even on the surface. The

responses from the other are the voice of the law, speaking through all ages, in one unvarying tone ; delivering the results of human wisdom, developed in principles, matured, digested, explained, enforced and supported during five centuries, amidst all the conflicts of party vengeance, civil war and regal oppression. But in reply to the question, has such a writ as this now asked for ever formed a part of the principles or usages of the common law of England, the response through all time has been the same : it is not the lineal descendant of the venerated mother of our best institutions. I have drawn largely on the adjudications of this high tribunal ; and sought in the principles established by the great men who have formed an embryo system of American jurisprudence, that will not cower before any which has required centuries to build up in Europe. There, too, I find no writ issued, no power asserted, to command a circuit court to seal a bill of exceptions. Without a rule to bind my faith, a decision to influence my judgment, a reason to enlighten my understanding, and without one precedent to justify me in disobeying the settled convictions of my conscience, I have a plain course to take, a plain line to guide me in the path of duty. Believing that the law of the land does not authorize this writ, that it is the exercise of a power, neither inherent nor conferred, I am compelled to resist it ; my judgment has been formed on the constitution and laws of the Union, the common law of England, of all the states and the nation, and cannot be surrendered to human authority. I am well aware of the weight of that against which, on several questions of jurisdiction, my duty has compelled me to stand alone, and may again compel me ; it is against odds truly fearful ; but to act against my conscience and conviction of duty, would be more fearful still. Internal calm and peace of mind are too precious, at my time of life, to be impaired by any considerations ; while all is at ease within, it little matters how the storm rages without. Judges do not *sit on cush-
*222] ions of down, while administering the supreme law of the land in this court ; their constitutional powers are not like those of the other departments of the government ; though the case arises which brings them into existence, their exercise is discretionary. 6 Wheat. 404. But with us, power and duty to bring it into action are inseparable ; whenever a case calls for it, the call is imperative. Questions of jurisdiction are important in all governments, but most powerful in this. They must be approached with caution, and examined with deliberation ; but cannot be avoided. When made by counsel, or suggested by ourselves, we must examine them with the greatest assiduity; when not aided by the researches, and enlightened by the display and conflict of the talent and intelligence of the bar, and without the responsibility of even an argument, this court is called on to assert a power, which in the forty-two years of its existence it has never exercised, that power growing out of a statute under which it has never been exercised, during the more than five centuries which have elapsed since its enactment, even in the country in which it was first adopted ; to be exercised by a prerogative writ, which can be granted only by one high prerogative court in England, in which the king is presumed to be present, and the proceedings to be "*coram domini regis ubicumque fuerimus in Anglico ;*" which can issue the writ only by virtue of its great supervisory power over all inferior courts, magistrates, officers and corporations. to force obedience to the statutes, and compel them to do those legal acts

which it is their duty to do ; I must follow my own judgment, and dissent in the threshold : *obsta principiis—stare decisis.*

The importance of the principles involved in this case, not only as they bear on the jurisdiction of this court in issuing prerogative writs to the inferior courts of the United States, but also on the appellate power conferred on them by the constitution and the 25th section of the judiciary act over the state courts, has made it a high duty to give this application a most deliberate examination. Compelled to dissent, I was bound to give my reasons, and cite the authority on which my judgment was formed. Another reason is equally imperious. Sitting here, or elsewhere, it is my duty to exercise all the powers given by the constitution, which the *legislation of congress has authorized the court to bring into action, on the cases which may properly arise, and call for their application [*223 and to enforce the judgments and decrees of either tribunal of which I am a member, by all the process and physical means which the laws have placed at its command, and on the failure of these, to apply to the executive to see that the laws are executed ; I approach all questions of power and jurisdiction with caution, and shall stop in the beginning, unless satisfied that the constitution and laws empower and enjoin it as a duty to proceed and finish what we can begin. Fully satisfied, that on the discreet exercise of the powers of this court, much of the strength and public usefulness of the government depend, I have no fear that its judgments will ever cease to command the support and confidence of the country, while they are applied only to subjects clearly within the judicial power, according to the laws which regulate their exercise. But I do most seriously apprehend consequences of the most alarming kind, by the extension of its powers, by any analogy to the supreme prerogative jurisdiction of the court of king's bench, or a state court, and its application to process hitherto unknown in the history of the jurisprudence of England or this court : *Via trita, via tuta.*

Johnson, Justice, concurred, verbally, with Justice Baldwin in the opinion, that the court had no authority to grant the *mandamus*, as prayed for : and he was of opinion, that the whole charge as delivered to the jury, by the court, should be stated in a bill of exceptions, if required by the counsel who took the exceptions.

Motion overruled, and *mandamus* prayed for refused.

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*William Yeaton *v.* Adam Lynn, Executor of John Wise, use of Thomas C. Lyles and Rebecca his wife, Dennis M. Lyles, Henry S. Coombs and Louisa his wife. [*224

Revocation of letters testamentary.—Plea puis darrein continuance. Effect of plea in bar.—Disability of plaintiff.

L., as executor to W., instituted an action of *assumpsit*, on the 8th of April 1826 ; the declaration stated L. to be executor of W., and claimed as executor, for money paid by him as such ; the defendant pleaded *non assumpsit*, and a verdict and judgment were given for the plaintiff ; after the institution of the suit, and before the trial, the letters testamentary of L. were revoked by the orphans' court of the county of Alexandria, he having, after being required, failed to give bond, with counter-security, as directed by the court.

The powers of the orphans' court of Alexandria are made, by act of congress, identical with the powers of an orphans' court, under the laws of Maryland; it is a court of limited jurisdiction, and is authorized to revoke letters testamentary in two cases—a failure to return an inventory, or to account. The proceedings against L. were not founded upon either of these omissions; the appropriate remedy, on the failure of the executor to give counter-security, is to take the estate out of his hands, and to place it in the hands of his sureties.

The issue tried by the jury was on the plea of *non assumpsit;* as the plaintiff was incontestably executor, when the suit was brought, and when issue was joined, and could then rightfully maintain the action, and the revocation of the letters testamentary was not brought before the court by a plea, since the last continuance, as it might have been; the defendant must be considered as waiving this defence, and resting his cause on the general issue.

A plea since the last continuance waives the issue previously joined, and puts the case on that plea.[1]

It is not doubted, that the revocation might have been pleaded; and it ought to have been pleaded, in order to bring the fact judicially to the view of the circuit court; it ought to appear upon the record, that judgment was given against the plaintiff, in the circuit court, because he was no longer executor of W., not because the defendant was not indebted to the estate of W., and had not made the *assumpsit* mentioned in the declaration.

The rule is general, that a plea in bar admits the ability of the plaintiff to sue; and if the parties go to trial on that issue, the presumption is reasonable, that this admission continues.

When a suit is brought by an administrator, during the minority of the executor, his powers as administrator are determined, when the executor has attained his full age; and the fact that he has not attained his full age, must be averred in the declaration; but if this averment be omitted, and the defendant pleads in bar, he admits the ability of the plaintiff to sue, and the judgment is not void.

A distinction seems to be taken between an action brought by a person who has no right to sue, and an action brought by a person capable of suing at the time, but who becomes incapable, while it is depending; in the first case, the plaintiff may be nonsuited at the trial; in the last, the disability must be pleaded.

*225] The rule is, that when matter of defence has arisen, after the commencement of a suit, it cannot be pleaded in bar of the action, generally; but must, when it has arisen before plea or continuance, be pleaded as to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrein continuance.*

It may safely be affirmed, that a fact which destroys the action, if it cannot be pleaded in bar, cannot be given in evidence on a plea in bar, to which it has no relation. If any matter of defence has arisen, after an issue in fact, it may be pleaded by the defendant; as, that the plaintiff has given him a release; or, in an action by an administrator, that the plaintiff's letters of administration have been revoked.

ERROR to the Circuit Court of the district of Columbia, and county of Washington.

The defendant in error, as executor of John Wise, on the 8th of April 1826, instituted an action of *assumpsit* in the circuit court. The declaration

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[1] A plea *puis darrein continuance* may be either in abatement, or in bar. If anything happen pending the suit, to abate it, this may be pleaded *puis darrein continuance*, though there be a plea in bar; for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not subsequent matter. Gilb. C. P. 105. The defendant may plead in bar, *puis darrein continuance*, payment, Chew *v.* Woolley, 7 Johns. 399; a release, a discharge in bankruptcy, Ingalls *v.* Savage, 4 Penn. St. 224; a recovery and satisfaction in another suit for the same cause, Bowne *v.* Joy, 9 Johns. 221; accord and satisfaction, after issue joined, Good *v.* Davis, Hempst. 14; and in general, any defence arising since the last continuance, Brownfield *v.* Braddie, 9 Watts 149. Matters which only go to the remedy, may likewise be so pleaded, as, a discharge in insolvency, Rayner *v.* Dyett, 2 Wend. 300; or a judgment confessed by an executor, after suit brought, Lawrence *v.* Burk, 3 Id. 305. And in a suit on a mechanic's claim, the defendant may plead, that since the last continuance, the premises have been sold under judicial process, Johns *v.* Bolton, 12 Penn. St. 339; or that the building has been destroyed by fire or tempest, and the lien thereby divested. Presbyterian Church *v.* Stetler, 26 Penn. St. 246.

contained two counts; the first, for money paid, laid out and expended; the second, on account for money paid, &c., in which the defendant was alleged to have been found in arrear to the plaintiff, as executor. The letters testamentary of the plaintiff, as executor of John Wise, were revoked by the orphans' court, on the 9th of November 1826.

The jury found a verdict for the plaintiff, and assessed the damages at $2431.59, with interest from the 1st of January 1820; subject to the opinion of the court on a case agreed. The circuit court gave judgment for the plaintiff, and the defendant prosecuted this writ of error. The case is stated in the opinion of the court.

E. J. Lee, for the plaintiff in error, contended, that there was error in the judgment of the circuit court: 1. Because Adam Lynn, as executor of John Wise, could not maintain an action against Yeaton, for money which he had been decreed to pay as trustee, under a deed of trust, out of the trust fund, which forms no part of the assets of his testator. 2. Because the case agreed does not sustain the allegation in the first count of the declaration, that he, as executor of John Wise, paid money for William Yeaton; but it shows, he never, as executor, had the means of paying money to any one. *3. There is no evidence in the record, to sustain the second count in the declaration. 4. Because, by the case agreed, and [*226 the proceedings referred to by it, it appears, that at the time the verdict and judgment were rendered, Adam Lynn had ceased to be executor. This fact having been given in evidence on the general issue, it is as competent for the plaintiff in error to avail himself of it now, as if it had been at the proper time specially pleaded.

Mr. Lee said, it would not be denied, that the orphans' court had authority to revoke the letters testamentary; this was fully warranted by the law of Maryland. The letters testamentary having been revoked, Mr. Lynn was put out of court as executor, and was no longer competent to prosecute the suit. In the case of a revocation of letters testamentary, all the intermediate acts of the executor are void. 11 Vin. Abr. 114, 117; *Barnehurst* v. *Yelverton*, Yelv. 83; *Klett's Case*, Ibid. 125; *Turner* v. *Davis*, 2 Saund. 148; 1 Mod. 63.

He also contended, that no money had been paid by Adam Lynn, as executor, but only as trustee; the evidence authorized this position.

Jones, for defendant, argued, that the liability or capacity of the executor, Mr. Lynn, to sue, was not affected by the proceedings of the orphans' court. That court was one of limited jurisdiction, with powers specially designated; and among them was not that of removing an executor, under the circumstances of this case. The court could have called on the executor to give security, but could not proceed, under the law, as it had done. The court could take away the assets from the executor, but not displace him.

The case stated shows, that the trust fund was, by the decree in the chancery proceedings, made assets in the hands of the executor.

Marshall, Ch. J., delivered the opinion of the court.—This is an action on the case, brought by Adam Lynn, as executor of John Wise, for the use of Thomas C. Lyles and others against William Yeaton, in the circuit court *of the United States, sitting in the county of Alexandria. [*227

The declaration contains two counts ; one for money paid by the plaintiff, Lynn, as executor, for the use of the defendant, and the other on an account settled by the said plaintiff, as executor, with the defendant, for money due by the defendant to the plaintiff, as executor as aforesaid. The cause was tried on the issue of *non assumpsit*, and the jury found a verdict for the plaintiff below, subject to the opinion of the court on a case agreed. Judgment was given for the plaintiff, and the then defendant has brought that judgment before this court by a writ of error.

The case agreed is in the words following : The plaintiff, to support the issue on his part, gave evidence to prove that John Wise, the testator, in his lifetime, had indorsed a note, as surety for the defendant, to one Robert Young, for the sum of ———, upon which note judgment was obtained by said Young, against such maker and indorser, and execution of one of the said judgments being levied upon the goods, &c., of the defendant, he gave a forthcoming-bond, with the said testator as his surety in such bond, upon which bond judgment was regularly entered against principal and surety, in the lifetime of the testator. The plaintiff then produced and read in evidence to the jury, the proceedings in two chancery causes, the one, by the said Robert Young against the said Adam Lynn *et al.;* the other, by the Bank of Alexandria, against the same defendants, thereto annexed. And the plaintiff, in order to show that the decree in the first of the said chancery cases had been paid and satisfied by the plaintiff, by way of a discount between him and the said Young, gave evidence to prove that the plaintiff had indorsed a note, as surety for said Young, discounted for his, said Young's, use, in the branch Bank of the United States, upon which note the said bank had recovered judgment against the said Young for $300, with interest from the 4th of March 1817, till paid, and costs. The said note and judgment had been taken up by plaintiff, as surety for said Young, on the 24th of March 1820, and thereupon, assigned over to the plaintiff ; and that the said Robert Young, by way of indemnity and payment to the plaintiff, assigned over to him the said judgment obtained by Young against the defendant, and all his claims and *remedies, &c., upon the estate *228] of the testator, as by a short copy of the said judgment and assignment indorsed thereon, thereunto annexed. That the plaintiff, before the institution of the said suits in chancery, and after the death of the testator, had sold out sufficient of the stocks mentioned in the said deed, to pay the said debt due the said Young ; but without any reference to the said suits, or to the said Young's claim, nor for the purpose of satisfying any creditor of the testator ; and, at the time of the institution of said suits, had the money in his hands proceeding from such sales, which money he has retained as against such of the *cestuis que trust* named in the said deed as are named as equitable plaintiffs in this case ; that the will of the said John Wise was duly proved and recorded in the orphans' court, and letters testamentary thereon duly granted to the plaintiff, and other proceedings relative thereto therein had, as appeared by the annexed transcript of proceedings in the orphans' court, and that the said Bank of Alexandria recovered judgment of the plaintiff, as appeared by the annexed record of the said judgment, to bind assets. And it is agreed, that the verdict to be rendered in this cause shall be subject to the opinion of the court, whether the plaintiff is entitled to recover in this action, for so much of the assets which the said deed pur-

ports to convey in trust, as has been appropriated under the said decree, in manner aforesaid, to satisfy the said debt due to the said Robert Young, and discounted with the plaintiff as aforesaid.

The judgment which was obtained by Robert Young, against John Wise, in his lifetime, and William Yeaton, the defendant, is stated in the case agreed to have been for the proper debt of the defendant, for which John Wise was surety. This debt has never been paid by the defendant, and was not paid by John Wise in his lifetime. After this judgment, William Yeaton became insolvent; and John Wise sold his real estate in Alexandria, and invested the proceeds in bank-stock, in the name of Adam Lynn, the plaintiff; after which, he executed a declaration of trust, in favor of his children and grandchildren, and departed this life, having first made his last will and testament, of which he appointed the plaintiff executor, who took upon himself the execution thereof.

*The chancery causes mentioned in the case agreed were instituted in July 1818, for the purpose of setting aside as fraudulent, [*229
with respect to creditors, this deed to Adam Lynn, the plaintiff, and for obtaining payment of the debt due to the plaintiffs, respectively, out of that fund. The court, in July 1824, decreed that the deed of trust be annulled and vacated, so far as respects the complainants, and that the said Adam Lynn do sell and dispose of so much of the trust fund as will satisfy and pay to the complainants their debt aforesaid, with interest and costs. The case shows, that previous to this decree, on the 24th of March 1820, the plaintiff had paid this judgment obtained by Young against Yeaton, with Wise as his surety; and that he had sold a sufficient quantity of the stock standing in his name, to meet the claim, the proceeds of which sale he held in his hands, at the time the debt was paid to Young.

It is obvious, that the debt due from Yeaton, the defendant, to Young, for which Wise was surety, has been paid out of the estate of Wise. Consequently, that estate has an unquestionable claim on Yeaton for the amount paid. The judgment rendered by the circuit court in favor of Adam Lynn, who was both executor and trustee of John Wise, is resisted, on the ground, that he has sued as executor, though he paid the money either on his private account or as trustee.

The bill in chancery, on which all the proceedings between Wise and Lynn were annulled, so far as respected this debt, and by the decree on which Adam Lynn was directed to pay the sum due to Robert Young, states, that Lynn was both executor and trustee. The executor and trustee were both necessary parties to the suit, and had they been distinct persons, must both have been brought before the court. The two characters being united in the same person, and that person being directed to execute the decree, it would seem reasonable to presume, that he acted in the character in which he ought to perform the particular act, especially, if it be necessary to give the act its full effect, and to make it rightful.

The trust property had been sold, in anticipation of the decree, and the money retained by the trustee and executor. When the investment in the name of Lynn, and the declaration of trust, were vacated and declared void, so far as *respected this debt, the money into which the trust [*230
property had been converted, and which remained in the hands of Wise's executor, became a part of Wise's estate, and consequently, were

assets subject to this debt. The payment of this money to Robert Young was rightful, if made by the executor; and being part of the funds of the estate, ought to inure to the benefit of the estate. We think, therefore, that the action is sustainable in the name of the executor. The form in which the question on the case is submitted to the court, strengthens this opinion. It assumes, that the money for which the suit was brought composed a part of the assets, and had been appropriated, under the decree of the court, to satisfy the debt due to Robert Young.

The plaintiff in error further contends, that this judgment ought to be reversed, because the letters testamentary granted to Adam Lynn, were revoked by the orphans' court of Alexandria, before it was rendered. The powers of the orphans' court of Alexandria are made, by act of congress, identical with the powers of an orphans' court, under the laws of Maryland. It is a court of limited jurisdiction, and is authorized to revoke letters testamentary in two cases—a failure to return an inventory, or to account. The proceedings against Adam Lynn were not founded on either of these omissions. A petition was filed by his sureties, stating their apprehension of loss from their suretyship, and praying that the proper measures might be taken for their relief. The appropriate remedy given by the law, in such case, is, to require counter-security, and, on the failure of the executor to give it, to take the estate out of his hands and place it in the hands of his sureties. The statute forbids the judge to exercise any implied power. On the failure of the executor in this case to give counter-security, the judge, instead of making the order prescribed by the act, revoked the letters testamentary. Some of the judges are of opinion, that the orphans' court transcended its powers, and that the judgment of revocation is void. It is unnecessary to decide this point, because we are all of opinion, that, as the issue tried by the jury was on the plea of *non assumpsit;* as the plaintiff was incontestably executor, when this suit was brought, and when that issue
*231] was joined, and could rightfully maintain this *action; as the revocation of the executorship was not brought before the court by a plea, since the last continuance, as it might have been; the defendant is to be considered as waiving the defence, and resting his cause on the general issue. There is the more reason for supposing that the defendant Yeaton made this election, because a plea since the last continuance waives the issue previously joined, and puts the cause on that plea. It is also remarkable, that the case agreed states expressly, that letters testamentary were granted to Adam Lynn, but does not state the revocation of those letters. The proceedings of the orphans' court are referred to generally.

It is not doubted, that this revocation might have been pleaded, and we think it ought to have been pleaded, in order to bring the fact judicially to the view of the circuit court. It ought to appear upon the record, that judgment was given against the plaintiff in that court, because he was no longer executor of John Wise; and not because the defendant was not indebted to the estate of Wise, and had not made the *assumpsit* mentioned in the declaration.

The rule is general, that a plea in bar admits the ability of the plaintiff to sue; and, if the parties go to trial on that issue, the presumption is reasonable, that this admission continues. In principle, this case is not unlike a suit brought by an administrator, during the minority of the exec-

utor. His power as administrator is determined, when the executor has attained his full age, and the fact that he has not attained his full age, must be averred in the declaration. But if this averment be omitted, and the defendant pleads in bar, he admits the ability of the plaintiff to sue, and the judgment is not void. 5 Com. Dig. tit. Plead. 2 D. 10, 267. The inference that he could not be permitted to give this fact in evidence is very strong. A distinction seems to be taken between an action brought by a person who has no right to sue, and an action brought by a person capable of suing at the time, but who becomes incapable, while it is depending. In the first case, the plaintiff may be nonsuited at the trial; in the last, the disability must be pleaded. 1 Chit. Pl. 437 (Am. ed. 319); 4 T. R. 361; 3 Ibid. 631.

The rule is, that "when matter of defence has arisen after the commencement of a suit, it cannot be pleaded in bar of the *action, [*232
generally, but must, when it has arisen, before plea or continuance, be pleaded as to the further maintenance of the suit; and when it has arisen after issue joined, *puis darrein continuance.*" 1 Chit. Pl. 635 (Am. ed. 456). It may safely be affirmed, that a fact which destroys the action, if it cannot be pleaded in bar, cannot be given in evidence, on a plea in bar to which it has no relation. This is decided in 7 Johns. 194: "If any matter of defence has arisen, after an issue in fact, it may be pleaded by the defendant; as, that the plaintiff has given him a release;" "or, in an action by an administrator, that the plaintiff's letters of administration have been revoked." In *Stoner* v. *Gibbons*, Moore 871, an action of debt was brought against an administrator, and pending the action, after demurrer joined, the letters of administration were repealed. The court refused to allow this matter to be pleaded, after demurrer, though it might, after issue joined. The distinction between allowing the plea after demurrer and after issue, is not now sustained: but certainly, the defence could not have been received, as the plea was disallowed. Upon this point, the court is unanimous: we are all of opinion, that the revocation of the letters testamentary not having been pleaded, could not be given in evidence. The judgment is affirmed, with costs, and damages at the rate of six per cent. per annum.

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 considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs, and damages at the rate at six per cent. per annum.

*Doe *ex dem.* William Patterson, Plaintiff in error, *v.* Elisha Winn and others, Defendants in error.[1]

Evidence.—Exemplification of grant.

An exemplification of a grant of land, under the great seal of the state of Georgia, is, *per se*, evidence, without producing or accounting for the non-production of the original; it is record proof, of as high a nature as the original; it is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own common seal; and imports absolute verity, as a matter of record.[2]

The common law is the law of Georgia, and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question, it does not appear, that Georgia has ever established any rules at variance with the common law; though it is not improbable, that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them, in the different circuits of that state; acting, as they do, independent of each other, and without any common appellate court to supervise their decisions.

There was, in former times, a technical distinction existing on this subject; as evidence, such exemplifications of letters-patent seem to have been generally deemed admissible; but where in pleading, a *profert* was made of the letters-patent, there, upon the principles of pleading, the original, under the great seal, was required to be produced; for a *profert* could not be of any copy or exemplification; it was to cure this difficulty, that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed; so too, the statute of 10 Ann., c. 18, makes copies of enrolled deeds of bargain and sale, offered by *profert* in pleading, evidence.

These statutes being passed before the emigration of our ancestors, and being applicable to our situation, and in amendment of the law, constitute a part of our common law.

By the laws of Georgia, all public grants are required to be recorded in the proper state department.

What should be considered proof of the loss of a deed, or other instrument, to authorize the introduction of secondary evidence?

However convenient a rule established by a circuit court, relative to the introduction of secondary proof, might be, to regulate the general practice of the court, it could not control the rights of parties, in matters of evidence admissible by the general principles of law.

Error to the Circuit Court of Georgia. This was an action of ejectment, brought to May term 1820, of the circuit court of the United States for the
*234] district of Georgia, to recover a tract of land, containing *7300 acres, lying in that part of the county of Gwinnett, which was formerly a portion of Franklin county.

On the trial, at Milledgeville, at November term 1829, the plaintiff offered in evidence, the copy of a grant or patent from the state of Georgia, to Basil Jones, for the land in question, duly certified from the original record or register of grants, in the secretary of state's office, and attested under the great seal of the state. To the admissibility of this evidence, the defendants, by their counsel, objected, on the ground, that the said exemplification could not be received, until the original grant or patent was proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for, according to a rule of the court. This objection the circuit court sustained, and rejected the evidence; to which decision, the plaintiff excepted.

The plaintiff then offered: 1. A notice to the defendants, requiring them to produce the original grant or patent for the land. 2. The affidavit of the lessor of the plaintiff, William Patterson, sworn before Theodoric Bland,

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[1] For a former decision in this case, see 11 Wheat. 380.

[2] S. P. United States *v.* Sutter, 21 How. 175; United States *v.* Vallejo, 1 Black 554–5.

district judge of the United States for the district of Maryland, on the 9th of October 1821, deposing, in substance, that he had not in his possession, power or custody, the said original grant, describing it; and that he knew not where it was; and that he had made diligent search for the same among his papers, and it could not be found. 3. The deposition of Andrew Fleming, stating at length the inquiries he had made for the papers of Thomas Smyth, jr., by whom, as attorney in fact for Basil Jones, this land had been conveyed to William Patterson, and the information he had received of the destruction of these payers. 4. The deposition of Mrs. Anna M. Smyth, stating the pursuits of her late husband, Thomas Smyth, and the facts and circumstances leading to the conclusion that his papers had been destroyed. 5. The plaintiff then called a witness who proved that he had compared the exemplification of the grant or patent aforesaid, with the register of grants in the office of the secretary of state of the state of Georgia, and the book or register of surveys, in the office of the surveyor-general of the said state; and that *the exemplification offered was a true copy from the said register of grants and plats in the said offices respectively. [*235

He further proved, that he had made search for the original grant or patent, in the said offices; and that the same was not there to be found. That he had made application to Mrs. Ann Farrar, the relict of Basil Jones, the grantee, who had since intermarried with Francis Farrar, for the said original grant or patent, if among the papers of her late husband, Basil Jones; and was assured by the said Ann and Francis, that there were no such papers in their possession. That the said witness had made application to Gresham Smyth, the reputed son of Thomas Smyth, jr., for the said original grant, if in his possession; and received for answer, that his father had died, while he was yet young, and that he had no papers of his father's in his possession. The said witness also proved, that he had made diligent search among the papers of George Walker, now and long since deceased, who, it appeared, had once had some of the muniments of title of the lessor of the plaintiff in his possession, or been consulted as counsel; but the said original grant or patent could not there be found. That the witness himself, assisted by the clerk of Richmond superior court, where the power of attorney from Basil Jones to Thomas Smyth, jr., was recorded, searched diligently through all the papers in the office for the said original grant or patent, without success. That the said witness, as agent of William Patterson, caused advertisements to be published, for two months, in two of the gazettes of the state of Georgia, for said grant or patent, as lost, offering a reward for its production, if required, which advertisements were exhibited to the court, and were inserted in the record, at full length. And the said witness further proved, that no information whatever had been received, in answer to the said advertisements, nor any discoveries made in relation to said original grant or patent. He also proved, that he had searched the executive office of Georgia for the said original grant, and had examined the list of grants or patents to which the great seal of the state had *been refused to be annexed; but the said original grant to Basil Jones was not found noted upon the said list, as one of that description. [*236

And thereupon, the said counsel for the plaintiff moved the court to admit the said exemplification of the said patent or grant in evidence, the

loss or destruction of the original having been sufficiently proved; which the said court refused: to which decision, the plaintiff excepted.

The case was argued by *Wilde*, for the plaintiff in error; no counsel appeared for the defendants.

Wilde, for the plaintiff in error, contended: 1. That the exemplification of the patent or grant, under the seal of the state, was, by itself, admissible evidence. 2. That even were it not admissible alone, the proof made created a sufficient presumption of the loss or destruction of the original, to authorize the introduction of the copy.

The law of evidence in Georgia is the common law, except in so far as it is altered by acts of assembly. On this subject, there is no act; nor is there any settled course of judicial decision. From the organization of the judicial department in that state, there can be none. Seven distinct tribunals, each deciding for itself, in the last resort, without any common umpire, in case of disagreement, cannot be expected to exhibit a uniform interpretation of any code, however simple. With respect to rules of court, they are mere regulations for the convenient and orderly transaction of business. They can neither make law, nor repeal it. If the rule is in opposition to the law, it is a nullity, of course. The common-law doctrine is perfectly well settled; the *constat* or *inspeximus* of the king's letters-patent, is as high evidence as the original itself. 1 Phil. Evid. 410; Peake's Evid. 21; *Page's Case*, 5 Co. 53; 1 Saund. 189, in notes; 1 Hardr. 119; *Roberts* v. *Arthur*, 2 Salk. 497; *Hoe* v. *Nelthrope*, 1 Ld. Raym. 154; 3 Salk. 154; 1 Dall. 2, 64; 2 Wash. 280–1; 2 Mass. 358; 12 Vin. Abr. tit. Evidence, Constat, A, b, 125; Ibid. tit. Evidence, Exemplification, 114, A, b, 33, § 1, 5, 8, 16–18.

*237] In Georgia, the original warrant and survey are returned to *the surveyor-general's office, where they are filed, and the survey recorded. The acts of that state prescribed the form of grants. A record of them is ordered to be kept in the secretary of state's office, where the great seal is attached to them; and no grant is allowed to issue, until it is recorded. No distinction exists, in reason or authority, between the patents of the state and the patents of the king. They are of equal dignity, and to be verified in the same manner. It will not be pretended, there is one rule of evidence for grants issued before the revolution, and a different rule for those emanating since.

The most distinguished counsel of that bar, one who was among the profoundest jurists of his country, the greatest ornament of his profession, and most eloquent man of his age, had been consulted, in his lifetime, on this subject. Before the action was brought, his opinion on the point in contest had been obtained. This is its purport: "There can be no doubt, that an exemplification or sworn copy of the registry of the grant, is good evidence, without proving the loss of the original. See 12 Vin. Abr. 97, especially § 8, 39, and page 114, § 2, 5, 16, &c. The distinction always was between *profert* and evidence. When a grant was pleaded, *profert* must have been made of the original; and hence, the statutes mentioned in Vin. Abr. *supra*, but the exemplification or sworn copy from the roll or registry was always evidence at the common law. The statutes, however, were all passed before the colonization of Georgia. In that state, the grant is enrolled, or a *con-*

stat of it preserved, in some public office or offices, as in Maryland ; and what question can it be, whether the book itself, or a copy from it, is evidence ; whether the original be producible, or not ? In Maryland, the office-copy is constantly given in evidence, and always has been, although we have no act of assembly for that purpose, and it was never otherwise in England. The enrollment can answer no sensible purpose, if it does not answer this. The practice of enrolling grants, &c., can have no other object but to furnish sure constant evidence of the titles of the citizen to his lands, or rather of the source of his titles." Opinion of William Pinkney, Esq.

Thus the matter stands upon authority. How is it on the *score of reason ? This is the transcript of a public record, and imports [*238 absolute verity. That which remains in the office, is the true original ; the grant, which goes out into hands of interested parties, may be subject to alteration for fraudulent purposes ; from this, the official record is secure The emanation of the grant is a public and official act. In relation to any such act of the legislature or judicial department, the original document authenticating it, is not produced, but a copy. Nay, in relation to any other official act of the executive authority, the citizen who claims a right under it is not held to produce the original instrument. Why should it be otherwise, in the case of a grant ? If the patent which goes out is to be considered the original, and that which remains in the office, only a copy, then the exemplication is merely the copy of a copy ; and the individual whose grant is destroyed by accident, can obtain from the public achives only the weakest kind of evidence, to aid him in establishing his rights. Again, what is the fact which the patent is introduced to prove ? That the state has divested itself of part of the public domain, in favor of a particular citizen. And will not the solemn acknowledgment of the state, extracted from its own records, and authenticated by its own seal, be deemed sufficient evidence of that fact ?

As to the second point. The exemplication was rejected, not on account of any inherent defect, but because the affidavit of the lessor of the plaintiff was alleged not to be a compliance with the rule of court. Rules of court are made to advance justice ; they are always to be interpreted and applied in subservience to that object. They have not the inflexibility of the law : made by the court, they may be changed by the court ; the judge can relax or enforce them as justice may require. The forms of the shrine are not to be converted into snares for the suitors who approach it. The rule requires of the party seeking to introduce a copy, an affidavit of his belief that the original is lost or destroyed ; but this, evidently, is applicable only to the case where such belief exists. Suppose, he does not believe it to be lost or destroyed ? Suppose, he believes it to be in the hands of the opposite party ? Must he perjure himself, or, *lose his rights ? May [*239 he not give notice to the opposite party to produce the original ; show diligent inquiries after it ; prove circumstances presumptive of its destruction ; and by his own oath, declare that he has it not, that it is not in his custody or power, and that he knows not where it is ? All of which has been done in this case. What room is there to imagine the voluntary suppression of the original, after such an affidavit ? Could he say, it was not in his power, if he had given it to another, or directed that other to give it to a third ? Could he say, he knew not where it was ?

Moreover, this action was commenced in 1820, the affidavit was made in

1821, and the rule was not established until 1823. Before the adoption of the rule, the evidence in this case, independent of the plaintiff's oath, would have been deemed sufficient to admit the secondary proof. The oath is, virtually, in every important particular, a compliance with the *ex post facto* rule. According to the recollection of counsel, it was once so held by the circuit court itself, and in these very cases. The rule of the circuit court is said to be borrowed from those of the state courts. If the rule is borrowed, the interpretation is original. Nothing is hazarded, in saying, that upon the affidavit and evidence offered in this cause, and set forth in the record, no court in the state of Georgia would have refused to admit this copy.

Story, Justice, delivered the opinion of the court.—This case comes before the court by a writ of error to the circuit court for the district of Georgia. The original action was an ejectment, brought by the plaintiff in error, against the defendants ; and at the trial in November term 1829, a bill of exceptions was taken, which raises the only questions which are now before us for consideration.

The bill of exceptions states, that the plaintiff offered in evidence, in support of his title, an exemplification, under the seal of the state of Georgia, of a grant or patent to Basil Jones, of a tract of 7300 acres of land, dated the 24th of May 1787, and registered the 5th of June, of the same year, in the registry of grants in the secretary of state's office. The defendants objected, that the exemplification could not be received, until the original *240] patent was *proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for ; which objection the court sustained, and rejected the evidence. The plaintiff then exhibited a notice, served on the opposite party, to produce the original grant, and also an original power of attorney from Basil Jones to Thomas Smith, jr., dated the 6th of August 1793, to sell and convey (among other tracts) the tract in question. And also offered an affidavit, duly sworn to by the plaintiff, in October 1821, that he had not in his possession, power or custody, the said original grant or power of attorney, and knew not where they were ; and that he had made diligent search among the papers for the said grant and power, and they could not be found. He further offered depositions to prove, that search had been made for the papers of Thomas Smyth, by whom, as attorney in fact of Jones, the land had been conveyed to Patterson, and that no papers could be found. He further proved, that he had made search for the original grant or patent in the office of the secretary of state, and the book or register of surveys in the office of the surveyor-general of Georgia, and that the same could not be there found. And he further proved, by a witness, that the exemplification was a true copy from the register of grants and plats in the said offices. He further proved, that search had been made among the papers of Basil Jones, in the possession of his widow ; and among the papers of George Walker, deceased, who, as counsel for the plaintiff, had once had the muniments of his, the plaintiff's, title in his possession ; and also in the office of the clerk of Richmond superior court, where the power of attorney was recorded ; but without success. He also proved, that he had, by public advertisement, in two gazettes of the state of Georgia, offered a reward for the production of

the said grant or patent, but no discovery had been made; and that he had searched the executive office of Georgia for the same, and had examined the lists of grants or patents, to which the great seal of the state had been refused to be annexed, but the grant to Jones was not found noted upon that list, as one of that description. And the plaintiff then moved the court to admit the said exemplification in evidence, the loss or destruction of the original having been sufficiently proved; which the court refused. The plaintiff excepted to the ruling of the court upon both points.

*The first exception presents the question, whether the exemplification, under the great seal of the state, was, *per se*, evidence, [*241 without producing or accounting for the non-production of the original; and we are of opinion, that it was. The common law is the law of Georgia; and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question, it does not appear, that Georgia has ever established any rules at variance with the common law; though it is not improbable, that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them, in the different circuits of that state, acting, as they do, independent of each other, and without any common appellate court to supervise their decisions. We think it clear, that by the common law, as held for a long period, an exemplification of a public grant, under the great seal, is admissible in evidence, as being record proof of as high a nature as the original. It is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own seal; and imports absolute verity, as matter of record.

The authorities cited at the bar fully sustain this doctrine. There was, in former times, a technical distinction existing on this subject, which deserves notice. As evidence, such exemplifications of letters-patent seem to have been generally deemed admissible. But where, in pleading, a *profert* was made of the letters-patent, there, upon the principles of pleading, the original, under the great seal, was required to be produced; for a *profert* could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed, by which, patentees, and all claiming under them, were enabled to make title in pleading, by showing forth an exemplification of the letters-patent, as if the original were pleaded and set forth. These statutes being passed, before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law. A similar effect was given by the statute of 10 Ann., c. 18, to copies of deeds of bargain and sale, enrolled under the statute of Hen. VIII., when offered *by way of *profert* in pleading; and since that period, a copy of the [*242 enrolment of a bargain and sale is held as good evidence as the original itself. 1 Phil. Evid., ch. 5, § 2, p. 208–302; ch. 8, § 2, p. 352–6; 408–11; Bac. Abr. title Evidence, F. p. 610, 644, 646; Com. Dig. Evidence, A, 2; 1 Stark. Evid. § 33, p. 152; 2 Saund. Plead. & Evid. 638; *Page's Case*, 5 Co. 53; 12 Vin. Abr. tit. Evidence, A, b, 25, p. 97; A, b, 33, p. 114; 1 Saund. 189, note 2. Such, then, being the rule of evidence of the common law, in respect to exemplifications, under the great seal, of public grants, the application of it to the case now at bar will be at once perceived;

since, by the laws of Georgia, all public grants are required to be recorded in the proper state department.

The question, presented by the other exception, is, whether under all the circumstances of the case (even supposing the exemplification of the grant had not been admissible in evidence, upon the principles already stated), there was not sufficient proof of the loss of the original, to let in the secondary evidence, by a copy of the grant. It is understood, that the court decided this point wholly upon the ground, that the affidavit of Patterson did not conform to a rule made by the court in December 1823. That rule is in the following words, "whenever a party wishes to introduce the copy of a deed or grant in evidence, the oath of the party, stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be indispensable, in aid of such evidence as he may adduce to prove the loss." Patterson's affidavit was made before the making of this rule (in 1821), and the defect in it is, that it does not contain any declaration of his belief as to the loss or destruction of the original.

It might not be important to decide this point, if it were not understood, that the same objection applied to the copy of the power of attorney in the case, as to the copy of the grant. We think, that the affidavit and other circumstances of the case were sufficient to let in the secondary evidence. The grant and power of attorney were of an ancient date; the former being more than forty years old, and the latter but a little short of that
*243] period since the execution. Some presumption *of loss might naturally arise, under such circumstances, from the mere lapse of time. There appeared also to have been a very diligent search in all the proper places, and among all the proper persons, connected with the transactions, to obtain information of the existence or loss of the papers. The affidavit of Patterson explicitly denied any knowledge, where they were, and declared, that they were not in his possession, power or custody. We think, that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals, to let in secondary proof; and that it was not competent for the court to exclude it, by its own rule. However convenient the rule might be to regulate the general practice of the courts, we think, that it could not control the rights of the parties in matters of evidence, admissible by the general principles of law.

The judgment must therefore be reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo.*

Johnson, Justice. (*Dissenting.*)—I am very well content that the judgment in this court should be reversed, as it went off below, on grounds which had little to do with the merits of the case. But I regret that no other grounds have been found for reversal than such as I feel it my duty to enter my protest against.

The truth of the case is, that the plaintiff below was precluded from introducing evidence of a secondary nature, under a rule of practice of five or six years' standing in that circuit, the benefit of which was strenuously claimed by the opposite counsel. The court would have permitted the copy grant and copy power of attorney offered in evidence, to go to the jury, upon the proof of loss of the originals, which was introduced; but as all the

evidence which can be adduced in such cases will be found very generally to leave the case subject to the possibility that the deed (except in cases of positive destruction) may still be in the party's own hands, or of another for him; the experience of that court, as well as the practice of the state courts, and the received doctrine, that such proof is addressed to the legal discretion of the judge, *had caused that court to require, by rule, [*244
the expurgatory oath of the party, in a prescribed form, such as any man may take in an honest case. An affidavit of the plaintiff was tendered, but not in the form prescribed, and in a form which did not amount to a substantial compliance with the rule; since, the affidavit so tendered might have been made consistently with truth, and yet the deed may, by possibility, have been delivered into the keeping of the affiant's next-door neighbor; at least, so it appeared to that court. It is true, it was of old date, and even antecedent to this suit; but then the plaintiff was still in life, and at any hour within the six years since the rule was adopted, might have amended it.

It appears by the first bill of exceptions, that at the trial, the plaintiff's counsel first offered in evidence a certified copy of the grant, without offering, in any mode whatever, to account for the absence of the original; not even the defective expurgatory oath, already noticed; so that, *non constat*, but that the original was then on the table before him. The defendant's counsel objected, on the ground, "that such exemplification could not be received, until the original grant or patent was proved to be lost or detroyed, or the non-production thereof, otherwise legally explained or accounted for." This doctrine the court sustained; and this is now to be overruled, and the doctrine established, that "in the state of Georgia, a copy of a grant, certified by the secretary of state, is of the same dignity with the original grant, and *per se* evidence in ejectment."

Although I do not know that it would make any difference in the law of the case, yet it is necessary to examine this bill of exceptions carefully, to understand its true meaning. The copy tendered has been supposed to be authenticated under the seal of the state, and the printed brief states it to be under the great seal. The word great is not in the exception, and as the whole matter thus set out is made part of the bill of exceptions, by referring to it, it will be seen that the seal is only appended to the governor's certificate to the character of the officer who certifies it; and his certificate only goes to the fact, that the writings exhibited, are true copies from the record-book of surveys and the register of grants. It is not then *certified, [*245
that such a grant was made or issued, but only that the above is a "true copy from the register of grants:" which I propose to show is only a certified copy of a copy.

But the general principle involved in this decision is one of infinitely greater importance than a mere rule of evidence. It is no less than this; how far each state is to be permitted to fix its own rule of evidence, as applicable to its own real estate. The course of reasoning, I presume, on which this doctrine is to be fastened upon the jurisprudence of Georgia, is this: "such is the doctrine of the common law; and the common law being the law of Georgia, *ergo*, such must be the law of Georgia." But, until better advised, I must maintain, that neither the major nor minor proposition here can be sustained; that the one is incorrect in the general, the

other true only in a modified sense; and in that sense, will not support the doctrine of this bill of exceptions.

If it be the correct sense of the common law, that the exemplification of a patent is as good evidence as the patent itself, I am yet to be made acquainted with the authority that sustains the doctrine. I am sure, that *Page's Case*, 5 Co. 53, commonly cited as the leading case in its support, establishes no such principle. It relies expressly on the British statutes, for the sufficiency of the exemplification of the patent, and the right to use it in the *profert*, and the exemplification is introduced into the cause, in order to correct an alteration that had been made in the date of the original patent, the original being then also before the court.

But it would be a waste of time, to run over cases upon this question, when we know that the force or authenticity given to such exemplifications is derived from the statutes 3 & 4 Edw. VI., c. 4; and 13 Eliz., c. 6; and then only of patents since 27 Hen. VIII. Now, how is it possible, that such secondary evidence should have been good at common law, and yet need the aid of those statutes to sustain it? In the passage in the Institutes on this subject, the introduction of these exemplifications of patents is expressly treated as an exception to the general rule. Co. Litt. 225; Harg. Co. Litt. 314. That a patent is proved by its own seal, we find *laid
*246] down in many places, and has always been the law of Georgia.

On the other member of this syllogism, it is not to be questioned, that in Georgia, as well as in every other state in the Union, the common law has been modified by local views, and settled judicial practice. So that, were it generally true as laid down, that at common law, the copy of the grant was equal in dignity as evidence to the original, still, unless so recognised in Georgia, it is not the law of Georgia. Now, to say nothing of my own "*lucubrationes viginti annorum*," there is not a professional man in Georgia, who does not know, that such has never been the rule of judicial practice in that state. I may subjoin, in form of a note, the most ample proof on this subject, and there is a reason in the practice of their land-office for this principle, which is too well known to every man in that country, to leave a doubt of the correctness with which they have applied the rules of evidence to their actual practice in the trial of land causes. I make no doubt, that there are, at this moment, thousands of grants lying unclaimed in the land-office, every one of which has been copied into the register. The truth is, the grant is a separate thing from the true original; and the *fac-simile* of it (if it may be so called in the register) is nothing more than a copy; so that the paper here dignified with the epithet of an exemplification is nothing more than a copy of a copy, and therefore, always considered, in practice, as evidence of an inferior order.

The courts of that state have latterly relaxed in requiring evidence of loss; but even at this day, such evidence cannot be received in any of their courts, without an affidavit from the party presenting it, of his belief in the loss or destruction of the original. And there are other reasons in support of this practice: for instance, suppose, the copy on the register of grants should be found variant from the original, without imputation of fraud in the latter, it is unquestionable, that the original must prevail. So also, in case of interlineation, erasure or alteration of the original, why should the

party be permitted to escape the penalties of the law, by suppressing it, and producing a correct copy from the register?

The second bill of exceptions goes to the exclusion of the *copy deed, for want of a substantial compliance with the rule of court. If [*247 this court mean to express the opinion, that the rule was substantially complied with, it is one of those mere matters of opinion, which are not to be argued down. Certainly, the defect already mentioned is imputable to the affidavit that was tendered; and there was no want of time to have made it conform to the rule. But if it be insisted, that the court transcended its powers in making such a rule, then, may the practice of the state and United States courts from time immemorial, and the actual existing practice of the courts of the states at this day, as well as the reason of the thing, be urged in its vindication; and if it be objected, that the case was one in which the court below might have relaxed its rule; then it may be fairly asked, how is it possible for one mind to dictate to another on such a subject? It is an exercise of discretion, which can be limited and directed by no fixed rule.

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 Georgia, and was argued by counsel: On consideration whereof, it is considered and ordered by this court, that the circuit court erred in refusing to allow the exemplification of the grant to Basil Jones, mentioned in the record, to be read in evidence as in the exceptions of the plaintiff is mentioned. Whereupon, 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 award a *venire facias de novo*.[1]

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*Lessee of John Fisher, Plaintiff in error, *v.* William Cockerell, [*248
Defendant in error.

Constitutional law.—Error to state court.—Record.

After a judgment for the plaintiff in ejectment, in the Union county circuit court of the state of Kentucky, an *habere facias possessionem* was awarded, and on the succeeding day, on motion of the defendant, commissioners were appointed by the court, according to the provisions of the occupying claimants' law of Kentucky, to assess the damages and waste committed by the defendant, and the value of the improvements made on the land; the commissioners valued the improvements at $1350; F. did not appear on the return of the inquisition, and judgment was rendered against him for the sum so reported; afterwards, F. tendered a bill of exceptions stating that "he moved the court to quash the report of the commissioners appointed to value the improvements, assess the damages, &c., but the court refused to quash the same," to which opinion he excepted, and appealed to the court of appeals; a citation was issued by the clerk of the court of appeals, which was served; in that court, among others, F. assigned, as error, "the plaintiff deriving his title from Virginia, the act or acts of the state of Kentucky, on which the court has founded its opinion, is repugnant to the compact with Virginia, therefore, void as to the case before the court, being against the constitution of the United States."

To bring a case within the protection of the seventh article in the compact between Virginia and Kentucky, it must be shown, that the title to the land asserted is derived from the laws of Virginia, prior to the separation of the two states.

The clerk of the Union county circuit court certified, that certain documents were read in evidence,

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[1] For a further decision, see 9 Pet. 663.

and among them, a patent under which F. claimed, issued by the governor of Kentucky, founded on rights derived from the laws of Virginia. This court cannot notice such patent; it cannot be considered a part of the record.[1]

In cases at common law, the course of the court has been uniform, not to consider any paper as part of the record, which is not made so by the pleadings, or by some opinion of the court referring to it; this rule is common to all courts exercising appellate jurisdiction, according to the course of the common law; the appellate court cannot know what evidence was given to the jury, unless it is spread on the record in proper legal manner; the unauthorized certificate of the clerk, that any document was read, or any evidence given to the jury, cannot make that document, or that evidence, a part of the record, so as to bring it to the cognisance of this court. The court cannot perceive from the record in the ejectment cause, that the plaintiff in error claimed under a title derived from the laws of Virginia; it, therefore, cannot judicially know, that this suit was not a contest between two citizens claiming entirely under the laws of the state of Kentucky. When the record of the Union county circuit court was transferred to the court of appeals, the course of that court requires, that the appellant or the plaintiff in error shall assign the errors on which he means to rely; the assignment in that court contains the first intimation that the title was derived from Virginia, and that the plaintiff in error relied *249] on *the compact between those states; but this assignment does not introduce the error into the record, nor in any matter alter it. The court of appeals was not confined to the inquiry, whether the error assigned was valid in point of law; the preliminary inquiry was, whether it existed in the record; if upon examining the record, that court could not discover that the plaintiff had asserted any right or interest in land derived from the laws of Virginia; the question whether the occupying claimants' law had violated the compact between the states, could not arise.

In the view which has been taken of the record by the court, it does not show that the compact with Virginia was involved in the case; consequently, the question whether the act for the benefit of occupying claimants was valid, does not appear to have arisen; and nothing is shown on the record, which can give jurisdiction to this court.

A review of the cases of Harris *v.* Dennie, 3 Pet. 292; Craig *v.* State of Missouri, 4 Ibid. 410; Owing *v.* Norwood, 5 Cranch 344; Miller *v.* Nicholls, 4 Wheat. 312.

In the argument, the court has been admonished of the jealousy with which the states of the Union view the revising power intrusted by the constitution and laws of the United States, to this tribunal; to observations of this character, the answer uniformly given has been, that the course of the judicial department is marked out by law; we must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it will never, we trust, shrink from the exercise of that which is conferred upon it.

Error to the Court of Appeals of the state of Kentucky, to review a decision of that court, affirming a judgment of the Union county circuit court of that state, involving the validity of a law of the state of Kentucky, called the special occupying claimant law.

The action of ejectment was commenced in the circuit court of Union county, on the 20th of May 1822. At September term 1822, William Cockerell, the defendant, appeared, and at his instance, as well as of the plaintiff, an order of survey was passed, requiring the surveyor to lay off the land in controversy, as either party should require. The plaintiff in the ejectment, after the filing of his declaration, at September term 1822, had leave to withdraw the title papers filed by him, for the purpose of the survey, as was presumed. At June term 1823, a verdict and judgment was rendered for the plaintiff, on the demise of John Fisher, the plaintiff in error. On the other counts in the declaration, which stated other demises, a verdict and judgment was entered for the defendant. *The record *250] specified the written evidence in the cause as follows:

"The following patent was the only paper read in evidence in this

[1] S. P. Reed *v.* Marsh, 13 Pet. 153.

cause. The following deeds, to wit, John Fisher to Frederick Ridgeley, and Frederick Ridgeley and wife to James Morrison, were filed among the papers, but rejected by the court, and so marked by the court, to wit:" (The patent and deeds so referred to, were then set out in the transcript.) The patent purported to have been issued in the usual form, under the seal of the Commonwealth of Kentucky, and the hand of the governor, duly countersigned by the secretary of state, on the 15th of June 1802; and "that by virtue and in consideration of three military warrants, Nos. 1115, 1125 and 1153, and entered the 21st of July 1784, there is granted by the said commonwealth unto John Fisher (*habendum*, to him and his heirs for ever), a certain tract or parcel of land, containing 600 acres, by survey bearing date the 23d of May 1785, lying and being in the district set apart for the officers and soldiers of the Virginia continental line on the Ohio," &c. The metes and bounds of the granted lands were then specially set out in the patent. The two deeds referred to having been rejected as evidence, for some reason not stated, but to be inferred, from the informality of their authentication, and in consequence the issue on the two counts which those documents were adduced to support, having been found for the defendant, it is unnecessary to state their contents. The recovery was upon the title of the original patentee, John Fisher, alone.

The court then proceeded, on the motion of defendant, to appoint commissioners (in virtue and execution of the state law) "to go on the land from which the defendant has been evicted in this action, and make assessment of what damage and waste the defendant has committed since the 20th of May 1822 (when the suit was commenced), and the rent and profit accruing since the 17th of June 1822 (the day of appearance to the action), and the value of improvements made on said land, and of the value of said land at the time of such assessment, regarding it as if such improvement had never been made." The report of the commissioners was returned to March *term 1824, in which they say, "that there has been no injury or waste done upon the premises by the occupant, since the 20th of June 1823; and they assess the improvements made on the premises as follows:" [*251

Clearing and inclosing forty-six acres of land, at twenty dollars per acre,	920
Dwelling-house and various farm buildings,	430
	$1350

For this sum, the court gave judgment against the plaintiff; who moved to quash the said report, and tendered a bill of exceptions to the refusal of the court so to quash.

Upon this last judgment, the plaintiff sued out a writ of error to the court of appeals of Kentucky, and made a special assignment of the errors complained of, pursuant to the law and practice of that court. The error assigned was, "the plaintiff deriving title from Virginia, the act or acts of the state of Kentucky on which this court has founded its opinion, is repugnant as to the compact with Virginia; therefore, void as to the case before the court, being against the constitution of the United States." The court of appeals affirmed the judgment of the circuit court of Union county, and the plaintiff prosecuted this writ of error.

Wickliffe, for the defendant in error, moved to dismiss the writ of error, for want of jurisdiction in this court. He contended, that the case presented by the record did not give the court jurisdiction under the 25th section of the judiciary act of 1789. It is a writ of error to a state court, and there is nothing on the face of the proceedings, to show that the construction of an act of congress, or the obligation of a contract, was brought into question in that court. The record does not show the particular point decided by the state court; and this court cannot look at the reasoning of that court in giving its decision, to ascertain the same. The jurisdiction must be determined by the record. *Inglee* v. *Coolidge*, 2 Wheat. 363. It is denied, that the title papers are, by the law of Kentucky, required to be recorded, in an action at law. This requisition is confined to proceedings in chancery.

*252] *The question in the state court was, whether a law of Kentucky of 1820 or 1823, was in force? The act of 1820 was repealed, before this suit was brought, and no judgment of the state court was given, whether the act of 1820 was void or not. 1 Bibb 442; 2 Ibid. 236, 292, 331; 3 T. B. Monr. 202, 128; 3 A. K. Marsh. 431.

Jones, for the plaintiff in error.—The patent shows the title of the plaintiff was derived from the state of Virginia, and the patent is properly on the record. It is the duty of the clerk, and is so made by law, to record all the title papers introduced in evidence; and under this requisition of the law, the patent is made part of the record. As to jurisdiction: *Craig* v. *State of Missouri*, 4 Pet. 426. The title of the plaintiff being shown by the patent to rest on a patent from Virginia, his rights to protection under the compact are manifest; and he is entitled to the benefit of the decision of this court. *Green* v. *Biddle*, 8 Wheat. 1.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the court of appeals of Kentucky, affirming a judgment of the Union county circuit court of that state.

The plaintiff brought an ejectment in the Union county circuit court, against the defendant, and in June term 1823, obtained judgment; on which a writ of *habere facias possessionem* was awarded. On the succeeding day, it was ordered, on the motion of the defendant, "that Josiah Williams and others be and they are hereby appointed commissioners, who, or any five of whom, being first sworn, do, on the second Saturday in July next, go on the lands from which the said defendant has been evicted in that action, and make assessment of what damage and waste the said defendant has committed since the 20th of May 1822, and the rent and profit accruing since the 17th of June 1823, and of the value of improvements made on said land, at the time of such assessment, regarding it as if such improvements had not been made; all which they shall separately and distinctly specify, and report to the next term of this court, until which time this motion is continued."

*253] *The report of the commissioners was made to the September term following, and was continued. On the 15th of March 1824, it was, on the motion of the defendant, ordered to be recorded. The improvements were valued at $1350. John Fisher, the plaintiff in the ejectment, and defendant on this motion, did not appear; and judgment was rendered against him for the sum reported to be due for improvements. Afterwards,

to wit, on the 20th of the same month, the said Fisher appeared and tendered the following bill of exceptions, which was signed: "Be it remembered, that in this cause, the defendant moved the court to quash the report of the commissioners appointed to value the improvements, assess the damages, &c.; but the court refused to quash the same, to which opinion of the court the defendant excepts," &c. The said Fisher then appealed to court of appeals. A citation was issued by the clerk of the court of appeals, which was served. Among the errors assigned by the plaintiff in error, was the following: "The plaintiff deriving title from Virginia, the act or acts of the state of Kentucky on which this court has founded its opinion, is repugnant as to the compact with Virginia; therefore, void as to the case before the court, being against the constitution of the United States." The cause was argued in the court of appeals, in June 1827, and the judgment of the circuit court was affirmed. That judgment is now brought before this court by a writ of error.

The seventh article of the compact between Virginia and Kentucky is in these words: "That all private rights and interests of lands within the said district, derived from the laws of Virginia, prior to such separation, shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in this state." This is the article, the violation of which is alleged by the plaintiff in error. To bring this case within the protection, he must show that the title he asserts is derived from the laws of Virginia, prior to the separation of the two states. If the title be not so derived, the compact does not extend to it; and the plaintiff alleges no other error. The judgment in the ejectment is rendered on a general verdict, and the title of the plaintiff is not made a part of the *record, by a bill of exceptions, or in any other manner. The clerk certifies that certain documents were read in evidence on the trial, [*254 and among these is the patent under which the plaintiff claimed. This patent was issued by the governor of Kentucky, and is founded on rights derived from the laws of Virginia. Can the court notice it? Can it be considered as part of the record?

In cases at common law, the course of the court has been uniform, not to consider any paper as part of the record, which is not made so by the pleadings, or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction, according to the course of the common law. The appellate court cannot know what evidence was given to the jury, unless it be spread on the record, in proper legal manner. The unauthorized certificate of the clerk, that any document was read, or any evidence given, to the jury, cannot make that document, or that evidence, a part of the record, so as to bring it to the cognisance of this court. We cannot perceive, then, from the record in the ejectment cause, that the plaintiff in error claimed under a title derived from the laws of Virginia.

The order made after the rendition of the judgment directing commissioners to go on the land from which the defendants had been evicted, and value the improvements, contains no allusion to the title under which the land was recovered. The plaintiff in error might have resisted this order, by showing that his title was derived from the laws of Virginia, and thus have spread his patent on the record. He has not done so. On moving to

quash the report of the commissioners, a fair occasion was again presented, for making his patent the foundation of his motion, and thus exhibiting a title derived from the laws of Virginia. He has not availed himself of it. He has made his motion in general terms, assigning no reason for it; the judgment of the court overruling the motion is also in general terms. The record, then, of the Union county circuit court does not show that the case is protected by the compact between Virginia and Kentucky. This court cannot know judicially that it was not a contest between two citizens, each claiming entirely under the laws of that state.

*255] *When the record of the Union county circuit court was transferred to the court of appeals, the course of that court requires, that the appellant, or the plaintiff in error, should assign the errors on which he means to rely. This assignment contains the first intimation that the title was derived from Virginia, and that the plaintiff in error relied on the compact between the two states. But this assignment does not introduce the error into the record, nor in any manner alter it. The court of appeals was not confined to the inquiry, whether the error assigned was valid in point of law. The preliminary inquiry was, whether it existed in the record. If, upon examining the record, that court could not discover that the plaintiff had asserted any right or interest in land derived from the laws of Virginia, the question, whether the occupying claimants' law violated the compact between the states, could not arise.

The 25th section of the act to establish the judicial courts of the United States, which gives to this court the power of revising certain judgments of state courts, limits that power in these words, "but no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statute, commissions or authorities in dispute." If the view which has been taken of the record be correct, it does not show that the compact with Virginia was involved in the case. Consequently, the question whether the act for the benefit of occupying claimants was valid or not, does not appear to have arisen; and nothing is shown on the record which can give jurisdiction to this court.

The counsel for the plaintiff in error has referred to former decisions of this court, laying down the general principle, that the title under a treaty or law of the United States need not be specially pleaded; that it need not be stated on the record, that a construction has been put on a treaty or law, which this court may deem erroneous; or that an unconstitutional statute of a state has been held to be constitutional. It is sufficient, if the record shows that misconstruction must have taken place, or the decision could not

*256] have been made. *Harris* v. *Dennie*, 3 Pet. 292, is a *strong case to this effect. That case recognises the principle on which the plaintiff in error relies; and says, "it is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction from some act of congress, &c." But this misconstruction must appear from the facts stated, and those facts can be stated only on the record. In the case of *Harris* v. *Dennie*, a special verdict was found, and the court confined itself to a consideration of the facts stated in that verdict. Goods, in the custody

of the United States, until the duties should be secured, and a permit granted for their being landed, were attached by a state officer, at the suit of a private creditor. This fact was found in the special verdict, and the state court sustained the attachment. This court reviewed the act of congress for regulating the collection of duties on imports and tonnage, and came to the opinion, "that the goods in the special verdict mentioned were not, by the laws of the United States, under the circumstances mentioned in the said verdict, liable to be attached by the said Dennie, under the process in the said suit mentioned; but that the said attachment, so made by him, as aforesaid, was repugnant to the laws of the United States, and therefore, utterly void." In this case, no fact was noticed by the court which did not appear in the special verdict.

So, in the case of *Craig* v. *State of Missouri*. The parties, in conformity with a law of that state, dispensed with a jury, and referred the facts as well as law to the court. The court in its judgment, stated the facts on which that judgment was founded. It appeared from this statement, that the note on which the action was brought was given to secure the repayment of certain loan-office certificates, which a majority of the court deemed bills of credit, in the sense of the constitution. This statement of facts, made by the court of the state, in its judgment in a case in which the court was substituted for a jury, was thought equivalent to a special verdict. In this case, too, the court looked only at the record.

We say, with confidence, that this court has never taken jurisdiction, unless the case as stated in the record was brought within the provisions of the 25th section of the judiciary act. There are some cases in which the jurisdiction of *the court has been negatived, that are entitled to notice. *Owings* v. *Norwood's Lessee*, 5 Cranch 344, was an ejectment brought in the general court of Maryland, for a tract of land lying in Baltimore county. The defendant set up as a bar to the action, an outstanding title in a British subject, which, he contended, was protected by the treaty of peace. Judgment was given for the plaintiff, and this judgment being affirmed in the court of appeals, was brought before this court. The judgment was affirmed; and the court said, "whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected; but if the party's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be affected by the treaty." Upon the same principle, the person who would claim the benefit of the compact between Virginia and Kentucky must show, and he can only show it on the record, that his case is within that compact. [*257

The case of *Miller* v. *Nicholls*, 4 Wheat. 312, bears, we think, a strong resemblance to this. William Nicholls, collector, &c., being indebted to the United States, executed, on the 9th of June 1798, a mortgage to Henry Miller, for the use of the United States, for the sum of $59,444, conditioned for the payment of $29,271. Process was issued on this mortgage from the supreme court of the state of Pennsylvania; in March 1802, a *levari facias* was levied, the property sold, and the money, amounting to $14,530, brought into court, and deposited with the prothonotary, subject to the order of the court. On the 22d of December 1797, the said Nicholls was found, on a settlement, indebted to the commonwealth of Pennsylvania in the sum

of $9987.15, and judgment therefor was entered on the 6th of September 1798. These facts were stated in a case agreed ; and the following question was submitted to the court : "Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December 1797, was and is a lien from the date thereof, on the *real estate of the said William Nicholls, and which has since been sold as aforesaid ?" On a rule made on the plaintiff in error to show cause why the amount of the debt due to the commonwealth should not be taken out of court, the attorney for the United States came into court and suggested, "that the commonwealth of Pennsylvania, ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the suit, because the said attorney in behalf of the United States saith, that as well by virtue of the said execution, as of divers acts of congress, and particularly of an act of congress entitled an act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys, approved the 3d of March 1797, the said United States are entitled to have and receive the money aforesaid, and not the said commonwealth of Pennsylvania." Judgment was rendered in favor of the state of Pennsylvania, which judgment was brought before this court by writ of error. A motion was made to dismiss this writ of error, because the record did not show jurisdiction in this court, under the 25th section of the judiciary act. It was dismissed, because the record did not show that an act of congress was applicable to the case. The court added, "the act of congress which is supposed to have been disregarded, and which probably was disregarded by the state court, is that which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the court of Pennsylvania ; but that fact does not appear." In this case, the suggestion filed by the attorney for the United States, alleged in terms, the priority claimed by the government under an act of congress which was specially referred to. But the case agreed had omitted to state a fact on which the application of that act depended. It had omitted to state, that Nicholls was insolvent, and the priority of the United States attached in cases of insolvency only. In this case, the act of congress under which the United States claimed, was stated in the record, and the claim under it was expressly made. But the fact which was required to *support the suggestion, did not appear in the record. The court refused to take jurisdiction.

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In the case at bar, the fact that the title of the plaintiff in error was derived from the laws of Viginia ; a fact without which the case cannot be brought within the compact, does not appear in the record : for we cannot consider a mere assignment of errors in an appellate court as a part of the record, unless it be made so by a legislative act. The question whether the acts of Kentucky in favor of occupying claimants were or were not in contravention of the compact with Virginia, does not appear to have arisen ; and consequently, the case is not brought within the 25th section of the judiciary act.

In the argument, we have been admonished of the jealousy with which the states of the Union view the revising power intrusted by the constitution and laws of the United States to this tribunal. To observations of

this character, the answer uniformly given has been, that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped an ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it. The writ of error is dismissed, the court having no jurisdiction.

BALDWIN, Justice. (*Dissenting.*)—I am compelled to dissent from the opinion of the court in this case, for the following reasons: The certificate of the clerk of the court of appeals, attached to this record, is in these words: "I, Jacob Swigert, clerk of the court of appeals for the state aforesaid, do hereby certify, that the foregoing seventy-two pages contain a transcript of the record and proceedings in the case therein mentioned;" and I feel bound, on the preliminary question of jurisdiction, to consider all that is so contained to be a part of the record in this suit; so far, at least, as to give power to this court to examine whether the judgment of the court of appeals is erroneous or not.

On a motion to dismiss this cause for the want of jurisdiction, the only question which arises is, whether it comes *primâ facie* within the 25th section of the judiciary act? This must be decided on an inspection of the whole *record; and if it does appear that it presents any of the cases [*260 therein provided for, the motion must be refused. When the record comes to be judicially examined, this court may be of opinion, that though the question did arise which brings their powers into action, yet it did not come up in such a shape, or is not so stated in the record of the court of appeals, that this court can affirm or reverse it, for the specific cause assigned for error. If the question appears in any part of the record, it is enough, in my opinion, for jurisdiction. The manner in which it appears, seems to me, only to be examinable, after jurisdiction is entertained.

It appears on the record, that the plaintiff read in evidence, on the trial of the cause, a patent from Kentucky for six hundred acres of land, in pursuance of three military warrants, Nos. 1115, 1125 and 1153; entered on the 21st of July 1784, and surveyed the 23d of May 1785. The patent is set forth *verbatim*. As the state of Kentucky had no existence in 1784 or 1785, when these warrants were entered and surveyed, we cannot be judicially ignorant that these acts, as well as the issuing of the warrants, and the title founded on them, were under the laws of Virginia. As the compact between the two states is a part of the constitution of Kentucky, we cannot be ignorant of its existence, and that it relates to lands held in Kentucky under the laws of Virginia. After the plaintiff in ejectment had recovered judgment, it appears, that the court appointed commissioners to assess the value of the improvements made by the defendant on the land recovered from him by the plaintiff. The commissioners filed their report, awarding $1350; and the court rendered judgment for this sum. The parties were then reversed. Fisher, the defendant, moved the court to quash the proceedings; on their refusal, he sued out a writ of error from the court of appeals, summoning the plaintiff Cockerell, to "show cause, if any he can, why a judgment obtained by him against Fisher, in the Union circuit court, at the March term 1824, for $1350, the value of the improvements as assessed by the commissioners appointed under the occupying claimant law, besides costs,

should not be reversed, for the errors therein contained." *On the record being removed into the court of appeals, Fisher, among other reasons for reversing the judgment, assigned this: "The plaintiff deriving his title from Virginia, the act or acts of the state of Kentucky, on which the court has founded its opinion, is repugnant as to the compact with Virginia; therefore, void as to the case before the court, being against the constitution of the United States." The court gave a deliberate opinion on this exception, and adjudged the occupying claimant law to be constitutional, and affirmed the judgment of the circuit court.

All this appears in the seventy-two pages of the record, certified to us from the court of appeals. I do not feel authorized to declare, that what is so certified by the highest court is no part of the record, and judicially unknown to this court; nor when the record comes up, certified as one entire act, can I, on a question of jurisdiction, summarily decide, that one part is not as much within judicial cognisance as another. I cannot be ignorant that John Fisher, a plaintiff in ejectment, claimed under a patent to himself, founded on a warrant, entry and survey, made in Virginia, and under her laws, has recovered a judgment for his land; and that the defendant in the same suit has obtained a judgment against him for $1350, under the laws of Kentucky, which has been affirmed by the highest court in that state. In this, I cannot fail to see with judicial eyes, that the validity of a statute of a state has been drawn in question, on the ground of being repugnant to the constitution of the United States. It seems to me, to present the very question arising under the 25th section, clearly and definitely set forth, sufficiently explicit, at least, for jurisdiction, and containing, in my opinion, all the certainty requisite to enable this court to decide whether they will affirm or reverse the judgment of the court of appeals.

The court of appeals did not think, that the record of the circuit court did not bring the great question directly and distinctly for their consideration. It seems to me, that the fact of the plaintiff in ejectment being saddled with a judgment of $1350, at the suit of a defendant, for improvements, necessarily involves every question necessary to give this court jurisdiction. A *citizen of Kentucky has a right to question the validity of the occupying claimant law, on its alleged repugnancy to the constitution of the United States. Independent of the compact, this court would be bound to hear him on that question, on a writ of error from the court of appeals, on a title wholly emanating from Kentucky. It may be questioned, whether he could set up the compact, but he could, at least, claim the protection of the constitution in this court. This is all that is necessary for jurisdiction.

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We are not informed, that it is necessary in the circuit courts of Kentucky, for a party moving to quash a proceeding like the one contained in this record, to specify the grounds. This motion does not appear to have been overruled by that court for such a reason, but solely on the validity of the law; the judgment of the court of appeals was given expressly on the ground, that it was not repugnant to the constitution of the United States.

When the state courts decide the merits of a judgment in favor of the defendant in ejectment, for his improvements, I am not prepared to say, that their records are not cognisable here, and that the constitutionality of the law under which they are rendered, does not arise on the judgment itself:

and I do not know why we should be more astute to the mode in which a question is presented on a record, than the supreme court of a state. It is not a settled rule of law, that reasons for the motion should be assigned of record; that is a matter of practice to be regulated by rule. No reasons are assigned of record in this court, on motions to quash, or errors assigned on a judgment. They are stated to the court, and in my opinion, whenever a motion is made in any court, to quash any proceeding, the party moving may urge any reason showing it to be void, without specifying them on record, unless it is required by some rule. If the court of appeals had refused to consider the question, on the record of the circuit court, because the reasons and grounds of the motion were not or record, we might, if the rule of comity applies to decisions of state courts on questions affecting the jurisdiction of this court under the 25th section, have made their decision the rule for ours. But, in yielding to this objection, we consider the record of the circuit court in an aspect entirely different from *that in which it was viewed and solemnly acted on by the court of appeals. The [*263 occupying claimants' laws are public acts, of which all courts in Kentucky are bound to take judicial notice. The proceeding of Cockerell against Fisher was conducted under the immediate eye and order of the court: in its very nature, it imported to be taken under those laws. There were no other laws which would authorize such a judgment; and the validity of the judgment involved the validity of the law.

But I apprehend that it is not necessary to give jurisdiction to this court, that it should appear in the record of an inferior state court, that a question arises on the validity of a state law; we have only to look to the record of the court to which we may issue a writ of error, and whose judgment we must reverse or affirm; if it appears there, that the validity of a state law has been drawn in question, for the reason set forth in the 25th section, and that the decision of the highest court is in favor of its validity, the party against whom their judgment is given has a right to be heard in this court.

In this case, the writ of error from the court of appeals to the circuit court most distinctly alleges the judgment to have been under the occupying claimant law; the error assigned denies its validity, as repugnant to a compact and constitution; and the opinion and judgment of the court affirmed the validity. I cannot, therefore, consider this record as *coram non judice*. The question involved in it is as distinct to my mind, and as unavoidable, as special pleading can make; and the plaintiff in error has, in my judgment, an undoubted right to the opinion of this court, on the constitutional validity of the judgment rendered against him by the court of appeals of Kentucky.

This cause came on to be heard, on the transcript of the record from the court of appeals for the state of Kentucky, being the highest court of law in said state, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the writ of error in this cause be, and the same is hereby dismissed, for want of jurisdiction.

*James L. Cathcart and Jane his wife, John Woodside, Richard Smith, Richard Harrison, Joseph Anderson, Thomas T. Tucker, and William H. Crawford, Secretary of the Treasury, Appellants, *v.* William Robinson, Appellee.

Equity.—Specific performance.—Fraudulent conveyance.—Construction of statutes.

Excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent a decree for a specific performance; but though it will not, standing alone, prevent a court of chancery enforcing a contract, it is an ingredient which, associated with others, will contribute to prevent the interference of a court of equity.[1]

The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said, that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks; omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid; if, to any unfairness, a great inequality between the price and value be added, a court of chancery will not afford its aid.[2]

The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable; such subjects are within the settled and common jurisdiction of the court. It is equally well settled, that if the jurisdiction attaches, the court will go on to do complete justice; although, in its progress, it may decree on a matter which was cognisable at law.

The contract between the parties contained a stipulation, that the payment of the purchase-money of the property should be secured by the execution of a deed of trust on the whole amount of a claim the purchaser had on the United States; the penalty which was to be paid on the non-performance of the contract, being substituted for the purchase-money, it should retain the same protection.

A conveyance of the whole of his property by a husband to trustees, for the benefit of his wife and his issue, is a voluntary conveyance; and is, at this day, held by the courts of England, to be absolutely void, under the statute of the 27th Eliz., against a subsequent purchaser, even although he purchased with notice. These decisions do not maintain, that a transaction, valid at the time, is rendered invalid by the subsequent act of the party; they do not maintain, that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character; the subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

The statute of Elizabeth is in force in the district of Columbia.

The rule, which has been uniformly observed by this court, in construing statutes, is, to adopt the construction made by the courts of the country by whose *legislature the statute was enacted; this rule may be susceptible of some modification, when applied to British statutes which are adopted in any of the states; by adopting them they become our own, as entirely as if they had been enacted by the legislature of the state.

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The construction which British statutes had received in England, at the time of their adoption in this country, indeed, to the time of the separation of this country from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them; but however subsequent decisions may be respected, and certainly, they are entitled to great respect, their absolute authority is not admitted; if the English courts vary

[1] When the inadequacy of price is so great as to be conclusive evidence of fraud, specific performance must be denied. Seymour *v.* Delancy, 3 Cow. 445; s. c. 6 Johns. Ch. 222; Williston *v.* Williston, 41 Barb. 635.

[2] Chancery will not decree specific performance, unless the contract be fair, just and reasonable, equal in all its points, founded on an adequate consideration, and free from fraud, misrepresentation or surprise. Slocum *v.* Clossom, How. App. Cas. 705. It will not enforce specific performance of a hard or unconscionable bargain, or where the terms are unequal, or the plaintiff is seeking an undue advantage. Oil Creek Railroad Co. *v.* Atlantic & Western Railroad Co., 57 Penn. St. 65.

their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them.[1]

At the commencement of the American revolution, the construction of the statute of Elizabeth seems not to have been settled; the leaning of the courts towards the opinion, that every voluntary settlement would be deemed void as to subsequent purchasers, was very strong; and few cases are to be found, in which such conveyance has been sustained; but those decisions seem to have been made, on the principle, that such subsequent sale furnishes a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement, the burden of proving it, from the settlement itself, or from extrinsic circumstances, to be made in good faith; rather than as furnishing conclusive evidence, not to be repelled by any circumstances whatever.

There is some contrariety, and some ambiguity, in the old cases on the subject; but this court conceives, that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable consideration (fraud not to be repelled by any circumstances whatever) go beyond the construction which prevailed at the American revolution, and ought not to be followed.

A subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bonâ fide;* this principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Eliz., as it applies to this case.

Robinson *v.* Cathcart, 3 Cr. C. C. 377, reversed.

Appeal from the Circuit Court of the district of Columbia, for the county of Washington.

In the circuit court for the county of Alexandria, the appellant, William Robinson, filed a bill for the specific execution of a contract entered into between him and James Leander Cathcart, on the 10th of September 1822. The bill was filed in March 1829, and an injunction issued as prayed. Afterwards, in July 1829, the proceedings in the case were removed to Washington county, by a bill filed there, in which was incorporated the former bill and other matters, and introducing, as parties, the trustee of Mrs. Cathcart; and praying *that the injunction might be extended to him, and to the cashier of the bank of the United States, and the officers of the [*266 treasury, to prevent the payment over of a fund, alleged in the bill to be pledged for the performance of the contract. The circuit court gave a decree in favor of the complainant, and Mr. Cathcart appealed to this court.

The case was argued, at January term 1830, by *Coxe* and *Key*, for the appellants; and by *Lee* and *Jones*, for the appellee. The case was held under advisement, until this term, when—

Marshall, Ch. J., delivered the opinion of the court.—This is a suit in chancery, brought by the appellee, in the court of the United States for the district of Columbia, to enforce the specific performance of a contract entered into between him and James L. Cathcart, one of the appellants, for the sale and purchase of a tract of land, called Howard, lying in the county of Alexandria; and also to subject a claim of the said Cathcart on the United States, under the provisions of the 11th article of the treaty with Spain, signed at Washington, on the 22d of February 1819, to the payment of the purchase-money.

The agreement, which was executed on the 10th of September 1822, stipulated, that Robinson should convey to Cathcart the place called

[1] See Tayloe *v.* Thomson, *post*, p. 358; Kendall *v.* United States, 12 Pet. 527; Kirkpatrick *v.* Gibson, 2 Brock. 388.

Howard, as soon as a proper deed could be made; that Cathcart should pay therefor the sum of $8000, by instalments; the first payment of $5000 to be made on the 1st of January 1825, and the residue, in three equal annual payments, to commence from that time. To secure these payments, Cathcart agreed to execute four bonds, bearing interest from the 1st day of January 1825; and, as a further security, to execute a deed of trust, with his wife's relinquishment of dower, upon Howard, and likewise on the total amount of his claim on the United States, under the provisions of the 11th article of the treaty with Spain, signed at Washington on the 22d of February 1819: and the contract concluded with the following words: "In further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of $1000." *At the date of this agreement, *267] Howard was in possession of a tenant, John T. O. Wilbar, who had a right to hold the premises till the end of the year. Under an arrangement with Cathcart, he surrendered possession of the place, soon after the purchase was made. Previous to the contract of the 10th of September 1822, on the 10th of November 1818, James L. Cathcart executed a deed conveying to John Woodside, the father of Mrs. Cathcart, for her benefit, all his property, including his claim under the Spanish treaty. This deed of conveyance, is recorded in the proper office for the recording of deeds conveying lands, in the city of Washington.

The answer of Cathcart resists the claim for the performance of the contract, on three grounds: 1. That he was induced to enter it by the fraudulent misrepresentations of the plaintiff. 2. That the price was excessive. 3. That he executed the contract, under an impression, sanctioned by the conduct of the plaintiff, that at any time before its completion, he might release himself from it by paying the penalty of $1000.

The answer of Woodside claims the Spanish fund, as trustee for Mrs. Cathcart; denies being consulted about the purchase of Howard, or that he was party or privy to the contract; and avers, that he never assented to any appropriation of that fund, to purchase any estate from Robinson.

The misrepresentations alleged in the answer respect the boundaries of Howard, its value, and its fitness for an academy, the purpose for which it was avowedly purchased. At the date of the contract, Robinson was in possession of a small adjoining tract, called Riddle's, his title to which was incomplete, a part of which, comprehending a peach orchard, was within the fence that inclosed Howard. The answer charges, that Robinson represented all the land within this fence as being part of the Howard tract. As this allegation avers new matter, not responsive to the bill, it cannot be regarded, unless it be proved.

Miss Amelia H. Cathcart deposes to the truth of the statements of conversations when the agreement was executed, which are contained in an affi- davit previously made by James Hutton. She adds, "I *likewise am *268] willing to declare on oath, that William Robinson stated, that Howard was a beautiful place, that it was remarkably healthy, that it had a great deal of fruit on it, and a fine peach orchard up by the fence, or near the fence, that divided Howard from Riddle's place." She adds, that the family believed, that the peach orchard was on Howard, and that the fence which Mr. Robinson referred to, was the division line between the Howard estate and Riddle's place. The peculiar language of the witness, that she

"is willing to declare on oath," what William Robinson stated, instead of declaring expressly what he did state, may be an accidental form of expression, not entitled to much attention. If we understand the deponent as averring on oath, what she declares she is willing to aver on oath, she represents Mr. Robinson as saying, that Howard had on it a fine peach orchard, near the fence that divided it from Riddle's place. This implies that the fence was the dividing line between the two places, which would be a misrepresentation of boundary.

It is difficult to assign a reason for this voluntary and useless misrepresentation. It is understood to have been made on the day on which the contract was signed. It could not be as an inducement to the contract, because that was formed previously. In a letter of the 9th of September, addressed to Wilbar, the tenant, Robinson informs him, that the farm is sold to Cathcart, who was extremely desirous to take immediate possession; and he had assured him, that Wilbar was willing to accommodate him immediately; he, therefore, requests Wilbar to deliver possession. The misrepresentation, therefore, at that time, could be of no avail. Mr. Cathcart, in his answer, does not aver, that it was made at that time. He says, that having advertised his desire to purchase a small farm, where he might establish a boarding school, the defendant offered him Howard as a place adapted to this purpose. The complainant afterwards visited this place, but did not see the defendant, who resided at a considerable distance from it. The farm was occupied by a tenant. Mr. Cathcart says, that, after this visit, Robinson informed him, that all the land, between the fence near the brick house (on the place called Riddle's) and the house on Howard, belonged to Howard place. He does not say, when this communication was made.

*James Hutton, one of the witnesses to the contract, was examined. He deposes expressly and particularly to the conversation [*269 respecting the penalty of $1000, but is silent as to that respecting the boundary of Howard.

In his letter of the 17th of August 1822, in which Robinson states the terms on which he will sell Howard, he says, "The forty acres adjoining I would sell to you for $2000, &c." "This is the place whereon the brick house, built for a wagon tavern, stands. It has a good well of water at the door, and orchard of fine fruit." That part of the letter which respects Howard is silent respecting fruit.

On the 29th of October, Robinson addressed a letter to Cathcart, stating, that he had performed his part of the agreement, and requesting Cathcart to call on Mr. Jones, who would deliver him a deed, regularly executed, for Howard, on receiving the papers which were to be executed on the part of Cathcart. This letter was answered on the 14th of December. Mr. Cathcart expresses his willingness to give the security proposed, but objects to incurring any expense in the preparation of the papers. It is answered more particularly, on the 8th of February 1823. In this letter, he says, he had called twice on Mr. Jones, but had found that gentleman too much occupied to attend to the business in question. He adds, "I am in no hurry for the deed, although the plot of the land would be of service, and would indicate what part of the land appertains to Howard." "The land" is a term which must apply to Howard and Riddle's place; because both were

the property of Robinson, and had been occupied by Wilbar. The expression is, with difficulty, to be reconciled to an opinion, that the fence was the dividing line between them. The same inference may be drawn from Cathcart's letter of the 24th of August 1822, announcing his determination to make an offer for Howard, not differing essentially from the proposals of Robinson. After expressing his expectation of being permitted to hold Riddle's place, as Wilbar held it, and that he should be preferred as a purchaser, on the same terms, to any other person, when Robinson should complete his title to it, he adds, as a proviso to his offer, "that if I do not purchase it, I shall not be put to any expense in the division and fencing off the said." The word "said" must refer to Howard place, and *indicates a knowledge, at that time, that it was not divided from Riddle's by the fence.

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In the early part of June 1823, Thompson F. Mason, on the part of Robinson, waited on Cathcart, to complete the transaction, by obtaining his signature to the necessary papers. Cathcart declined signing them, and declared his determination to relinquish the purchase and pay the penalty. He said nothing to Mason of any misrepresentation made by Robinson. In a letter to Mason, written soon afterwards, he enumerates all his objections to the conduct of Robinson, and does not include his misrepresentation respecting the boundary of Howard among them, although he does complain of having Riddle's place. He also says, "in one of my letters, I requested Mr. Robinson to send me the deed of Howard." The reason is explained in another letter, "as I wish to know the boundaries, for as yet I know not its extent."

On the 21st of April 1824, Cathcart wrote again to Mason. In this letter, after professing to take a brief retrospect of the premises, he again enumerates his causes of complaint against Robinson, and does not place the misrepresentation of boundary among them.

Upon this review of the testimony in the cause, the court is of opinion, that the charge of misrepresentation respecting the boundary of Howard is not supported. It is quite probable, as the views of the appellant and of his family were directed to the adjoining place, called Riddle's, as well as to Howard, places then occupied by the same tenant, that the witness might not have distinguished exactly between the places, and might have applied to one, expressions intended for the other. Cathcart himself may also have confounded the conversations with each other. The answer also charges the complainant with misrepresentation as to the fitness of Howard for an academy, and as to the value of the property.

So far as its fitness for an academy depended on situation or on the buildings, Cathcart was capable of deciding for himself, and must have acted on his own judgment—so far as it depended on health, the testimony in the cause proves that general reputation was in its favor, and that *families from the city sometimes repaired to it for the sake of health. Robinson's representation was mere matter of opinion, and the record affords no reason for believing it was not his real opinion. It is true, that Cathcart's family, after settling on the place, was sickly; but this circumstance may have been produced by other causes, and is not certainly attributable to the place.

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On the subject of value, the answer charges Robinson, not with any

positive assertion that the property was worth a specific sum, but that it had cost him more than $8000, and that he had held it at $10,000. The assertion that the property cost him more than $8000, is proved, and that he had held the property at $10,000 is not disproved. Mr. Peake deposes that he, sometime in 1822, was engaged in a negotiation with Robinson, the object of which was the exchange of some property in Alexandria for Howard. He has an indistinct impression that the cash value set upon Howard at that time was $5000, but does not know, that it was derived from Robinson. This witness certainly does not prove at what price Robinson had held Howard; and we think that misrepresentation is not justly imputable to him.

The second objection to a specific performance is the excessive price at which it was sold. Without recapitulating the testimony on this point, we can say it proves quite satisfactorily, that Howard was sold beyond its real value at the time. If the witnesses are to be believed, and there is no reason to doubt them, $5000 would have been a full price for it. But Robinson had given more for it, and might estimate it himself, higher than it was estimated by others. The value of real property had fallen; its future fluctuation was matter of speculation. At any rate, this excess of price over value, if the contract be free from imposition, is not, in itself, sufficient to prevent a decree for a specific performance. But, though it will not, standing alone, prevent a court of chancery from enforcing a contract, it is an ingredient, which, associated with others, will contribute to prevent the interference of a court of equity. We must bear it in mind, while *considering the next objection made by the plaintiffs in error to the decree of the circuit court. [*272

Cathcart alleges in his answer, that at the time of executing the articles of agreement, he explicitly and peremptorily refused to insert the sum of $20,000, which the complainant had proposed as a penalty for the non-fulfilment of the agreement; and also the sum of $10,000, which was afterwards proposed; that he then refused to agree to any large penalty, assigning as his reason, that he had been long in the service of government, and was then an applicant for an appointment, that he might be sent abroad or to some other part of the United States, when it would be more for his interest to pay the forfeiture than to comply with the contract. "And he positively avers, that the sum of $1000 was inserted, with the full belief on his part, that he might either take the property at the stipulated price, or pay the said sum, at his option; and that the agreement was executed by said complainant, with full knowledge that such was the belief and understanding of this defendant." Cathcart has been uniform in declaring, that this was the understanding with which he executed the agreement.

James Hutton, a subscribing witness, deposes, "that while Cathcart was drawing the articles in form, from notes which had been prepared by Robinson, he was interrupted by a remark made by one of the parties, the deponent does not recollect which, suggesting the propriety of providing for the payment of a pecuniary forfeiture, in the event of a non-performance of the stipulations of the agreement by either of the parties. The said Carthcart referred to the said Robinson, to say how much the said penalty should be, to which the said Robinson answered, he did not care how much, it made no difference to him, or words to that amount, and added $20,000. To this the said Cathcart decidedly and promptly objected, and refused to accede to,

declaring it to be entirely too much, and assigned as the reason for his objection, that he had passed a large part of his life in the public service, was then endeavoring to, and had the expectation of being again employed; in which case, it might become more to his advantage to give up the place; and
*273] the expected employment *might be such as indeed to justify and enable him to pay the smaller penalty, if he found it necessary or expedient to violate the agreement, though it should not be such as to enable him to pay the larger one. He then stipulated $1000 as the amount of the penalty, to which the said Robinson acceded, under (as it clearly appeared to the witness) a full understanding of the privilege of relinquishment reserved by the said Cathcart, on the payment of the penalty of $1000 as aforesaid; which said sum of $1000 was inserted as the amount of the penalty in the articles of agreement, which were then and there (as before declared) made out in duplicates, and signed by the said Cathcart and Robinson as parties thereto, and by myself and another person (now deceased) as witnesses thereto." This testimony was first given by Hutton in July 1824, in the form of an *ex parte* affidavit; and was afterwards verified by a deposition. Miss Amelia H. Cathcart deposes to the truth of the statement made in the affidavit of James Hutton.

Charles William Cathcart was passing sometimes in and sometimes out of the room, while the parties were reducing the agreement to form, but recollects perfectly that J. L. Cathcart, Sen., objected to the penalty of $20,000; and said, if the penalty was more than $1000, he would not make an agreement with Mr. Robinson.

James L. Cathcart, jr., deposes to the declaration of his father, that unless the penalty was made small, and such as he could pay, he would make no agreement, whatever, because he expected to get some appointment soon; and if, in that case, he relinquished the agreement, Mr. Robinson would receive at the rate of $500 a year for his place. He would agree to pay a penalty of $1000, but nothing more; and if Robinson did not agree to this sum, he would break off the negotiation. Robinson then agreed to this proposal.

If these witnesses are entitled to any credit, if they have not concurred in fabricating conversions which never took place, Cathcart signed the agreement, in the full belief that he might relieve himself from it by paying the penalty. This belief was openly expressed, was communicated to
*274] *Robinson, and the penalty was reduced, by consent, to $1000, on the condition on which alone Cathcart would agree to sign the contract. The credibilty of this testimony has been attacked, and it must be admitted, that it appears under circumstances not entirely free from suspicion. It would have been more satisfactory, had the depositions been all taken in the usual manner; but the reputation of all the witnesses stands unimpeached, and the conduct of Robinson has no tendency to discredit them.

Cathcart's refusal to execute the contract was founded in part on the alleged misrepresentations of Robinson, but chiefly on the right, reserved expressly, when he signed the agreement, of relieving himself from it, by the payment of the penalty. This right was asserted in terms, and accompanied by a statement of circumstances, which might be expected to induce Robin-

son to controvert the fact, if it was untrue. It does not appear, that he has ever controverted it.

In the conversation which took place with Mason, when, as the attorney of Robinson, he called on Cathcart to complete the transaction, by executing the papers which had been prepared for the purpose, this objection was fully and strongly stated; and the answer of Mason was, that he mistook the law, and that it was advisable for him to consult counsel upon the subject. After consulting counsel, Cathcart addressed a letter to Mason, as the agent of Robinson. In this letter, he states at large, his objections to the completion of the contract. On this subject, he says, when the penalty of the agreement was in discussion, Mr. Robinson proposed to make it double the amount of the purchase, *i. e.* $16,000. This I objected to *in toto*, and before the subscribing witnesses and a number of the members of my family, for the agreement was made in my house, I assigned as my reason for objecting so heavy a penalty, that I had been in public service for many years, and was a candidate for an appointment under government. That it might happen, that I would be sent abroad, or to some other part of the country; when, in that case, it would be more to my interest to forfeit the penalty, than to comply with the terms of the agreement; and under the impression that Mr. Robinson might either re-assume possession, or that I might cancel the *agreement by paying the penalty, it was agreed [*275
to make it $1000; and the last time Mr. Robinson was at my house, he acknowledged that he verily believed that I was under the above impression, when I signed the agreement. Does, then, Mr. Robinson really wish to take advantage of my supposed ignorance, knowing it at the time? I trust not." This letter was, of course, transmitted to Robinson, and returned by him to Mason, with some remarks on it, respecting the price at which Howard had been sold, and respecting his own propositions to Cathcart. No notice is taken of what is said respecting the penalty. A charge which might be expected to be repelled with some indignation, if untrue, is passed over in total silence. The letter, with the remarks of Robinson, is annexed to the deposition of Mason.

John B. B. Carden, to a question propounded by the plaintiff in error, answers, that in the latter end of June, or beginning of July 1824, he met Robinson, near Alexandria, and was informed by him, that he had secured all the money Cathcart had in the treasury; but as that was not enough, he would have it (Howard) put up to sale and buy it in himself. "I suggested to Mr. Robinson (continues the witness), the difficulty on account of the conveyance to Mrs. Cathcart and children, to which Mr. Robinson replied, that he had it safe enough, that he had not seen the $1000, but that he knew how to manage it."

These circumstances, taken together, satisfy the court, not only that Cathcart signed the agreement, believing that it left him at liberty to relieve himself from it by paying the penalty, but that Robinson knew how he understood it. Cathcart insisted on reducing the penalty to $1000, that, should a change of circumstances make it advantageous, he might be enabled to relieve himself from it, by the payment of a sum he thought within his resources. He insisted on this, as the condition on which alone he would sign the agreement. He stated the object for which the condition was

demanded. Robinson, without hinting that the object would not be obtained by the condition, assented to it, and the agreement was signed.

*276] If this be a correct view of the transaction, it is not simply *an instrument executed by a person who mistakes its legal effect, as it would have been, had it been prepared with a penalty of $1000, and silently executed by Cathcart in the full conviction that it left him the option to perform the contract or to pay the penalty; it is something more. The assent of Robinson to this reduction of the penalty, when demanded, avowedly for the purpose of enabling Cathcart to terminate his obligation by paying it, is doing something active on his part to give effect to the mistake, and turn it to his advantage. It is, in some measure, co-operating with Cathcart in the imposition he was practising on himself. Had Robinson induced Cathcart to sign this agreement, by suggesting that, in point of law, he might relieve himself from it, by paying the penalty, a court of equity would not aid him in an attempt to avail himself of the imposition. The actual case is, undoubtedly, not of so strong a character. No untruth has been suggested; but if Robinson knew that Cathcart was mistaken, knew that he was entering into obligations much more onerous than he intended, that gentleman is not entirely exempt from the imputation of suppressing the truth.

This is not a bill to set aside the contract. Cathcart does not ask the aid of equity. He asks that the parties may be left to their legal rights, or that the contract shall be enforced no further than as avowedly understood at the time of its signature. The difference between that degree of unfairness which will induce a court of equity to interfere actively, by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Cox 77. It is said, that the plaintiff must come into court with clean hands; and that a defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid. 1 Madd. Ch. 405. If, to any unfairness, a great

*277] inequality *between price and value be added, a court of chancery will not afford its aid. 2 Cox 77. In the case of bar, this inequality is very considerable. This inequality gives importance to the mistake under which the purchaser executed the agreement; a mistake to which the vendor contributed, by consenting to reduce the penalty to the sum which the vendee said he could pay, should circumstances make it his interest to absolve himself from the contract by its payment.

But as the plaintiff in error has entirely failed in supporting that part of his answer which alleges such misrepresentation on the part of the vendor, as would turn him out of court; as his whole equity consists in a right to surrender the land, and pay the stipulated penalty, instead of performing the whole agreement, by receiving the land and paying the purchase-money; as he insists upon this, as being the true spirit of the contract, according to his understanding of it, which understanding was contenanced by the conduct of the vendor at the time; every principle of equity and fair dealing requires, that he should do what he claims the right to do, in order to relieve himself from the still more onerous pressure of a contract into which

he has voluntarily entered. He ought to pay the penalty, as the equitable condition on which alone he can be permitted to resist a decree for a specific performance of the whole.

It has been argued by the defendant in error, that the subsequent conduct of Cathcart; his eagerness to take possession of the property; his apparent satisfaction with it; his willingness to complete the transaction, by executing the necessary papers, and receiving the deeds, as was manifested in his conversations with Mr. Jones; his entire silence on the subject of relinquishing the contract and paying the penalty, until June 1823, when his scheme of an academy had failed, and when he communicated this intention to Mason, the attorney of Robinson; his failure even then to tender the penalty; are circumstances which ought to deprive him of this defence. We do not attach quite so much importance to these circumstances, as is attached to them by the defendant in error.

Undoubtedly, Cathcart was satisfied with his contract, on the 10th of September 1822, or he would not have entered *into it. Yet, at this time, he stipulated, as he supposed, for the right to relieve himself [*278 from it, on the payment of $1000. The time during which this privilege should continue was not fixed. By what is it to be limited? The mind can prescribe no other limitation than while the contract continued executory. Had the parties executed the contract, without inserting this privilege, it must have been terminated; but while the contract remained executory, it retained its original force, unless expressly or impliedly released. The failure of Cathcart to tender the penalty would have some weight, was it not accounted for by the circumstances of the case. It was perfectly understood, that Robinson would not receive it, and the only fund from which it could have been raised, the Spanish claim, was bound to him. The court, therefore, does not perceive in this conduct of Cathcart sufficient cause to overrule his defence.

It has been urged by his counsel, that if the penalty only can be decreed, this bill ought to be dismissed, because the penalty might have been recovered at law. We do not think so. The right of a vendor to come in to a court of equity to enforce a specific performance, is unquestionable; such subjects are within the settled and common jurisdiction of the court. It is equally well settled, that if the jurisdiction attaches, the court will go on to do complete justice, although, in its progress, it may decree on a matter which was cognisable at law. Robinson could not have sued for the penalty at law, without abandoning his right to enforce the contract of sale. He could not be required or expected to do this. Consequently, he came properly into a court of equity, and the court ought to do him justice. It ought to direct Cathcart to pay that which he says was to be, according to his understanding, a substitute for the principle subject of the contract. In addition to these considerations, the application to this court to subject the Spanish fund to the claim, is unquestionably proper.

Cathcart also attempts to oppose some equitable set-offs to this penalty, the money, he paid to Wilbar to obtain immediate possession, and the expenses incurred for repairs which Wilbar ought to have made. Robinson did not undertake to deliver possession until *the 1st of January [*279 1823. The right of Wilbar to retain the premises to that time was perfectly understood. If Cathcart's impatience to obtain immediate posses-

sion induced him to make a very improvident and losing contract with Wilbar, it furnishes no pretext for throwing that loss on Robinson.

If, then, Cathcart ought not to be coerced to receive the deed for Howard, and to pay the purchase-money, because he believed, and was encouraged by Robinson to believe, that he had introduced a clause into the agreement which would permit him to abandon the contract on the payment of $1000, he cannot be permitted to abandon it, but on the payment of that sum; and the court ought, when it refuses to compel him to pay the purchase-money, to decree him to pay the penalty, if Robinson shall prefer receiving it, to a resort to his remedy at law.

A point of considerable importance to the parties remains to be considered. Cathcart, in the contract of the 10th of September 1822, agreed to secure the payment of the purchase-money for Howard, by the execution of a deed of trust "on the total amount of his claim on the United States, under the provisions of the 11th article of the treaty with Spain." If the penalty be substituted for the purchase-money, it should certainly retain the protection of the same security. But the plaintiff in error alleges, that he had disabled himself from complying with this part of the contract, by his previous conveyance of this fund to John Woodside in trust for Mrs. Cathcart and her issue.

This, being a voluntary conveyance, is, at this day, held by the courts of England to be absolutely void, under the statute of 27 Eliz., against a subsequent purchaser, even although he purchased with notice. 1 Madd. Ch. 271; 18 Ves. 110; 2 Taunt. 523. Their decisions do not maintain, that a transaction, valid at the time, is rendered invalid by the subsequent act of the party. They do not maintain, that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

*280] *The statute of Elizabeth is in force in this district. The rule, which has been uniformly observed by this court in construing statutes, is, to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states; by adopting them, they become our own, as entirely as if they had been enacted by the legislature of the state. The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and, certainly, they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

At the commencement of the American revolution, the construction of the statute of 27 Eliz. seems not to have been settled. The leaning of the courts towards the opinion, that every voluntary settlement would be deemed void, as to a subsequent purchaser, was very strong; and few cases are to be found, in which such conveyance has been sustained. But these

decisions seem to have been made on the principle, that such subsequent sale furnished a strong presumption of a fraudulent intent; which threw on the person claiming under the settlement, the burden of proving it, from the settlement itself, or from extrinsic circumstances, to be made in good faith; rather than as furnishing conclusive evidence, not to be repelled by any circumstances whatever. There is some contrariety and some ambiguity in the old cases on the subject; but this court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable consideration—fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the American revolution, and ought not to be followed. The universally received doctrine of that day unquestionably *went as far as this: a subsequent sale, without notice, by a person who [*281 had made a settlement, not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bonâ fide*. This principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Eliz., as it applies to this case.

The strong presumption of fraud arising from the subsequent conveyance to Robinson, is not repelled by a single circumstance. On the contrary, all the circumstances which can be collected from the record come in aid of it. The conveyance to Woodside, so far as we can judge from the evidence in the cause, contained all or nearly all the property of Cathcart. He continued to act as the owner of it. His correspondence shows, that he offered even the lots in Washington for sale, and he undoubtedly appeared as the absolute owner of this Spanish claim. His negotiations with Robinson respecting it appear to have been carried on openly; and there is no reason to believe, that they were unknown to his family or his trustee. The agreement by which he bound it to Robinson, was signed at his own house, in the midst of his family; and his want of power over the subject was never suggested. It is also worthy of observation, that Mrs. Carthcart, in January 1824, after the determination to relinquish the contract for Howard, addressed a letter to the trustee, requesting him to make an assignment of this claim, for the purpose of paying debts contracted by Cathcart. We think, therefore, that under all the circumstances of this case, the conveyance to John Woodside, on the 10th of November 1818, in trust for Mrs. Cathcart and her children, does not withdraw the property in question from the claim of Robinson, he being a subsequent purchaser without notice.

It is the opinion of this court, that the circuit court erred, in decreeing the defendant in that court to receive a conveyance for the tract of land in the proceedings mentioned, called Howard, and to pay therefor the purchase-money stipulated in the contract, dated the 10th of September 1822; and that so much *of the said decree ought to be reversed: and that the [*282 cause be remanded to that court, with instructions to reform the said decree, so far as to direct the defendant to pay the penalty of $1000, with interest thereon from the time the money due from the government, and enjoined by order of that court, was directed to be placed out at interest, and to direct the title papers filed in the cause by the complainant to be re-delivered to him. But if the complainant shall prefer to pursue his

remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the circuit court erred in decreeing the defendant in that court to receive a conveyance for the tract of land in the proceedings mentioned, called Howard, and to pay therefor the purchase-money stipulated in the contract, dated the 10th of September 1822, and that so much of the said decree ought to be reversed; and that the cause be remanded to that court, with instructions to reform the said decree, so far as to direct the defendant to pay the penalty of $1000, with interest thereon from the time the money due from the government, and enjoined by order of that court, was directed to be placed out at interest, and to direct the title papers filed in the cause by the complainant to be re-delivered to him. But if the complainant shall prefer to pursue his remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice. Whereupon, it is ordered, adjudged and decreed by this court, that the circuit court erred, in decreeing the defendant in that court to receive a conveyance for the tract of land in the proceedings mentioned, called Howard, and to pay therefor the purchase-money stipulated in the contract, dated the 10th of September 1822: and that so much of the said decree 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
*283] reform the said *decree, so far as to direct the defendant to pay the penalty of $1000, with interest thereon from the time the money due from the government, and enjoined by order of that court, was directed to be placed out at interest, and to direct the title papers filed in the case by the complainant to be re-delivered to him. But if the complainant shall prefer to pursue his remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice.

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*284] *The State of New Jersey, Complainant, *v.* The People of the State of New York.

Actions against states.

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution.

It has been settled, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution, and existing acts of congress; the rule respecting the process, the persons on whom it is to be served, and the time of service, is fixed; the course of the court, after due service of process, has also been prescribed.

In a suit in this court instituted by a state against another state of the Union, the service of the process of the court on the governor and attorney-general of the state, sixty days before the return-day of the process, it is sufficient service.

At a very early period in our judicial history, suits were instituted in this court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

After due service of the *subpœna*, the state which is complainant, has a right to proceed *ex parte*; and if, after the service of an order of the court for the hearing of the case, there shall not be an appearance, the court will proceed to a final hearing.

New Jersey v. New York.

No final decree or judgment having been given in this court against a state, the question of proceeding to a final decree is not conclusively settled in this case, until the cause shall come on to be heard in chief.

The cases of the State of Georgia *v.* Brailsford; Oswald *v.* State of New York; Chisholm's Executors *v.* State of Georgia; State of New York *v.* State of Connecticut; Grayson *v.* Commonwealth of Virginia, cited, as to the jurisdiction and modes of proceeding in suits in which a state is a party.

Wirt, for the complainant, stated, that the *subpœna* had been regularly served, upwards of two months, and there was no appearance on the part of the state of New York.

The 17th section of the judiciary act of 1789, authorizes the court to make and establish all necessary rules for the conducting the business of the courts of the United States; this court has such a power, without the aid of that provision of the law. The seventh rule of this court, which is applicable to this matter, was made at August term 1791. "The Chief Justice, in answer to the motion of the attorney-general, informs him and the bar, that this court consider the practice of the court of king's bench and of chancery, in England, as affording outlines for the practice of this court; and that they will, from *time to time, make such alterations therein as circumstances may render necessary." (1 Pet. xxiii.) In 1796, [*285 the tenth rule was adopted: "Ordered, that process of *subpœna* issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, should not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." (Ibid. xxiv.)

Construing these two rules together, they bring us, in the case before the court, to that part of the English practice where the party may proceed to a hearing. There is no necessity for those proceedings here, which are resorted to in England to compel an appearance; nor would the practice in England be proper in the case before the court. The object of the bill is, to quiet a title; it is a bill of peace. Here, the rule considers the party, when served with process, in the same situation as if he had appeared.

The question is, what is to be done, when all the process to compel an appearance is exhausted? what is the next step? It is to take the bill *pro confesso;* but in England, formely, by a standing rule in chancery, before this can be done, the party must have appeared. Afterwards, to prevent the process of the court being eluded, the statute of 25 Geo. II. was enacted, by which it was provided, that if no appearance was entered by one who had absconded, the court would make an order for an appearance, and if no appearance was entered, the bill should be taken *pro confesso*. This statute regulated the practice in the courts of chancery of England in 1791, when the seventh rule of this court was adopted. But this statute applied only to the case of a party absconding, and it was only to force an appearance. In the present case, as has been observed, we stand as if all the proceedings for such a purpose had been exhausted.

Different practices prevail in relation to such a case, in the several states of the Union. In New Jersey, the practice is to file the proofs in the cause, and proceed to a hearing. This is not the course which is pursued in Virginia. As to the practice in England: 2 P. Wms. 556; Moseley 386; Harr. *Chan. Pract. by Newland 156; 1 Grant's Chan. Pract. [*286

96. Something is now to be done in this case: and it is for the court to determine, what that may be. If the court desire it, it is fully competent to them to make any new rule relative to the future proceedings in the case. In the court of chancery in England, the party could take a decree, *pro confesso*, and consider it as final. But this is not the wish of the complainant. It is desired, that the proceedings should be carried on with the utmost respect to the other party; and the wish of the state of New Jersey is to have an examination of the case, and a final decree, after such an examination.

It is, therefore, proposed, that the court direct a rule to be entered that the bill be taken *pro confesso*, unless the party against whom it is filed appear and answer before the rule-day in August next; and if they do not, that the cause be set down for a final hearing, at the next term of this court, on such proofs as the complainants may exhibit.

BALDWIN, Justice, suggested, that it might be proper to argue certain questions arising in this case, in open court: such as, what was the proper duty of the court in the case? what was the practice in England? and whether this court had power to proceed, in suits between states, without an act of congress having directed the mode of proceeding? he did not propose this as a matter personal to himself; but as a member of the court.

Wirt said, that the jurisdiction which was to be exercised was given by the constitution, and the 17th section of the act of congress authorized the court to establish such rules as to the manner in which the power should be executed. There are cases in which the court have taken this jurisdiction. *Chisholm* v. *State of Georgia*, 2 Dall. 419; *Grayson* v. *State of Virginia*, 3 Ibid. 320.

When the *subpœna* was asked for, at last term of this court (3 Pet. 461), the case of *Chisholm* v. *State of Georgia* was then particularly referred to; *287] and it was considered, that *although the amendment to the constitution has taken away the jurisdiction of this court, in suits brought by individuals against a state, it has left its jurisdiction, in suits between states, in the situation in which it stood originally. The court, in awarding the process of *subpœna*, had reference to these cases.

If an elaborate argument of the questions which the case presents is desired, time is asked to prepare for it; and sufficient time to give notice to the attorney-general of the state of New Jersey to attend and assist in the argument.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states.

The constitution of the United States declares, that "the judicial power shall extend to controversies between two or more states." It also declares, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. The act to establish the judicial

courts of the United States, § 13, enacts, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." It also enacts, § 14, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." By the 17th section, it is enacted, "that all the said courts of the United States shall have power "to make and establish all necessary rules for the ordinary conducting business in the *said courts, provided such rules are not repugnant to the laws of the United States." "An act [*288 to regulate processes in the courts of the United States" was passed at the same session with the judiciary act, and was depending before congress at the same time. It enacts, "all writs and processes issuing from the supreme or a circuit court shall bear teste," &c. This act was rendered perpetual in 1792. The first section of the act of 1792 repeats the provision respecting writs and processes, issuing from the supreme or a circuit court. The second continues the form of writs, &c., and the forms and modes of proceeding in suits at common law, prescribed in the original acts, and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States: subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same.

At a very early period in our judicial history, suits were instituted in this court against states; and the questions concerning its jurisdiction and mode of proceeding were necessarily considered. So early as August 1792, an injunction was awarded, at the prayer of the state of Georgia, to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia, under her acts of confiscation. This was an exercise of the original jurisdiction of the court, and no doubt of its propriety was ever expressed. In February 1793, the case of *Oswald* v. *State of New York* came on. This was a suit at common law. The state not appearing on the return of the process, proclamation was made, and the following order entered by the court: "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said state." *At the same term, the case of *Chisholm's Executors* v. *State* [*289 *of Georgia* came on, and was argued for the plaintiffs, by the then attorney-general, Mr. Randolph. The judges delivered their opinions *seriatim*; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction of the court; and that the process served on the governor and attorney-general of the state was

sufficient. Mr. Justice IREDELL thought an act of congress necessary to enable the court to exercise its jurisdiction. After directing the declaration to be filed, and copies of it to be served on the governor and attorney-general of the state of Georgia, the court ordered, "that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the 1st day of the next term, judgment by default shall be entered against the said state." In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry was awarded, but the 11th amendment to the constitution prevented its execution.

Grayson v. *State of Virginia*, 3 Dall. 320, was a bill in equity. The *subpœna* having been returned executed, the plaintiff moved for a *distringas*, to compel the appearance of the the state. The court postponed its decision on the motion, in consequence of a doubt, whether the remedy to compel the appearance of the state should be furnished by the court itself, or by the legislature. At a subsequent term, the court, "after a particular examination of its power," determined, that though "the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity," "still it was thought, that we are also authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration and control of the legislature. We have, therefore, agreed to make the following general orders: "1. Ordered, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney-general of such state. *2. Ordered, that the process of *subpœna* issuing out of this court, in any suit in equity, shall be served on the defendant, sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." 3 Dall. 320.

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In *Huger* v. *State of South Carolina*, the service of the *subpœna* having been proved, the court determined, that the complainant was at liberty to proceed *ex parte*. He accordingly moved for and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. 371. *Fowler* v. *Lindsey*, and *Fowler* v. *Miller*, 3 Dall. 411, were ejectments depending in the circuit court for the district of Connecticut, for lands over which both New York and Connecticut claimed jurisdiction. A rule to show cause why these suits should not be removed into the supreme court by *certiorari*, was discharged, because a state was neither nominally nor substantially a party. No doubt was entertained of the propriety of exercising original jurisdiction, had a state been a party on the record. In consequence of the rejection of this motion for a *certiorari*, the state of New York, in August term 1799, filed a bill against the state of Connecticut (4 Dall. 1), which contained an historical account of the title of New York to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of November 1783, between the two states, on the subject; and prayed a discovery, relief and injunction to stay the proceedings in the ejectments depending in the circuit court of Connecticut. The injunction was, on argument, refused, because the state of New York was not a party to the ejectments, nor interested in their decision.

It has, then, been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court on the failure *of the state to appear, after the due service of process, has been also prescribed. [*291

In this case, the *subpœna* has been served, as is required by the rule. The complainant, according to the practice of the court, and according to the general order made in the case of *Grayson* v. *Commonwealth of Virginia*, has a right to proceed *ex parte;* and the court will make an order to that effect, that the cause may be prepared for a final hearing. If, upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

Baldwin, Justice, did not concur in the opinion of the court, directing the order made in this cause.

The *subpœna* in this cause having been returned executed, sixty days before the return-day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered, that the complainant be at liberty to proceed *ex parte:* and it is further decreed and ordered, that unless the defendant, being served with a copy of this decree, sixty days before the ensuing August term of this court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill.

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*John Smith, T., Plaintiff in error, *v.* United States, Defendant in error. [*292

Accounting department.—Treasury transcripts.—Practice in error.

Action of debt on a bond, executed by Alpha Kingsley, a paymaster in the army, and by John Smith, T., and another, as his sureties, to the United States; the condition of the obligation was, that Alpha Kingsley, "about to be appointed a district paymaster," &c., "and who will, from time to time, be charged with funds to execute and perform the duties of that station, for which he will be held accountable," &c., shall "well and truly execute the duties of district paymaster, and regularly account for all moneys placed in his hands to carry into effect the object of his appointment."

On the trial, the plaintiff gave in evidence a duly certified copy of the bond, and a "transcript from the books and proceedings of the treasury department, of the account of Alpha Kingsley, late district paymaster, in account with the United States;" in this account, A. K. was charged with moneys advanced to him for pay, subsistence and forage, bounties and premiums, and contingent expenses of the army; and credited with disbursements of the same, for the

purposes for which they were paid to him, and showing a large amount of items suspended and disallowed; making a balance due to the United States of $48,492.53; the account was thus settled by the third auditor of the treasury, and was duly certified to the second comptroller of the treasury, and this balance was by him admitted and certified on the 23d of April 1823; the account was further certified, "Treasury department, third auditor's office, 1st of September 1824: pursuant to an act to provide for the prompt settlement of public accounts, approved 3d of March 1817, I, Peter Hagner, third auditor, &c., do hereby certify, that the foregoing transcripts are true copies of the originals, on file in this office;" to this was annexed a certificate that Peter Hagner was the third auditor, &c., "in testimony whereof, I, William H. Crawford, secretary of the treasury, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 1st of September 1824, (signed) Edward Jones, chief clerk, for William H. Crawford, secretary of the treasury;" the seal of the treasury department was affixed to the certificate. On the trial, the district court of Missouri instructed the jury, that, "as by the account, it appears, there are in it terms of debit and credit to Kingsley, as district paymaster, it furnishes evidence of his having acted as district paymaster, and of his appointment as such."

There are two kinds of transcript which the statute authorizes the proper officers to certify: first, a transcript from "the books and proceedings of the treasury," and secondly, "copies of bonds, contracts and other papers, &c, which remain on file, and relate to the settlement." The certificate under the first head has been literally made in this case, and is a sufficient authentication of the transcript from "the books and proceedings of the treasury," and is a substantial compliance with the requisitions of the statute.[1]

The objection, that this signature of the secretary of the treasury was signed by the chief clerk, seems not to be important; it is the seal which authenticates *the transcript, and not the signature of the secretary; he is not required to sign the paper; if the seal be affixed by the auditor, it would be deemed sufficient under the statute. The question, therefore, is not necessarily involved, in deciding this point, whether the secretary of the treasury can delegate to another the power to do an official act, which the law devolves on him personally.

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The defendant pleaded, that Alpha Kingsley was removed from office on the 1st of April 1815, and on the 15th of September, reported himself to the treasurer of the United States as ready for the settlement of his accounts; at which time, and long afterwards, he was solvent, and able to pay the full amount of his defalcation; that no notice was given to him by the treasury to account for moneys in his hands, nor to the defendant, until the commencement of the suit, and that before the commencement of the suit, K. became insolvent. The United States demurred to this plea; the district court of Missouri sustained the demurrer, and gave judgment for the United States. There was no error in the judgment.

Sound policy requires, that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable; this is alike due to the public and to the persons who are held responsible as sureties; to the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of government for reimbursement; but there may be some cases of hardship where, after a great lapse of time, and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon consideration of public policy; while various acts of limitation apply to the concerns of individuals, none of them operate against the government; on this point, there is no difference of opinion among the federal or state courts.

The fiscal operations of the government are extensive and often complicated; it is extremely difficult, at all times, and sometimes, impracticable, to settle the accounts of public officers, with as little delay as attends the private accounts of a mercantile establishment; but it is always in the power of an individual, who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled, and the payment of any balance enforced. A notice to the government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release.

By the act of congress of 3d March 1797, a notice is required to be given by the auditor of the treasury, to any person who had received public moneys, for which he is accountable, fixing a reasonable time for the production of vouchers for the expenditures, and, in default, costs are to be charged against the delinquent, whether in a suit, judgment be given for or against him

[1] See United States *v.* Pinson, 102 U. S. 548.

—on a revision of the settlement by the comptroller, after having caused notices to be served of the items disallowed, &c., the decision is declared to be final and conclusive. If there had been no subsequent act of congress on this subject, it might be important to inquire, whether the notice authorized by this act was not merely directory to the officers, and essential only to subject the delinquent to the penalties provided. By the acts of the 3d of March 1797, and the 3d of March 1817, material changes are made in the accounting department of the government; and although the act of 1795 may not be expressly repealed, yet it is abrogated by new and substantive provisions; under the present mode of *proceeding against defaulters, [*294
the notice authorized by the act of 1795 is unnecessary.

Although on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of this court think there is no error, yet the judgment of the district court must be reversed, as, on the question of reversal, the minorities unite and constitute a majority of the court.

Error to the District Court of the United States for the district of Missouri, exercising the jurisdiction and powers of a circuit court.

In that court, the United States instituted a suit against the plaintiff in error, John Smith, T., who, with Wilson P. Hunt, were, by a bond executed on the 7th of February 1810, in the sum of $10,000, the sureties of Alpha Kingsley, appointed a district paymaster in the army of the United States, under the act of congress passed the 16th of March 1802. Alpha Kingsley was dismissed from the service of the United States, in 1815. The action was commenced in December 1824. The pleadings are stated fully in the opinion of the court.

The case was argued by *Benton*, for the plaintiff; and by *Berrien*, Attorney-General, for the United States.

For the plaintiff in error, *Benton* contended: 1. That the sureties of the paymaster were exonerated by the neglect of the United States to settle the accounts of their principal. Although Alpha Kingsley was dismissed in 1815, and made frequent applications for the settlement of his accounts, no settlement was made until 1823. 2. The treasury transcript was not evidence in the cause; as it was not certified by the secretary of the treasury, but by Mr. Jones, who was the chief clerk in the department. 3. The transcript and certified copy of the bond were not evidence against the sureties, to show that Alpha Kingsley was a "paymaster;" and the district judge erred in instructing the jury, that it was evidence conducing to prove that fact. 4. The transcript was not evidence of debt against the sureties. They were entitled to notice of the settlement of the accounts, and to a trial by jury, to ascertain the amount for which they are responsible.

The *Attorney-General*, in reply, argued, that the act of *congress [*295
of 1797 does not require the certificate of the secretary of the treasury to the transcript. It is to be certified by the register, under the seal of the treasury. All the requisites of the law were complied with. 2. The account settled at the treasury, and the copy of the bond, were evidence of official acts by the paymaster. Proof of official character may be made, by showing individual acts in that character. 2 Stark. Evid. 370; 1 Phil. 170. Also, 1 Stark. 30; 1 Phil. 79. The act of congress makes a copy of the bond evidence equal to the original. The transcript contains the bond, and thus the bond is a part of the transcript. 3. The decisions of this court in the *Postmaster-General* v. *Early*, 12 Wheat. 136; and *Dox* v. *Postmaster-General*, 1 Pet. 318; and in other cases, are conclusive to show, that the

sureties cannot avail themselves of the delay of the accounting officers of the treasury to settle the accounts of those who have received public money, as officers under the government of the United States.

McLean, Justice, delivered the opinion of the court.—A writ of error is prosecuted in this case, to reverse the judgment of the district court of Missouri, which exercises the powers of a circuit court. In December 1824, the United States brought an action of debt against the plaintiff in error, to recover $10,000. The claim arises on a bond signed by the plaintiff, as one of the sureties of Alpha Kingsley, who is alleged to have been appointed a paymaster in the army. The bond was executed on the 7th day of February 1810, in which the plaintiff, and one Wilson P. Hunt, bind themselves, jointly and severally, to pay to the United States the above sum. The condition of the obligation states, "that the said Alpha Kingsley is about to be appointed a district paymaster," &c., "who will, from time to time, be charged with funds, to execute and perform the duties attached to that station, for which he will be held accountable," &c., and if he shall "well and truly execute the duties of district paymaster, and regularly account for all
*296] moneys placed in his hands, to *carry into effect the object of his appointment," &c., "then the obligation to be void."

Several pleas were filed, and relied on in the defence. In the first plea, it is asserted, that from the time of executing the writing obligatory the said Kingsley did well and truly observe and fulfil the conditions of said bond, according to their tenor and effect. The second plea contains similar allegations, except as to accounting for all moneys in the hands of said Kingsley; and by way of excuse, the plea states, that he was removed from office, on the first day of April 1815, for various causes assigned; and that on the 15th of September following, he reported himself to the treasurer of the United States as ready for settlement, but his accounts were not adjusted by the government; that at this time, and long afterwards, Kingsley was solvent, and able to pay the full amount of his defalcation; that no notice was given to him by the treasury department to account for moneys in his hands; nor was any notice given to the defendant below, until about the commencement of the suit. And it is alleged, that before the commencement of the suit, Kingsley became insolvent. In the third plea, it is averred, that Kingsley, neither at the time the bond was executed, nor at any subsequent period, was appointed district paymaster. The fourth plea denies that any money came into his hands, as district paymaster.

To the second plea, a demurrer was filed, and issues were joined on the third and fourth. In their replication to the fourth and first pleas, the plaintiffs allege, that a large sum of money came into the hands of Kingsley as district paymaster, and that on a final adjustment of his accounts, in April 1823, there remained in his hands a balance unaccounted for, of $48,492.53. The rejoinders stated, that Kingsley did regularly account for and pay to the plaintiffs all sums of money which came into his hands, as district paymaster.

The jury found the issues of fact for the plaintiffs, and that the defend-
*297] ant, as paymaster, was indebted to the plaintiffs in the *sum of $31,197.14. On this verdict, a judgment for $10,000, and costs of suit, was entered.

At the trial, exceptions were taken to the evidence offered, which being

overruled, the following bill was tendered and signed. ' The plaintiffs to maintain the issue on their part, read to the jury, a duly certified copy of the bond sued on, and offered to read, as evidence, a paper purporting to be a transcript from the books and proceedings of the treasury department, containing an account, headed, Alpha Kingsley, late district paymaster, in account with the United States. In which account, he was charged, as late district paymaster, with moneys advanced to him, for pay, subsistence, forage, bounties and premiums, and contingent expenses of the army ; and credited with disbursements made, under the same heads of expenditures, and showing a large amount of items suspended and disallowed. By this account, it appeared, that the same had been settled by the third auditor of the treasury, and it showed a balance due to the United States of $48,492.53. The account was duly certified to the second comptroller of the treasury ; who admitted and certified the above balance, on the 23d day of April 1823."

There were also the following certificates annexed—"Treasury department, third auditor's office, 1st September 1824. Pursuant to an act, to provide for the prompt settlement of public accounts, approved 3d March 1817, I, Peter Hagner, third auditor of the treasury of the United States, do hereby certify, that the foregoing transcripts are true copies of the originals on file in this office. (Signed) Peter Hagner, auditor."

"Be it remembered, that Peter Hagner, Esq., who certified the foregoing transcripts, is now, and was, at the time of doing so, third auditor of the treasury of the United States, and that faith and credit are due to his official attestations. In testimony whereof, I, William H. Crawford, secretary of the treasury, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 1st September 1824. (Signed) Edward Jones, chief clerk, *for William H. Crawford, secretary of the treasury." To this certificate, the seal of the treasury department was affixed. [*298

There being no other evidence given to the jury than this transcript, the court instructed them, "that as by the account, it appears, there are in it items of debit and credit to Kingsley, as district paymaster, it furnished evidence of his having acted as district paymaster, and of his appointment as such. On the facts stated, a reversal of the judgment entered in the district court is insisted on. 1. Because the United States neglected to enforce their claim against Kingsley, and 2. Because the court erred in admitting the transcript as evidence, and by instructing the jury, that it conduced to prove that the defendant was a district paymaster.

That the government has been negligent in settling the account of Kingsley, and collecting the balance of moneys in his hands, it is contended, is shown by the facts stated in the second plea, to which the plaintiffs demurred. From the removal of Kingsley from office, to the final adjustment of his accounts in the treasury department, there was a lapse of about eight years; during which period, it seems, he became insolvent. That he was able to pay the amount of his defalcation, when he was dismissed, is admitted by the pleadings ; and also, that no steps were taken by the government to recover the claim from him, or his sureties, until a short time before the commencement of the present action.

Sound policy requires, that the accounts of disbursing officers should be

adjusted at the proper department, with as much despatch as is practicable. This is alike due to the public, and to persons who are held responsible as sureties. To the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of the government for reimbursement. But there may be some cases of hardship, where, after a great lapse of time, and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon considerations of public policy. While various acts of limitation apply to the concerns of individuals, none of them operate against the government. On this point, there is no difference of opinion among the federal or state courts.

*299] *The fiscal operations of the government are extensive and often complicated. It is extremely difficult, at all times, and sometimes impracticable, to settle the accounts of public officers with as little delay as attends the private transactions of a mercantile establishment. But it is always in the power of an individual, who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled and the payment of any balance enforced. A notice to the government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release.

By the act of congress of the 3d March 1795, the comptroller of the treasury was authorized to issue a notification to any person who had received moneys for which he is accountable to the United States, fixing a reasonable time within which vouchers for the expenditures of such moneys shall be returned; and if default be made, costs are to be charged against the delinquent, whether in a suit judgment be given for or against him. In the same act, a revision by the comptroller of the settlement made by the auditor, is authorized; and after having caused notices to be served, of items disallowed, &c., the decision is declared to be final and conclusive. This act, it is contended, has never been repealed, and that until the notice authorized by it shall have been served, a writ cannot be brought against a defaulter. If there had been no subsequent acts of congress on this subject, it might be important to inquire, whether the notice authorized by this act was not merely directory to the officer, and essential only to subject the delinquent to the penalties provided. By the acts of the 3d March 1797, and the 3d March 1817, material changes were made in the accounting department of the government; and although the act of 1795 may not be expressly repealed, yet it is abrogated by new and substantive provisions. Under the present mode of proceeding against defaulters, the notice authorized by the act of 1795 is unnecessary.

The objection made to the authentication of the transcript given in evidence, presents a question of some difficulty. As the transcript has not

*300] been made a part of the record, *the bill of exceptions must be looked to, as containing the ground of objection. By the second section of the act of the 3d March 1797, it is provided, "that in every case of delinquency, where suit has been, or shall be, instituted, a transcript from the books and proceedings of the treasury, certified by the register (or under the act of the 3d March 1817, by the auditor), and authenticated under the seal of the department, shall be admitted as evidence." "And all copies of bonds, contracts or other papers, relating to, or connected with, the settle-

ment of any account between the United States and an individual, when certified as aforesaid, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court."

The auditor certifies, that the foregoing "transcripts are true copies of the originals on file in his office." It is the certificate of the auditor, and the seal of the department, which make the transcript evidence. If either be omitted, whatever the transcript may purport upon its face, it is not evidence. Where copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down.

There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the "books and proceedings of the treasury;" and, second, "copies of bonds, contracts and other papers, &c., which remain on file, and relate to the settlement." Under the first head, are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected or placed to his credit. These all appear upon the books of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head, copies of papers which remain on file, and *which have a relation to the settlement, may be certified. In this case, it is essential, that the officer certify that the transcripts "are [*301 true copies of the originals, which remain on file."

This certificate has literally been made in the case under consideration; and the question arises, whether it is a sufficient authentication of the transcript, from the "books and proceedings of the treasury." A majority of the members of the court think, that the certificate is a substantial compliance with the requisitions of the statute. They connect the certificate of the auditor with the statement in the bill of exceptions, that a "paper, purporting to be a copy from the books and proceedings of the treasury," was offered in evidence; and consider, that although the auditor states, that "the foregoing transcripts are true copies of the originals on file, in his office," the certificate can only relate to the transcript offered in evidence, and that it sufficiently authenticates it. This construction is strengthened, in their opinion, by another statement in the bill of exceptions: "that a duly certified copy of the bond sued on, was offered to be read as evidence." Three of the judges think, that the certificate, from the language used, can only relate to the transcript which contained a copy of the bond. That it can only authenticate copies of papers, the originals of which remain on file. They consider that the books of the department cannot be said to be on file, nor are copies from the books copies from the originals. All moneys advanced or paid by the government are charged in the books of the treasury, and a transcript from these charges may be said to be copies from the original, but the credits entered are copied into the books from the vouchers rendered, and these vouchers remain on file. A transcript from the books, therefore, it is believed, cannot be said to be copies from the originals on

file. That it is a copy from the books, which is made evidence, and not a copy of the paper, though it be on file, on which the rough draft of the settlement may have been entered. They consider that the statement in the bill of exceptions, that the transcript offered in evidence purported to be a "copy from the books and proceedings of the treasury," as merely descriptive of the paper, and cannot cure the defect in *the certificate. *302] That it is not the body of the transcript which is to give it validity, but the authentication required by the statute. The copy may be strictly accurate in all its parts, and come within the provisions of the law; yet, if the seal be not affixed, or the certificate be defective, the paper cannot be received as evidence. They consider this certificate to be defective, as every word of it may be true, and yet the copies from the "books and proceedings" may be inaccurate. The auditor certifies nothing from the "books," or the "proceedings of the treasury;" and his language is so explicit in referring to "copies of originals on file, in his office," that the three judges think, that the certificate cannot, by reference, or any correct rule of construction, be made to anthenticate copies from "the books of the treasury." The objection, that the signature of the secretary of the treasury was signed by his chief clerk, seems not to be important. It is the seal which authenticates the transcript, and not the signature of the secretary; he is not required to sign the paper. If the seal be affixed by the auditor, it would be deemed sufficient under the statute. The question, therefore, is not necessarily involved, in deciding this point, whether the secretary of the treasury can delegate to another the power to do an official act, which the law devolves on him personally.

A majority of the court think, that the transcript from the "books and proceedings of the treasury," being admitted as evidence, did conduce to prove, not only that Kingsley acted as district paymaster, but his right so to act. In the account, he is charged as "late district paymaster," with moneys advanced to him for pay, subsistence, forage, bounties and premiums, and contingent expenses of the army; and credited with disbursements made, under the same heads of expenditures of the army. These transactions not only establish, *primâ facie*, the correctness of the items charged, but show the capacity in which the defendant acted. As district paymaster he receives money, and disburses it in discharge of the duties required of paymasters. His vouchers for moneys expended prove this, and every item stated in the account goes to establish the fact, that the government recognised the official capacity which he assumed. These facts, appearing upon the face of the transcript, might *well be considered by *303] the jury as, at least, conducing to prove the official character of Kingsley.

Although on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of this court think there is no error; yet the judgment of the district court must be reversed, as, on the question of reversal, the minorities unite, and constitute a majority of the court.

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 Missouri, and was argued by counsel: On consideration whereof, it is ordered and adjudged

by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings to be had therein, as to law and justice may appertain, and in conformity to the opinion of this court.

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*Maria Wilson Page, relict and administratrix of Mann Page, deceased, Mann Alexander Page and Jane Maria Page, [*304 infant children of the said Mann Page, by the said Maria Wlson Page, their mother and next friend, Complainants, *v.* John Lloyd, executor of Osgood Hanbury, who was surviving partner of Capel & Osgood Hanbury, Robert Patton, administrator with the will annexed of Mann Page, deceased, John T. Page, Lewis Burwell, administrator of Robert C. Page, and John Minor, Defendants.

Decedents' estates.

Page was indebted, at the time of his decease, to Patton, 3000*l.*, and upwards, which was covered by a deed of trust, on Mansfield, one of Page's estates; the executors of Page refusing to act Patton, in 1803, took out administration with the will annexed, and gave sureties for the performance of his duties; Patton made sales of the personal estate, for cash, and on a credit of twelve months, and received various sums of money from the same; he made disbursements in payment of debts, and expenses for the support and education of the children of Page, and in advance to the legatees; he kept his administration accounts in a book provided for the purpose, entering his receipts and disbursements for the estate, but not bringing his own debt and interest into the account. In 1810, he put the items of his account into the hands of counsel, and requested him to introduce the deed of trust, "as he might think proper;" and an account as administrator was made out, in which the principal and interest of Patton's debt was entered as the first item; afterwards, in the same year, by order of court, the real estate was sold, and Patton received the proceeds of the same: *Held*, that the sum due under the deed of trust to Patton, should be charged on the funds arising from the sale of the real estate; and that having omitted to retain from the proceeds of the personal estate, the sum due to him by Page, Patton could not afterwards charge the same against the legal assets, being the fund produced by the personal estate.

The executor or administrator cannot discharge his own debt, in preference to others of superior dignity; though he may give the preference to his own over others of equal degree. In some of the states, this rule would not apply, as there is no difference made in the payment of debts between a bond and simple contract.

If the creditor appoints the debtor his executor, in some cases, it operates as a release; this, however, is not the case, as against creditors; the release is good against devisees, when the debt due has not been specifically bequeathed.

This case came before the court, from the Circuit Court for the Eastern District of Virginia, upon certain questions certified from that *court, [*305 upon which the judges of the circuit court were divided, which, with the facts, are fully stated in the opinion of the court.

The case was argued by *Key* and *Wirt*, for the complainants; *Patton* read a written argument prepared by *Johnston*.

McLean, Justice, delivered the opinion of the court.—This cause is certified from the eastern district of the circuit court in Virginia, the judges of that court being divided in opinion. The legal question arose out of the following facts, which are substantially stated by the defendants' counsel:

Mann Page, the second, having made his will, died in 1803, leaving a

large estate, real and personal, the whole being charged with the payment of his debts. The words in the will are, "I do hereby subject all my estate, both real and personal, to the payment of my debts, and full power is given to my executors, to sell and convey all or any part thereof, which in their discretion they shall deem it most expedient to dispose of for that purpose." To his wife he gave a life-estate in a part of his farm called Mansfield ; and the residue of it, he bequeathed, in fee-simple, to his two sons Robert and Mann. He devised three several parcels of real estate, and, with the exception of his plate, all his personal property, to his executors, to be "by them applied, in the first place, to the payment of his debts, and the balance, if any, to be divided among his three sons." His daughters were provided for in the will, and the support and education of his children were charged upon his whole estate.

The testator, at his death, owed to Robert Patton, 3557*l.* 12*s.* 9*d.*, which debt was secured by a deed of trust on the Mansfield estate, dated the 12th of July 1799, bearing interest from the date. He also owed other debts to a large amount, which bound his real estate.

As the executors appointed by the will refused to act, Patton took out letters of administration, with the will annexed, *in October 1803, and *306] gave sureties for the performance of his duties. In 1804, he made sales of the personal property, on a credit of twelve months ; with the exception of certain sums which were required to be paid down. The devisees of the real estate took possession of it. That part which was devised to the executors seems not to have been in a condition to be sold. Up to the year 1810, the administrator received, at different times, various sums of money, from the personal assets, and made disbursements, in payment of debts and expenses, for the support and education of the family, and in advance to legatees. During this period, he kept his administration account in a book provided for that purpose, in which his receipts and disbursements were entered ; but the debt due to him from the estate, or the interest on it, was not brought into the account. In 1810, he furnished to his counsel the items of his account, and requested him to put it into proper form, and to introduce the deed of trust, "as he might think proper." A statement of the account was made, under the direction of the counsel, in which the first item of the debit was the principal and interest of the above debt. This account, balanced annually, makes the administrator creditor ; at the end of 1803, the sum of 5746*l.* 12*s.* 7*d.*; at the close of 1810, of the sum of 2989*l.* 12*s.* 11*d.*; and the lowest annual balance exhibited in his favor was, at the end of 1807, 2096*l.* 0*s.* 6½*d.* In the account, he did not credit the estate with the amount of sales, but with the amount of collections only. Creditors, Lloyd, &c., who had liens on the real estate, brought suits against the administrator and devisees ; a sale of the Mansfield estate was ordered, and a receiver appointed.

In this state of things, in June 1810, the plaintiffs, who are the administratrix, widow and children of Mann Page, the devisor, called Mann Page the second, brought this suit against Robert Patton, administrator, and other representatives of Mann Page the second, to have a settlement of the administration account, and a distribution of the surplus. In their bill, they allege, that the administrator had received the personal *assets of the *307] testator, and mixed them with his own ; and among other things, com-

plain of his attempting to pay himself the annual interest upon his debt, after omitting it in the account which he had kept of the administration.

The administrator answered, in March 1811, exhibiting with his answer, the account made out under the direction of his counsel, and which included the deed of trust. He admits, that he sold "the personal property, and proceeded to pay the debts due from the estate, which he may not have paid, according to their dignity; as he was advised, the whole real estate, which was more than sufficient to pay the debts, was chargeable with them."

On the 7th June 1811, in the case of Lloyd, &c. *v.* Patton *et al.*, there was a consent decree, directing "the commissioner of sales, out of the first instalment, which would fall due on the 1st of August, to pay costs and charges, and distribute the balance among Robert Patton and others, in the order of priority of their liens; limiting the payment to Patton, whose balance is unsettled, to any sum that the commissioner and William C. Williams might agree on; and taking from him a receipt, submitting himself to any order the court may in future make, for refunding any part of the same." In the same cause, on the 1st June 1812, the former receiver being dead, the court made an order appointing Patton the receiver of the court, to collect the money remaining unpaid, arising from the sale of the estate, called Mansfield, directing the purchasers to pay to him the purchase-money as it fell due, and directing him to apply the money so received, in the payment of his testator's debts, according to their dignity. Afterwards, in the same year, Patton made a report to the court, showing that of the second instalment of the purchase-money, he had received several sums, amounting together to $16,950.80. That prior to his appointment as receiver, he had received from the former receiver, the sum of $2333.33, on account of the balance reported due to him, on his accounts as administrator; and "which balance arose principally from a deed of trust given to him by Mann Page in his lifetime, on his Mansfield estate, to secure a debt then due, and which *left a balance due the administrator of ——— dollars, which he retained out of the moneys received by him as above stated." He [*308 also stated, that there were several debts due from the sales of the personal estate, which were in a train of collection." There having been reports made of the administration accounts, exceptions were taken; the first and fifteenth of which it may be proper to notice.

In the first is stated the ground, on which the plaintiffs insist that the principal and interest of the debt secured by the deed of trust ought not to be introduced into the account, and was done by Patton, under direction of his counsel, in 1810, but ought to be excluded from the account, because it had been excluded in the administration account kept by Patton in his book. The fifteenth contains an objection to the manner in which interest is charged, and alleges in support of that objection, that the administrator received and mixed the money of the estate with his own. The account, with the exceptions, was recommitted, in June 1813, and commissioner Nicholson made a report, in the year 1815, crediting the interest on the debt due by the deed of trust, reporting the principal still due, and Patton indebted as administrator 375*l.* 13*s.* 3*d.* In November 1815, an order was made for directing payments by the receiver, and further accounts. A report was made in pursuance of this order, stating Patton to be creditor as administrator to the amount of 57*l.* 12*s.* 5*d.* In 1820, another order was made in both causes,

directing a further payment by the receiver, and further accounts to be taken. Commissioner Barton, in September 1825, made a report, in obedience to this order, in which he states, that the defendant Patton contends, that he has now the right to debit his testator's estate, in the account of his administration, with the amount of his deed of trust on the Mansfield property.

The plaintiffs object to this charge, and insist, that "although the right to charge the personal assets with this debt once existed, it has been forfeited; not only from the neglect to exercise it, but by his election to charge it on the funds derived from the sale of the identical property, upon which there was a lien to secure it." *The commissioner, not under- *309] taking to decide the question thus raised, presented two statements to the court. In the first, he placed the principal of the deed of trust, together with the interest from December 1814, to the credit of the receiver. In the second, the same sum was carried as a credit to the administrator. Upon the argument of this question, the judges of the circuit court being divided in opinion, it was adjourned to this court for their decision.

Shall the credit be given to the administrator or receiver? The counsel for the complainants insist, that as a specific lien was given on the Mansfield estate, by the deed of trust, that the proceeds of the sale of that estate were more properly applicable to the payment of the debt, than the legal assets. In answer to this, it may be said, that although the testator charged his real as well as personal estate with the payment of his debts, yet, it was the duty of the administrator, first to apply the legal assets to this purpose. The fact, that the debt in controversy was secured by a lien, does in no respect alter the principle. It seems to have been the design of the testator, to secure to his devisees the Mansfield estate, at least, until his other property had been exhausted in the payment of debts. The legal assets, under the Virginia statute, are required to be first applied in the payment of debts, according to their different degrees. This is in conformity to the principle of the common law, and applies as well to debts secured by mortgage as to others.

The facts in the case, it is contended, conclusively show that the deed of trust was not paid by Patton out of the administration fund, but out of moneys received from a sale of the real estate. The manner in which his administration account was kept; the interest on the deed of trust, which was charged to this account by the commissioner, under the direction of Patton; the decree of 1811, which directed the receiver to make a payment to him and others, according to the dignity of their claims; the acknowledgment, under his own hand, in his report as receiver, in 1812, of having received from the former receiver between two and three thousand dollars, and that he retained the *remaining balance due him, out of moneys *310] then in his hands as receiver, which balance arose principally from the deed of trust—all prove that the deed of trust was principally, if not entirely, paid out of the funds in the hands of the receiver.

It is insisted, that the facts also show a determination by Patton to give a preference, in payments, to other debts, and to look to a sale of the Mansfield estate for the satisfaction of his deed of trust. That having made his election, or application of the funds in his hands as administrator, it is now too late, as it was in 1810, to change his purpose. That a change might

be productive of great embarrassment and consequent injury, by shifting the interests and responsibilities of parties. Several authorities are cited under this head. 4 Cranch 326; 7 Wheat. 13; 6 Cranch 28; 9 Wheat. 730; 1 Wash. 128. In a case where the right of applying payments existed and was exercised, by either a debtor or creditor, and notice given, no change can be made in the credit, except by the consent of both parties.

On the part of the defendant, it is contended, that it being the duty of the administrator first to apply the legal assets in the payment of debts, he cannot, by refusing to do so, throw the burden of payment on the real estate. That the consent of the devisees, of which there is no evidence in the present case, cannot authorize the administrator to take any steps which the law does not sanction, and thereby make his sureties responsible. If any agreement were made between the administrator and the devisees, that the real estate should be sold for the payment of the above debt, instead of applying the legal assets, it is insisted, that such a proceeding would be governed by the contract; and, consequently, the sureties of the administrator could not be held responsible. That the fund would be considered as left in the hands of Patton, under the new agreement, as an individual, and not as administrator; and for which he could only be responsible in his private capacity. That for this sum, thus withdrawn from the administrator, the administration fund must be credited. If such an arrangement had been made with the devisees, it might be difficult to come to this conclusion. How any *agreement with them could affect the claims of creditors on the legal assets, and the eventual responsibilities of the sureties of the administrator for a failure in his duty, it is difficult to understand. [*311

The facts of the case show that the sale of the Mansfield estate was necessary. It was sold under a decree of a court of chancery, obtained by the creditors of the estate, and the application of the proceeds was made by the court. In that suit, the proceedings of the administrator were fully investigated. All the items of this account were examined by the court, or by a commissioner under its authority. From this examination, it appeared to the satisfaction of the court, that to satisfy specific liens on the estate, and other debts, its sale was indispensable; and it was decreed to be sold.

The testator by his will not only subjected his real estate, without reservation, to the payment of his debts; but he placed it in the hands of his executors to be sold at their discretion. Patton was administrator, with the will annexed, and could exercise all the powers of an executor. That a sale by him of the real estate would have been valid, even before the personal assets were exhausted, will not, perhaps, be denied.

But it is insisted, that the doctrine of election does not apply to this case; that as administrator, Patton had a right to retain the amount of his own debt, out of the personal assets, and that it was extinguished, so soon as personal assets to that amount came into his hands; that this effect is produced by operation of law, and requires no sanction or election by the administrator. His right being thus fixed, it is contended, that he cannot waive it to the injury of his sureties. This point is urged with earnestness and ability by the defendant's counsel, and a number of authorities are referred to in support of it. Toller's Law of Executors 295; 1 Com. Dig. 476; 3 Bac. Abr. 10; 3 Bl. Com. 18; 1 Salk. 299, are cited. Blackstone lays down the doctrine of retainer, as "a remedy by mere operation of law,

and grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself; but having the whole in his hands, so much as is sufficient to answer his demand is, by operation of law, applied to that particular purpose." *This doctrine is sanctioned in all the cases referred to, and is believed to be nowhere controverted. But this right of retainer must be exercised, under certain restrictions. The executor or administrator cannot discharge his own debt, in preference to others of superior dignity; though he may give the preference to his own over others of equal degree. In some of the states, this rule would not apply, as there is no difference made in the payment of debts between a bond and simple contract.

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In the case of *Wankford* v. *Wankford*, cited from 1 Salk. 299, POWELL, Justice, said, "there would be a great diversity where the obligee makes the obligor executor, and where the obligor makes the obligee executor, for in this last case, the debt is not extinct, but only upon supposal, that the executor has assets; but in case of failure of assets, the executor may sue the heir. Indeed, where the executor has assets, the debt is gone, but that is because he may retain and pay himself." It is not within the rule that a personal action once suspended, by the act of the party, can never be revived. HOLT, Chief Justice, in the same case, said: "If the obligor make the obligee, or the executor of the obligee, his executor, this alone is no extinguishment, though there be the same hand to receive and pay; but if the executor has assets of the obligor, it is an extinguishment, because then it is within the rule that the person who is to receive the money is the person who ought to pay it; but if he has no assets, then he is not the person that ought to pay, though he is the person that is to receive it; and to that purpose is the case of 11 Hen. IV. 83, and the case of *Dorchester* v. *Webb*, Keilw. 372."

In the case reported in Hobart, page 10, the court say, when the obligor makes the executrix of the obligee his executrix, the action is, at least, suspended, and then the rule is, that a personal action once suspended, is extinct; but the other reason is the surer, that when assets were left the debt was presently satisfied by way of retainer, and consequently, no new action can be had for that debt. The case of *Woodward* v. *Lord Darcy*, reported in 1 Plowd. 184, is cited. In that case, the court say, that the reason why the action is lost for ever is, because in judgment of law he is satisfied before, for if the executor has as much goods in *his hands as his own debt amounts to, the property in these goods is altered and vested in himself; that is, he has them as his own proper goods, in satisfaction of the debt, and not as executor; so that there is a transmutation of property by the operation of law, without suit and execution; for inasmuch as Windham here could not have an action against himself as executor, the operation of law is equivalent to a recovery and execution for him; and the property is as strongly altered as it could be by recovery and execution. If the creditor appoint the debtor his executor, in some cases, it operates as a release of the debt. This, however, is not the case as against creditors; though the release is good against devisees, where the debt due has not been specifically devised.

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On these authorities, it is contended, that the debt of Patton was extinguished, as early as the year 1804, he having received personal assets to the amount of it, at that time; and that the payment of these assets, in

discharge of other debts, does not prevent this legal consequence. If the debt be once extinguished, it is urged, that no act of Patton could revive it. He could not make a contract with himself, nor could he, by any agreement with the devisees, renew the old obligation. It will be observed, that all the decisions referred to were made in suits prosecuted by executors, or their legal representatives, to recover debts which, as executors, they had a right to retain. That in such cases, the right of action is gone, cannot be disputed. The executor cannot sue himself, and for this reason, he is authorized to retain the amount of his debt out of the assets in his hands. The right of action, being once extinguished, cannot be revived either by the executor or his legal representatives. On this point, the authorities are decisive; and, although some difference of opinion seems to have been entertained as to the extinguishment of the debt, yet it is, in effect, extinguished, as the legal right to enforce the payment of it is gone. On this principle were the adjudications made which have been cited. The question under consideration does not arise on a suit prosecuted by Patton for the recovery of his debt. If it did, the application and force of the *authorities would be conclusive. In such a case, his debt would be considered as extinguished, by the extinguishment of the right of action. [*314

Patton, as administrator, having received personal assets, instead of paying his own debts, pays others of equal or inferior dignity; and the question is presented, whether by doing so, he has forfeited his claim? It is not in proof, that at any one time, he had in his hands money enough from the personal estate to discharge his debt. As before remarked, he sold the personal property, generally, on a credit of twelve months. He seems to have preferred realizing the interest, annually, upon his own demand; knowing that it was secured by a lien on the real estate. He postponed the payment of the whole, or a part of this debt, until the realty was sold, and discharged it out of the proceeds of such sale. Is there any principle of law, which will apply this payment, as a credit to the administration account; or that will consider the fund to have been withdrawn from the administrator?

The law presumes his own debt to be satisfied, when assets come to his hands to the amount of it, there being no other debts of higher degree. But may not this presumption be rebutted, by an application of the money in the payment of other debts? This seems to have been done by Patton. In the maintenance and education of the children, and in payment of other debts than his own, he applied the personal assets. If the doctrine contended for be correct, that it was not in the power of Patton to waive the operation of law, by which his own debt would be discharged, as soon as assets of sufficient amount came into hands; it would seem to follow, that having applied the assets to other purposes, his own debt becomes forfeited, and the right of retainer completely extinguished. The argument does not stop short of this consequence.

Under this view of the case, to destroy the right of retainer in the administrator, it is only necessary to show, that he had in his possession legal assets sufficient to pay his debt, and that there were no other debts due by the estate of higher dignity. These facts being established, if the principle be correct, as effectually destroy the existence of the debt and the *right [*315

of retainer, as if the debt had been paid. It can be of no importance, how the legal assets were applied. Being in the hands of the administrator, the law applies them in discharge of his debt, it is contended, in defiance of his own acts and intentions; if this be not the case, if the administrator may postpone the payment of his own debt, a day or a month, and give a preference in payments to other demands, he may extend the time at his discretion: and if he may discharge his own debt, after paying other debts of equal amount, and of no higher degree, out of the legal assets, he may continue to give the preference to other claims, and eventually discharge his debt out of any moneys which may come into his hands as representative of the estate.

Is the debt paid, as soon as the legal assets shall come to the hands of the administrator? That the right of action is gone, is admitted; because a man cannot sue himself: and this right being once extinguished cannot be renewed. This rule is founded on reason and justice, and is well established by repeated adjudications. But, can the principle be extended so as to extinguish the right of retainer, where assets equal to the debt have been received and applied in the payment of other demands? Such a rule would be contrary to reason and justice, and is not believed to be law. The language used in some of the decisions referred to would seem to favor the construction contended for by the defendant's counsel; but the point presented in all the cases was, whether the action could be sustained. The right of the administrator to retain the money in his hands, for the discharge of his own debt, is as unquestionable, as if it had been paid to him on executions. It is his own, and he may retain it as such. This is the case put by some of the judges, in illustration of the principle: but it is nowhere said, that a waiver of this right is an abandonment of it.

Lord HARDWICKE, in 2 Atk. 411, says, "If the executor happen to be a bond creditor himself, the court never direct that if any sums come into his hands, he should, from time to time, by piecemeal, discharge the principal and interest of his own debt; for he may first discharge all other demands before his own: and unless it appear, that a considerable sum was *316] *left in his hands, sufficient to pay off his bond entirely, over and above what was due upon other demands, there could be no ground for the exception taken." The principle is here stated correctly, and applies to the question under consideration. That an administrator or executor may retain the amount of his debt, out of the assets in his hands, is a principle which grew out of the necessity of the case. If such a right did not exist, the executor or administrator would be, in many cases, without remedy. The principle was intended for his benefit, and not to mislead or entrap him. It is a right which he may postpone, if, in doing so, he does no injury to the estate; and such a question can only be made by the devisees or their heirs. If he shall pay debts, not on interest, and permit his own to run on interest, it may become a question whether he be entitled to interest. But his right to pay himself, so long as assets shall remain in his hands, is clear.

The moneys arising from the sale of the Mansfield estate were applied in payment of debts under the orders of the court of chancery. The decree, in 1811, directed Robert Patton and others to be paid "in the order of priorities of their liens." These, and other facts connected with it, show that the debt

due on the deed of trust was referred to, which constituted a lien on the estate. In the year 1812, Patton reported to the court, that he had retained, out of the moneys in his hands as receiver, the balance due to him. This payment was sanctioned by the court. It appears, then, that a court of chancery has sanctioned the payments which have given rise to this controversy. On a full investigation of the administration account, they direct the payments to be made out of the equitable fund. Had that court considered the claim of Patton as satisfied, by failing to apply in its discharge the moneys arising from the sale of the personal property, the payments would not have been decreed.

Debts to a large amount were paid out of the proceeds of the real estate, under the sanction of the court. Must these, as well as Patton's debt, be credited to the administration fund? Was Patton obliged to pay his own debt? Was he not at liberty to release it? And if he had done so, could there *have been any just ground of complaint by his sureties? Is not their complaint, as now made, equally groundless? [*317

Patton has received payment of a part, or the whole, of his deed of trust, out of the equitable assets, under the decree of a court of chancery. This payment cannot be transferred to the administration fund, and entered as a credit to the administrator; nor is the administrator, under the circumstances of the case, entitled to a credit, on any other principle, for the amount. It should be credited to the fund out of which the payment was made.

JOHNSON, Justice. (*Dissenting.*)—As I understand the decision just delivered, it affirms a principle to which I certainly cannot yield my assent. As the will charges the real estate, as well with the maintenance and education of the children, as the payment of debts, and there does not appear to have been, at any time, in the administrator's hands, a sum sufficient to pay off his whole debt, I am satisfied, that it is not a case of extinguishment; and that the payments made to the maintenance and education of the children, and the satisfaction of debts of an inferior order, are not to be imputed to the administrator as payments upon his own bond. They were voluntary payments, it is true, but they were made in pursuance of the will. But as to all other sums arising out of the personalty, and which were not applied to either of those purposes, but in fact sunk and wasted in the administrator's hands, I am clearly of the opinion, that they are to be imputed to him as payments on his own bond; and that, *pro tanto*, he could not be permitted to apply the proceeds of the real estate to the satisfaction of his debt; it was, in fact, a repayment on a debt which he knew to be satisfied. And as to the amount paid, respectively, to the maintenance and education of the children, having an interest in the proceeds of the realty; I have no idea, that they can be permitted to come upon the sureties of the administrator, for the amount so paid on their account. Indeed, upon the whole, it appears to me, to be one of those cases of common misfortune in which the court ought to leave the parties as it finds them. If the personal assets were, in fact, in existence, it would be a different case; and there might be an equity in the heirs, now to *come upon the assets for indemnity; supposing that they might originally have compelled the administrator to apply the personalty in relief of the real estate; but when the assets are [*318

in fact wasted, I cannot conceive that a court of equity would ever compel the sureties to pay up the administration bond for the relief of the heirs. Their liability is legally confined to the demands of creditors and distributees alone; and I can see no equity in subjecting them, directly or indirectly, to the general equity of the heirs, in stretching that liability beyond its strict legal limits.

Baldwin, Justice, also dissented from the judgment and opinion of the court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, 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 for that purpose made and provided; and was argued by counsel: On consideration whereof, it is the opinion of this court, that the debt of Patton, or such portion of it as was paid out of the proceeds of the sale of the real estate, should be credited to that fund, and not to his account of the administration fund. Whereupon, it is ordered and adjudged by this court, that it be certified to the judges of the said circuit court, that the debt of Patton, or such portion of it as was paid out of the proceeds of the sale of the real estate, should be credited to that fund, and not to his account of the administration fund.

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*319] *The Lessee of James B. Clarke and others, Plaintiff in error, *v.* John Courtney and others, Defendants in error.

Proof of deed.—Power of attorney.—Adverse possession.

The clerk of the court brought into court, under process, a letter of attorney, and left a copy of it, by consent of the plaintiffs and defendants, returning home with the original; M., a witness, stated, that the clerk of the court showed him the instrument, the signature of which he examined, and he believed it to be the handwriting of the party to it; with whose handwriting he was acquainted; another witness stated, that the instrument shown to M. was the original power of attorney; the letter of attorney purported to be executed and delivered by "James B. Clarke, of the city of New York, and Eleanor his wife," to "Carey L. Clarke, of the city of New York," on the 7th of October 1796, in the presence of three witnesses. In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for; when he is dead, or cannot be found, or is without the jurisdiction of the court, or otherwise incapable of being produced, the next secondary evidence is the proof of his handwriting, and that, when proved, affords *primâ facie* evidence of a due execution of the instrument; for it is presumed, that he could not have subscribed his name to a false attestation. If, upon due search and inquiry, no one can be found who can prove his handwriting, no doubt, resort may then be had to proof of the handwriting of the party who executed the instrument; such proof may always be produced as corroborative evidence of its due and valid execution; though it is not, except under the limitation stated, primary evidence. Whatever may have been the origin of the rule, and in whatever reason it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness. The rule was not complied with in the case at bar; the original instrument was not produced at the trial, nor the subscribing witnesses, or their non-production accounted for; the instrument purported to be an ancient one; but no evidence was offered, in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof. The agreement of the parties dispensed with the production of the original instrument, but not with the ordinary proof of the due execution of the original, in the same manner as if the original were present.

Clarke v. Courtney.

A power of attorney "to sell, dispose of, contract, and bargain for land, &c., and to execute deeds, contracts and bargains for the sale of the same," did not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794; which allowed persons who held lands subject to taxes, to relinquish and disclaim their title thereto, by making an entry of the tract, or the part thereof disclaimed, with the surveyor of the county.[1]

A power of attorney from "James B. Clarke and Eleanor his wife," to "Carey L. Clarke," for the sale of lands, is not properly or legally executed in the *following form: "I, the said Carey L. Clarke, attorney as aforesaid, &c., do;" "in witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800.—Carey L. Clarke. [L. S.]" This act does not purport to be the act of the principal, but of the attorney; this may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals; but the law looks not to the intent alone, but to the fact, whether the intent has been executed in such a manner as to possess a legal validity.[2] [*320

In the case of Hawkins *v.* Barney's Lessee (*post*, p. 457), it was decided, that when the plaintiff's title, as exhibited by himself, contains an exception and shows that he has conveyed a part of the tract of land to a third person, and it is uncertain whether the defendants are in possession of the land not conveyed, the *onus probandi*, to prove the defendant on the ungranted part, is on the plaintiff.

If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the owner, it is an ouster or disseisin of the owner; but in such case, the possession of the trespasser is bounded by his actual occupancy; and consequently, the owner is not disseised, except as to the portion so occupied.

Where a person enters into land, under a deed or title, his possession is construed to be co extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed to be disseised to the extent of the boundaries of such deed or title; this, however, is subject to some qualifications; for if the true owner be, at the same time, in possession of part of the land, claiming title to the whole, then his seisin extends, by construction of law, to all the land which is not in the actual possession or occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title.

In the case of the Society for Propagating the Gospel *v.* Town of Pawlet, 4 Pet. 480, the court held, that where a party entered as a mere trespasser, without title, no ouster could be presumed in favor of such a naked possession; but that when a party entered under a title adverse to the plaintiff, it was an ouster of, and an adverse possession to, the true owner; the doctrines recognised by this court are in harmony with those established by the authority of other courts, especially, by the courts of Kentucky.[3]

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[1] A power of attorney to sell and convey lands, was held, under the circumstances, to empower the attorney to enter into a covenant of seisin. Le Roy *v.* Beard, 8 How. 451. See Hubbard *v.* Elmer, 7 Wend. 446.

[2] If an agent sign and seal a deed in his own name, it does not bind his principal, though it purport to be made between the other party and the principal, by such agent. Bellas *v.* Hays, 5 S. & R. 427. Where, however, an instrument, executed by an agent, shows on its face, the names of the contracting parties, the agent may sign his own name first, and add to it "agent for the principal," or he may sign the name of his principal first, and add, "by himself as agent;" either form may be followed; all that is required, in such case, is, that the contract shall purport on its face to be the contract of the principal. Smith *v.* Morse, 9 Wall. 76. And in Van Ness *v.* United States Bank, 13 Pet. 20–1, it was held, that the rule does not apply, where an authority is to be executed under the decree of a court of chancery.

[3] The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is co-extensive with his right, and continues until he is ousted thereof by an adverse possession. United States *v.* Arredondo, 6 Pet. 743. So, where a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title; still, his possession beyond the limits of his actual occupancy is only constructive; if the true owner be, at the same time, in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual possession be not within the limits of the defective title Hunnicutt *v.* Peyton, 102 U. S. 368.

Error to the Circuit Court of Kentucky. This was an action of ejectment, instituted in February 1821, against a number of persons in possession of a large tract of land, containing 55,390 acres, in the state of Kentucky. The suit was afterwards dismissed, by the plaintiffs, as to forty of the defendants.

The declaration contained five counts, each count stating separate demises of the same tract of land. The first was on the demise of James B. Clarke, *321] of the 1st of September 1820, for 55,390 acres, granted *by Virginia to Martin Pickett, by patent, bearing date the 10th December 1785, "beginning at a sugar tree and white oak, at the head of a hollow corner, to another survey of the said Pickett, and of younger Pitt's land, thence with a line of said Pickett's survey of 44,740 acres," &c., describing the abuttals as set forth in the patent.

The second count was on the demise of John Bryant, Maxwell and wife, Anna Maria Maxwell and Eliza Bryant Grant, heirs of John Bryant, deceased. The third was on the demise of Abraham Schuyler, and Neelson and wife. The fourth, of Theodocia, Thomas and John B. Grant. The fifth on several demises made by John B. Maxwell, Anna Maria Maxwell, Eliza B. Grant, Theodocia S. Grant, Thomas R. Grant, John B. Grant, Abraham S. Neelson and wife.

The case was tried at November term 1826; when the verdict and judgment were for the defendants. In the course of the trial, the plaintiffs took three bills of exception to the opinions of the court on the matters set forth therein.

The first bill of exceptions set forth, that on the trial of the cause, some of the defendants, professing to hold a conveyance from the plaintiff, Clarke, by Carey L. Clarke, as attorney in fact of the said plaintiff, offered in evidence, a deed and letter of attorney, the former, executed by Carey L. Clarke, as the attorney in fact of James B. Clarke and Eleanor Clarke, his wife, on the 23d October 1800, to Robert Payne, and the latter, the power of attorney, executed at the city of New York, on the 7th of October 1796. The deed to Robert Payne, which was duly admitted to record, released to him all James B. Clarke's title to all the land embraced by the surveys of John and Robert Todd, on the North Fork of Eagle and Mill Creek, so far as they interfered with the patent to Martin Pickett, under which Robert Payne claimed; and gave testimony likewise, conducing to prove them. And that, Andrew Moore, the clerk of the Harrison circuit court, who brought the letter of attorney into this court, under process for that purpose, desiring to return, and considering it his duty to retain possession of that instrument, by consent of plaintiff and defendant, departed with it, *322] leaving a copy. And at a *subsequent day, Moses L. Miller was introduced as a witness, to prove the letter of attorney, who stated, that being summoned as a witness, he met with the clerk of Harrison aforesaid, in Georgetown, who showed him an instrument, the signature to which he examined, and he believed it to be the handwriting of James B. Clarke, with whose handwriting he was acquainted. And another witness was examined, tending to prove that the instrument so shown by said Moore to Miller, was the same previously read before this court as aforesaid. When Andrew Moore, the clerk of Harrison court, was about to resume possession of the letter of attorney, and to depart, the attorney of the plaintiff declared

that he had no objections. No further evidence was offered relative to the power of attorney. To the admission of the testimony of Miller, the plaintiff objected, especially, in the absence of the letter of attorney ; but the court overruled the objection, and submitted the testimony to the jury, as tending to prove that instrument ; to which the plaintiff excepted.

The second bill of exceptions stated, that the plaintiff proved and read in evidence, a patent from the commonwealth of Virginia, to Martin Pickett, dated 10th of December 1785, for 55,390 acres, "beginning at a sugar tree and white oak, at the head of a hollow corner to said Pickett's and younger Pitt's land, thence with a line of said Pickett's survey of 44,740 acres, being part of said entry, north 9°, east," &c.; being the same abuttals set forth in the declaration of ejectment, and in the power of attorney. And also a deed from the said Martin Pickett, of Virginia, to William and John Bryant, for the said land, dated May 1st, 1793 ; and also a deed from William Bryant to James B. Clarke, dated 18th July 1794, for an undivided moiety of the said land ; and also a deed from John Bryant to James B. Clarke, dated October 13th, 1794, for the other moiety ; he having proved the possession of the defendants, and that James B. Clarke, at the date of his deed and ever since, was and had been, a citizen and resident in the state of New York.

*The plaintiff relied solely on the demise from James B. Clarke, and gave no evidence on the other demises—and relied solely upon the patent to Pickett for 55,390—none of the defendants being within the patent to Pickett for 44,370 acres. [*323

The defendants offered in evidence the following exhibits : a release of 49,952 acres by Carey L. Clarke, as attorney for James B. Clarke, and John Bryant, bearing date 25th November 1800—acknowledged same day, before John Payne, the surveyor of Scott county, by him certified—afterwards lodged with the auditor of public accounts :—it recited that James B. Clarke and wife, and John Bryant and wife, had appointed Carey L. Clarke their attorney, to sell, transfer and convey a certain tract on the waters of Eagle creek, in the county of Scott, and state of Kentucky, containing 100,192 acres, entered in the name of Martin Pickett, and which tract of land is now held by the said Clarke and Bryant, as tenants in common : "Now, therefore, I, the said Carey L. Clarke, attorney as aforesaid, in pursuance of an act of the legislature of the state of Kentucky, authorizing claimants of land within its commonwealth to relinquish, by themselves or their attorneys, any part or parts of their claims to the commonwealth ; I do hereby relinquish to the commonwealth of Kentucky, all the right, title, interest, property, claim and demand of the said Clarke and Bryant, of, in and to the hereinafter described tracts of land, being part of the above mentioned tract, and lying within the boundaries, viz :—" Here, the deed specified various conflicting surveys, and gave the quantity in the various surveys ; also specified certain other quantities, by boundaries expressed, altogether amounting to 49,952 acres.

Also, a release, bearing date 25th November 1801, executed by the said Carey L. Clarke, as attorney in fact for John Bryant, reciting the act of assembly aforesaid, authorizing the relinquishment of lands to the commonwealth, specifying various conflicting surveys and other specific boundaries of the several parcels, amounting to 34,027 acres—also certified by the sur-

veyor of Scott, and filed in the *auditor's office—with a transcript by the auditor, from the books of his office, certifying the entries for taxes, of the 55,390 acres—and the subsequent relinquishment of 49,952 acres thereof, and the sale to the state for taxes of 3438 acres—also, the entry for taxes of the 44,547 acres; the release to the state of 34,029 thereof, and that the residue was the property of John Hawkins, of George (Kentucky): —annexed also was the certificate of the auditor, that neither James B. Clarke nor John Bryant appeared to have paid any taxes since the said relinquishments were made. To prove which, he relied upon the power of attorney to Carey L. Clarke, mentioned in a former bill of exceptions, and the original relinquishment from the auditor's office, and proved the execution thereof by John Payne, the surveyor of Scott county, wherein the land relinquished then was situate.

John Payne also stated, that in the year 1794, or thereabouts, ——— Griswold came to his residence in Scott county, claiming the land in Pickett's patent, by contract with Clarke; that the deponent and Robert Parker, the surveyor of Fayette, made out a connected plot, showing the interfering claims set forth in this relinquishment, and Griswold, expressing dissatisfaction with the claim and the contract, returned. Afterwards, Carey L. Clarke came to Kentucky, avowing himself the agent of Clarke, by the letter of attorney, a copy of which was set forth in the bill of exceptions taken in this cause; that Carey L. Clarke, in 1796, or thereabouts, called on the witness, and expressed a disposition to relinquish. The witness advised Clarke, that he might be able to prevail for some of the land, and nad better not make the relinquishment. Afterwards, in the year 1800, the relinquishment was prepared by Carey L. Clarke, in his own handwriting, and executed in the surveyor's office, before said Payne, and he, the surveyor, certified it, and took copies; Carey L. Clarke then took the original; and the witness having no record-book for the purpose (this being the only relinquishment ever made in his office for taxes), still kept a copy, with his private papers, andhe did not deliver the copy to his success or in office
*325] (and did *not suppose Clarke had used it, till lately), when he resigned and handed over the records; which took place some years afterwards.

Porter Clay, the present auditor of state, produced the original, stating, on examination, that he found it in his office, and that no tax had been paid upon that part of the tract embraced by that instrument, subsequent to its date.

The attorney for the plaintiff then made a motion to the court to instruct the jury, that the instrument, under the proof, did not bind the plaintiff, and could not bar his recovery; but the court overruled the motion, and instructed the jury, that the said relinquishment for the 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment: And on the motion of the defendants, the court instructed the jury, that if they believed the execution of the power of attorney from James B. Clarke to Carey L. Clarke, and of the relinquishment in evidence, then it was incumbent on the plaintiff, to maintain his action, to show that the defendants, or some of them, were, at the service of the ejectment, outside of the several parts relinquished to the state: to which several opinions of the court, the plaintiff excepted.

The third bill of exceptions stated, that the plaintiff having given in evidence the patent to Pickett, the deed to John and William Bryant, the deeds from John and William Bryant to the plaintiff, James B. Clarke, and proved, that the said James B. Clarke was, at the date thereof, and ever since, resident of the state of New York, and that the title papers aforesaid, all embrace the land in controversy, and that the defendants were all in possession, at the time of the commencement of this suit; and after the defendants had given the evidence touching the relinquishment, as set forth in the bill of exceptions on file in this cause, and the court had given the instructions and opinions therein also contained, the plaintiff gave testimony conducing to prove, that some of the defendants, to wit, William Hinton, James Hughes, John Vance, John Gillum, Henry Antle, Jeremiah Antle, Peter Sally, Benjamin Sally, Samuel Courtney, &c., were not within the limits set forth by the said instrument of relinquishment; and these all *relying in their defence upon their possession, they gave in [*326
evidence a patent to James Gibson, and a patent to Sterrett and Grant. That Gibson's patent was for 657 acres, surveyed 4th December 1783, patented March 1st, 1793. Sterrett and Grant's patent, 1629 acres, entered 16th January 1783, surveyed 1st November 1792, patented 24th October 1799. And gave testimony conducing to prove that the said Sallys, Courtneys, &c., were within the boundary prescribed by the patent of Grant and Sterrett; and Hinton, Hughes, Gillum, Vance, Antles, were within the bounds of the grant to Gibson: and touching the possession within Gibson's patent, the witness stated, that in the year 1796, William Hinton entered within the patent of Gibson, claiming a part of the tract under that grant; and that tenement had been occupied ever since; and at subsequent periods, the other tenants claiming under said William Hinton, had settled in the same manner upon other parcels, claimed by them as parts of said William Hinton's purchase, and from the time of their respective settlements, their possession had been continued; the witness knew not the extent of boundary of any of the purchases, and no title papers were produced. And touching the possession within the grant to Sterrett and Grant, the witness stated, that in the year 1791 or 1792, Griffin Taylor entered under that patent; that tenement had been still occupied by Taylor and his alienees, and at periods subsequent, the other tenants had entered and taken possession, claiming under said Taylor, within the limits of the patent to Sterrett and Grant. No written evidences of purchase were offered.

Whereupon, the attorney for the plaintiff made a motion to the court to instruct the jury: 1. That the possession of those defendants was no bar to the plaintiff's action. 2. That the statute of limitations could only protect the defendants, to the extent that had actually inclosed their respective tenements; and occupied for twenty years preceding the commencement of this suit. The court overruled the motion of the plaintiff for the *in- [*327
structions aforesaid, as made; and instructed the jury, that adverse possession was a question of fact; that under the adverse patents given in evidence, it was not necessary to show a paper title derived under those adverse grants, to make out adverse possession; but that such hostile possession might be proved by parol; that an entry under one of the junior grants, given in evidence by the defendants, and within the boundaries of

the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttals and boundaries under which such entry was made. To the refusal of the court to give the instructions asked by the plaintiff, and to the instructions given by the court, the plaintiff excepted.

The case was argued by *Loughborough*, for the plaintiff in error; and by *Bibb*, for the defendant.

For the *plaintiff's* in error, it was contended:

1. As to the proof of the letter of attorney. The court erred in admitting a copy to the jury. The original was in existence, and it was in the power of the defendants to produce it. This should have been done. Peake's Evid. 96; 9 Wheat. 558; *Tayloe* v. *Riggs*, 1 Pet. 591. To admit the copy as evidence, it was necessary first to have proved the execution of the original. *Rees* v. *Lawless*, 4 Litt. 220; *Elmendorf* v. *Carmichael*, 3 Ibid. 479. This was not done. There were subscribing witnesses to the deed. Proof of handwriting in such case, is secondary evidence; and to admit it, a foundation must be laid, by showing that the testimony of the subscribing witnesses cannot be had. Here, the absence of the subscribing witness was not accounted for in any manner; proof of handwriting was, therefore, incompetent. Peake's Evid. 101, and cases cited in notes. *Fox* v. *Reil*, 3 Johns. 477; *Henry* v. *Bishop*, 2 Wend. 575; *McMurtry* v. *Frank*, 4 T. B. Monr. 39; 1 Stark. Evid. 330.

But admitting a sufficient excuse shown for the absence of the subscribing witnesses, the next best evidence is proof of *their handwriting. *328] Phil. Evid. 420–21; Stark. Evid. *ubi supra*. Norris' Peake 152; *Sluby* v. *Champlin*, 4 Johns. 461 and notes. It does not appear that this proof was given here. Proof of the party's signature was, therefore, incompetent and misplaced.

That the plaintiff's counsel did not object to the withdrawal of the original by Moore, does not preclude his exception to the secondary evidence. The instrument constituted a part of the defendants' evidence, offered by themselves; which they had a right at any time to withdraw, without the plaintiff's assent. The plaintiff could have made no objection. At the proper time, the proper objection was made; that was, when the secondary and objectionable evidence was offered. And surely, the defendants cannot be permitted to cut off the objection, upon the ground that the plaintiff did not make himself the guardian of their case, by forewarning them that he would in due time avail himself of a just exception to incompetent testimony. No surprise could have been occasioned by the objection. It was one which the defendant's counsel should have expected.

2. But if the court shall consider the power of attorney sufficiently proved, it is insisted by the plaintiff, that it does not authorize the act of relinquishment attempted to be performed by the agent. In the commencement, it authorizes the attorney "to sell and dispose of, contract and agree for, a certain tract of land," &c., and after describing the land, proceeds as follows, "hereby fully authorizing and empowering the said Carey L. Clarke to sell, dispose of, contract and bargain for, all or so much of said tract of land, and to such person or persons, and at such time and times, as

he shall think proper; and in our or one of our names, to enter into, acknowledge and execute, all such deeds, contracts and bargains, for the sale of the same, as he shall think proper." Then follows a proviso, limiting the attorney's power to make warranties. Whether this power of attorney be regarded in the whole, or with a view to its several parts, it will not appear to give the agent any authority to abandon the land of his principal, by relinquishing it to the commonwealth. No one can believe, that James B. Clarke expected to escape from his title in this manner. The agency intended seems to have been *one for the sale of the land, or such [*329
parts of it as the agent might think proper. This will appear from the first clause recited; and when the power to execute deeds, contracts and bargains, for the principal, is given, it is limited to such as shall be "for the sale" of the lands. When, therefore, the agent attempted to execute a deed, not for the sale of the land, he exceeded his authority. That an authority must be strictly pursued: Bac. Abr., tit. Authority; 1 Com. Dig., tit. Attorney; *Nixon* v. *Hyserott*, 5 Johns. 58. The power of attorney shown does not appear to have been that under which C. L. Clarke acted By the relinquishment, it appears, that the attorney had a joint letter of attorney from Clarke and Bryant, tenants in common of a tract of 100,192 acres of land, to sell, &c. The authority shown is from J. B. Clarke, sole tenant of 50,000 acres; this does not support the relinquishment; it is inconsistent with it.

3. But the relinquishment was not duly made. The power to relinquish did not exist at common law; it was given by the act of assembly of Kentucky of the 4th of December 1794. 1 Litt. Laws 222; Digest Laws of Kentucky 845. The act provides, that the relinquishment shall be, "by making an entry of the tract, or that part thereof, so disclaimed, with the surveyor of the county in which the land, or the greater part thereof, shall lie, in a book to be by him kept for that purpose; which said entry shall describe the situation and boundary of the land disclaimed, with certainty, and be signed by the party, in the presence of the surveyor, who shall attest the same." It is a principle of law, that enabling statutes must be strictly pursued; where a statute innovates upon the common law, and confers authority, in derogation thereof, to do a particular thing; as, in this case, to surrender land to the commonwealth; the act must be performed in the manner directed by the statute, else it cannot prevail: not by the common law, for that does not at all permit it; not by the statute, because its requisitions have not been complied with. The statute declares, that when certain things are done, in the mode pointed out by it, they shall operate a relinquishment of the title. To make an act valid, therefore, under this statute, it must *be shown to have been performed in the prescribed [*330
manner. In *Wilson* v. *Mason*, 1 Cranch 97, this court held, that a party claiming under a statute, should show that its requirements had been fully complied with; and that the court could not substitute any equivalent act for that required by the law.

The court will perceive no motive for liberality in the construction of this act of the Kentucky legislature. The land had been appropriated by entry, survey and patent, all on record; the relinquishment should have been made of record; in a book kept for that purpose, by the surveyor, signed by the party, in presence of the surveyor, by him attested; and if an agent,

that officer should have received the power, duly authenticated, and recorded it with the entry. None of these requisitions have been fulfilled. The relinquishment offered was in no book—not even held officially by the surveyor; for he laid the copy aside, with waste papers, and handed none of them to his successor. Suppose, an entry upon a land-warrant had been thus made; no court could recognise it as a valid act.

In *Hardin* v. *Taylor* (4 T. B. Monr. 516), the court of appeals of Kentucky deemed it a valid objection to a relinquishment made by an attorney, that the power of attorney was not filed in the surveyor's office. The relinquishment, in this case, was, it is true, after the act of 1801, which directed the power to be recorded; but that direction was only an affirmance of an established principle of law, that the authority of the agent should be evidenced as the act performed by him. In England, the title to land can pass, neither to nor from the king, except by matter of record. 3 Bl. Com. 344. This rule is applicable to the commonwealth of Virginia. *Fairfax* v. *Hunter*, 7 Cranch 603. In the case of *Barbour* v. *Nelson*, 1 Litt. 59, the court of appeals of Kentucky recognise the principle as existing in that state. Also, 4 Litt. 479. In *Robinson* v. *Huff*, 3 Ibid. 38, the court of appeals of Kentucky decided, that the common law prevailed in that state; and that an act of the legislature which provided that lands which could not be sold for taxes, should be *"stricken off to the state," did not affect it; and they held, that the title to lands actually stricken off to the state was not thereby vested in it. If the rule, that a record is necessary to pass a freehold to the king, or to the commonwealth, be as inflexible as these authorities show it, then that record must be complete between the holder of the freehold and the state. Such is not the case here. Admitting the relinquishment to be a record, still, it is a record made up between C. L. Clarke and the commonwealth, and to which J. B. Clarke, the owner of the title, is no party. It does not appear of record, that C. L. Clarke was the attorney of J. B. Clark, for the purpose of this relinquishment. The authorities, it is believed, will show, that to an inquest of office, to vest a freehold in the king, it was necessary, that the party interested, should appear in person or by an attorney, whose warrant was entered on the record of the proceeding.

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But furthermore, this deed of relinquishment is invalid upon its face, as not having been executed in the proper manner. It is executed in the name of the attorney, not of his principal. In *Combe's Case*, 9 Co. 76, it was resolved, that if attorneys have power by writing to make leases by indenture, they cannot make indentures in their own names, but in the name of him who gives them warrant. In *Frontin* v. *Small*, 2 Ld. Raym. 1418, s. c. 1 Str. 705, held, that a deed purporting to be made by an attorney, in his own name, was void upon its face. Also, *White* v. *Cuyler*, 6 T. R. 176; 2 Stark. Evid. 477. *Elwell* v. *Shaw*, 16 Mass. 42, s. c. 1 Greenl. 339, is a case analogous to the present; there, the supreme court of Massachusetts review all the cases, and adduce from them the rule now advanced.

The case of *Parker* v. *Kett*, reported in 1 Salk. 95, and 12 Mod. 466, which would seem to conflict with the rule, is the case of an act *in pais*, not of a deed. That the deed in question is not a common-law, but a statutory deed, cannot vary the rule. The act authorizing this relinquishment, it is true, says, that lands may be relinquished to the commonwealth, by the holder or his attorney, but as it does not prescribe any *particular

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mode in which the attorney may perform the act, it follows, that he must proceed according to the common-law rule above stated.

The relinquishment does not describe the boundaries of the tracts given up, with the certainty required by the statute ; it is, therefore, invalid. It is insisted, that the circuit court erred in the instruction predicated from the relinquishment ; by which was thrown upon the plaintiff the *onus* of showing that the defendants were without the relinquished tracts. The boundaries of the abandoned territory are not defined. The jury could not say, from the documents and proof before them, that the land in controversy was embraced by that writing. As the obscurity arose out of he defendants' proof, and affected their defence, it was incumbent upon them to clear it up ; the plaintiff had made out his cause of action clearly, and had closed his proofs. This is not the case of an exception contained in the title papers of the plaintiff. If, after the plaintiff had proved his title, the defendant had shown in evidence a deed from him, for 100 acres of land, it certainly woudl be required of them also to show its boundaries. The instruction of the court supposes, that all the relinquished tracts were within the patent of 55,390 acres. Upon the proof offered, this does not appear to be so. The fact of the relinquishment does not afford any evidence of it. It shows only that the surveys relinquished lie within the claim of 100,192 acres, entered in the name of Martin Pickett.

The case of *Hawkins* v. *Barney's Lessee*, decided at the present term (*post*, p. 457), does not support the instruction of the court below. As that case is understood, it is this—plaintiff showed his title, and proved defendant in possession ; defendant then showed that plaintiff had conveyed his title to a third person ; and the plaintiff showed a conveyance back to him, containing on its face an exception of part of the land ; this court said, he should show the defendants out of the excepted part. This was a case of an exception in the title papers of the plaintiff, which he was bound to show presented no bar to his recovery. The cases cited from Marshall and Monroe's reports, sustain *fully that decision ; but they do not bear upon the present case, because they are all cases in which the ambiguity grew out of the plaintiff's title. When the defendant shows an elder outstanding title for part of the land, he must show what part. *Buckley* v. *Cunningham*, 4 Bibb 285. [*333

The transcript from the books of the auditor, that 3438 acres had been sold to the state, is no evidence of that fact. It does not show the title vested in the state, and the defendants cannot avail themselves of it. *Robinson* v. *Huff*, 3 Litt. 38. The recital in the power of attorney, that J. B. Clarke had conveyed to John Bryant, 5390 acres of the land, is not evidence in this case, and for these defendants. Peake's Evid. 111, and cases there cited. The recital of that which is a nullity cannot estop. The deed of a person out of possession is merely void, and does not prevent the grantor from maintaining his action. *Jackson* v. *Vredenburg*, 1 Johns. 161 ; *Williams* v. *Tibbits*, 5 Ibid. 489 ; *Meredith* v. *Kennedy*, 6 Litt. Sel. Cas. 516 ; *Jackson* v. *Brinckerhoff*, 3 Johns. Cas. 101. The case of *Carver* v. *Astor*, 4 Pet. 1, does not show that the recital in the power of attorney in this case is evidence against the plaintiff. That was the case of the recital of a lease in a deed of release, which the court say is evidence. But the case decides nothing beyond this.

But admitting the recital is evidence, should not the defendants, to make it available, show themselves within the land recited to have been conveyed by Clarke? If the recital is evidence that the title is out of Clarke, one of the lessors, it also shows that it is in the heirs of John Bryant, who are also lessors of the plaintiff. The proof of possession is insufficient to warrant the finding of the jury. Hinton, one of the defendants, entered within the junior patent of Gibson, claiming a part of that tract by purchase; and subsequently, others of the defendants settled upon parcels claimed by purchase of Hinton. His was not a contract for an interest in common in the whole tract, but for an entire parcel. His possession, therefore, was
*334] confined to *his purchase; and, as he did not show its boundaries, should not be a bar for more than was actually inclosed by him. When the other defendants entered, what were the boundaries of their parcels, or whether they were in fact within Hinton's first purchase, does not appear. Adverse possession is a question of fact; but, in the absence of the title papers of the tenant, the *quo animo* of his entry and taking possession should appear. The extent of possession depends upon this. *Calk* v. *Lynn's Heirs*, 1 A. K. Marsh. 346; 3 Ibid. 94; *Owings* v. *Gibson*, 2 Ibid. 515. That possession should be restrained to defendants' close, &c.: *Green* v. *Liter*, 8 Cranch 229. If a junior patentee enterupon the interference, and then sell by metes, his possession is limited by bounds of the lands sold: *Trotter* v. *Cassaday*, 3 A. K. Marsh. 365.

The adverse possession under Gibson's patent was taken, after the title had vested in plaintiff's lessor. Though the record states that Taylor entered as early as 1791 or 1792, under Sterrett and Grant's patent, yet it appears, that patent did not issue until 1799. Under this grant, the adverse possession, therefore, did not begin, before the conveyance to Clarke. But the possession of Taylor, and those claiming under him, is not properly shown to be adverse; at the time he entered, the plaintiff held the only patent for the land. To protect himself under the patent afterwards issued, he should show some connection with it. The conveyance to Clarke, as regards this part of the land, cannot be void, on account of the law of champerty; because the possession of Taylor is not adverse, within that law, to make the deed inoperative; or it is only so to the extent of his actual inclosure, and the defendants, who entered afterwards, are not saved by it. *Barr* v. *Gratz*, 4 Wheat. 214. Possession taken before survey and patent is limited to the actual close. *Brooks* v. *Clay*, 3 A. K. Marsh. 545; *Henderson* v. *Howard's Devisees*, 1 Ibid. 26. Patentee conveys part of his land by bounds; grantee enters; he gets possession only to the extent of his bounds, and patentee cannot avail himself of possession out of them. *Maury* v. *Waugh*, Ibid. 452. Patentee extending protection to an occu-
*335] pant whose *possession is bounded, acquires possession only to the limits of the occupant's claim. *Lee* v. *McDaniel*, Ibid. 234.

Under each of the junior patents shown by defendants, it appears, that possession was taken by purchasers of distinct parcels. The entries, therefore, could not have been by persons claiming to the abuttals of the patents. It was incumbent on defendants, if they would save more than their actual closes, to show their rightful boundaries. It does not appear, that any of the tenements, except Hunter's and Taylor's, have been occupied for twenty

years before suit. *Clay* v. *White*, 1 Munf. 162 ; *Potts* v. *Gilbert*, 3 W. C. C. 475 ; *Bonnell's Lessee* v. *Sharp*, 9 Johns. 162 ; *Brandt* v. *Ogden*, 1 Ibid. 157 ; *Hardenberg* v. *Schoonmaker*, 2 Ibid. 220 ; *Jackson* v. *Woodruff*, 1 Cow. 276 ; *Jackson* v. *Camp*, Ibid. 605 ; 2 Johns. 230.

Bibb, for the defendants, insisted, that the decisions of the court upon the points set forth in the several bills of exception taken by the plaintiff, contained no just cause of exception : those motions were rightly ruled by the court ; and the instructions given, applied to the facts which the evi dence conduced to prove, were correct expositions of the law.

The first bill of exceptions objects "to the admission of the testimony of Miller, especially, in the absence of the letter of attorney." Miller's testimony proved the handwriting of James B. Clarke, the maker of the letter of attorney to Carey L. Clarke. The exception has two aspects : 1. To the testimony itself : 2. To the absence of the power of attorney at the time when Miller's testimony was given. As to the first, it is to be remembered, that the original letter of attorney was brought into court, and evidence conducing to prove its execution was given, to which evidence there was no objection, and that evidence so given is not stated. The exception is to the after auxiliary testimony of Miller, as to the handwriting of James B. Clarke. If any previous evidence, conducing to prove the execution, could lay the foundation for admitting proof of the handwriting of the maker of the instrument, then this court must presume that such foundation was laid. *Not having made the whole evidence on this subject a part of the bill of exceptions, every intendment should be [*336 indulged in favor of the court, and against him who excepts. *Hodges* v. *Biggs*, 2 A. K. Marsh. 222. The party taking a bill of exceptions must state enough to show that the opinion of the court was erroneous to his prejudice in that very case. *Brown* v. *McConnell*, 1 Bibb 266.

The handwriting of the maker of the deed is proper auxiliary evidence to prove its execution, in certain cases. "When the subscribing witness is dead, insane, or absent in a foreign country, at the time of the trial, whether for a permanent residence or temporary purpose, or by the commission of a crime, or by some interest subsequent to the execution of the instrument, has become incompetent, proof of his handwriting is the next best evidence. In the first case, where the witness is dead, this alone (proof of his handwriting) has been held sufficient ; but in the others, it has been usual, and in one case, was held to be necessary, to prove the handwriting to the deed also; and in all these cases, a foundation must be laid, by proving the situation of the subscribing witnesses." Peake's Evid. 100 ; *Wallis* v. *Delaney*, 7 T. R. 266 ; Gilb. Evid. 105 ; *Jones* v. *Blount*, 1 Hayw. 238 ; *Mushrow* v. *Graham*, Ibid. 361 ; *Oliphant* v. *Taggart*, 1 Bay 255 ; *Hopkins* v. *Degraffenreid*, 2 Ibid. 187 ; *Nelius* v. *Brickell*, 1 Hayw. 19.

As to the absence of the power of attorney, when Miller's testimony was admitted, let it be noted, that the original was in custody of an officer, whose duty it was to keep it ; no court, state or federal, had rightful authority to take it out of his custody ; to bring him into court with the instrument, was the only mode of getting that power of attorney before the court and jury ; that process had been adopted, the officer had attended, the instrument had been produced and given in evidence ; for the accommo-

dation of the officer, who wished to return home, but could not, consistent with his duty, leave the paper, the plaintiff and defendant consented that he should depart, leaving a copy of the instrument. The instrument of which Miller testified, was identified as the same which the clerk, Moore, had produced, and which had been read in the case. Under these circumstances, it seems, that this *exception is captious; that it proceeded from a *337] raging thirst for a bill of exceptions, so scorching that a phantom was grasped at for its gratification.

The second bill of exceptions presents two questions: 1st. The efficacy of the relinquishment in the surveyor's office, of the 49,952 acres, part of the 55,390 acres, to bind the plaintiff, and bar his recovery as to so much as was released. 2d. As to the instruction that it was incumbent on the plaintiff to show that some of the defendants were, at the service of the ejectment, outside of the several parts relinquished to the state.

1. As to the supposed inefficiency to bind the plaintiff, and its want of potency to bar the plaintiff *pro tanto*. The plaintiff, by his argument, supposes the power of attorney to Carey L. Clarke is not broad enough to authorize a relinquishment to the state; and that if the power was sufficient the relinquishment was not consummated according to the statute. The authority is, "to sell and dispose of, contract and agree for"—"fully authorizing the said Carey to sell, dispose of, contract and bargain for, all, or so much of said tract of land, and to such person or persons, and at such time or times, as he shall think proper"—"and execute all such deeds, contracts, and bargains," &c. The statute under which this relinquishment by James B. Clarke was made to the commonwealth, passed in 1794. 2 Digest, Laws Ky. 845. This did not require the power of attorney under which an agent relinquished to be filed in the surveyor's office; but the act of the 11th of December 1801 did. 2 Digest 846. The entry of relinquishment, so made with the surveyor, describes the land relinquished with certainty; was signed in the presence of the surveyor, who tested it, as required by the statute. Whether the surveyor kept his copy of it in a bound book, or on a sheet of paper; and whether he delivered it to his successor or not, are facts immaterial. The deed was consummated by the signature, acknowledgment, attestation and delivery in the surveyor's office; as to keeping a book for such *purposes, that was but directory to the surveyor for *338] safe-keeping and preserving the evidence of its interest on behalf of the state; but the omission of the surveyor in this behalf, could not vitiate the act and deed of the party relinquishing. 1 Litt. Laws Ky., Act of 1792, p. 64, § 14, 15.

The state of Kentucky commenced her system of land tax in 1792. By her revenue laws, non-residents were bound to enter their lands for taxation, at first, with some commissioner; but afterwards, with the auditor of public accounts. Act of 1794, p. 265, § 2, 3. The taxes were to be paid to the treasurer; his receipt to be filed with the auditor, who was to give a *quietus*. Act of 1795, p. 321; 1797, p. 663, § 15; 2 Litt. 1798, p. 55; 1799, p. 316, § 15, 17. If the taxes were unpaid, as required by law, the auditor was to transmit the list of lands and taxes due thereon (at first to the sheriff), but by a subsequent law, to the register of the land-office, whose duty it was to sell at auction, the lands, on the third Monday of November, in every year, and transmit the account of sales to the auditor; taxes in arrear to bear an

interest of ten per cent. per annum. The state held a perpetual lien on the land for the payment of the taxes; all personal property found upon the land in possession of any tenant or occupant, claiming under the proprietor from whom the taxes were due, was liable to distress for the taxes; the tenant who paid taxes had a lien on the land for reimbursement; the auditor was to keep a book of transfers; and non-residents, who transferred their lands entered with the auditor for taxation, were bound to have the alteration made accordingly in the auditor's office. 2 Digest 946, 951, 953. Non-residents and residents were required, upon pain of forfeiture, to enter their lands for taxation by the last day of November 1795, but prolonged until 1st December 1798; and until 15th December 1806, &c. Lands offered for sale for the taxes, and not sold for the amount, for want of bidders, to be stricken off to the state. Those who had paid the taxes were entitled, upon relinquishing their interest, to have the taxes upon the land so relinquished refunded from the treasury.

*Carey L. Clarke, then, by relinquishing for his principal a part of the tract, disengaged the residue from the taxes and arrearages [*339 and interest due, and to become due, upon the part relinquished; prevented the sale of the whole tract, for the amount of taxes due upon the whole—and if the taxes had been paid upon the part relinquished, was entitled to draw them back. In effect, he sold the 49,952 acres for the amount of taxes which had accrued thereon from 1792 up to 1800; and by so doing, disengaged the residue from liability to distress or sale for taxes accrued or accruing upon the part relinquished.

2. As to the instruction that it was incumbent on the plaintiff to show some of the defendants outside of the several parts relinquished, to recover in ejectment: the plaintiff must prove title of right of entry, and that the defendant, at the service of the ejectment, was in possession in some part of the land, to which the plaintiff, at that time, had the right of entry. It is not enough, that the plaintiff once had title; if he had title, and had parted with it, before action brought, he could not recover. If he had parted with title to part of a tract, he must still prove the defendant possessed of that which was not aliened; possessed of that to which his right of entry was existing. *Taylor* v. *Floyd*, 3 A. K. Marsh. 20; 7 T. R. 323; Bull. N. P. 110.

The third bill of exceptions was taken to the refusal of the court to instruct: 1. That the possession of these defendants, within the patents of Gibson and Sterrett, and Grant, was no bar to the plaintiff's action. 2. That the statute of limitations could only protect them to the extent of their actual inclosures of twenty years' duration. The counsel of the plaintiff in error having declined arguing the question presented by the first proposition, no notice is taken of it.

Upon the second proposition, "that the statute of limitations could only protect the defendants to the extent that had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of this suit," *the court negatived that proposition, and instructed [*340 the jury, "that adverse possession was a question of fact; that under the adverse patents, given in evidence, it was not necessary to show a paper title derived under those grants, to make out adverse possession; but that such hostile possession might be proved by parol: that any entry under

one of the junior grants, given in evidence, and within the boundaries of the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttals and boundaries under which such entry was made." The counsel for the defendants insisted, that the points involved in this proposition for instruction moved by the plaintiff, were correctly ruled by the court.

It must be remembered, that no evidence was adduced, tending to prove any actual possession by Pickett, or the lessors of the plaintiff, under Pickett's patent. Entry by purchaser of part of a survey not patented, his purchase not meted : he is possessed of the whole survey, and possession is not limited to his actual inclosure. *Kendall* v. *Slaughter*, 1 A. K. Marsh. 376; *Roberts* v. *Sanders*, 3 Ibid. 29 ; *Walden* v. *Heirs of Gratz*, 1 Wheat. 295. Entry by one claiming under a deed of conveyance specifying the boundaries : he is possessed to the extent of those boundaries, although the person who made the deed had only an entry, not perfected by survey or patent, and not appearing to cover the land so deeded. *Thomas* v. *Harrow*, 4 Bibb 563 ; *Smith's Heirs* v. *Lockridge*, 3 Litt. 20. An occupant, possessing himself of part of a tract, with intent to occupy the whole, is possessed of the whole, although he enters without the assent of the patentee, and without any written evidence of title. *Taylor* v. *Buckner*, 2 A. K. Marsh. 19 ; *Herndon* v. *Wood*, 2 Ibid. 44 ; *Smith's Heirs* v. *Lockridge*, 3 Litt. 20. Entry under a junior patent, within the interference, no possession existing under the elder patent : the possession so taken under the junior patent is not limited to the close, but *is co-extensive with the interference. *Fox* v. *Hinton*, 4 Bibb 559.

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But it would have been improper for the court to have told the jury, that the limitation was no protection to those defendants who were within Gibson's survey ; because the evidence conduced to prove, and the jury might have so found, that those defendants were not within the part to which James B. Clarke had title. That James B. Clarke had conveyed 5390 acres, part of the 55,390 acres, to John Bryant, is proved by his recital in the power of attorney of October 1796. The recital in that power is evidence of the fact against said James B. Clarke, and all persons claiming under him. *Carver* v. *Astor*, 4 Pet. 8, 19, 83.

Although there is a demise laid from the heirs of John Bryant, the plaintiff gave no evidence to show that they were within any of the savings of the statute, nor that John Bryant was. Neither did he give any evidence to show that the residue of Pickett's patent, after deducting the part conveyed to John Payne, by deed of October 1800, and the 5390 acres conveyed to John Bryant, which remained to James B. Clarke, included these defendants. The proof was, that they were within the patent of 55,390 acres, and outside of the 49,952 acres relinquished to the state. But were they outside of the surveys of John and Robert Todd, conveyed to Payne? Were they outside of the 5390 acres conveyed to Bryant? Had James B. Clarke the title to the land within the survey of Gibson? James B. Clarke was not the only lessor ; he was not the only substantial plaintiff. This state of the evidence required of the plaintiff to open his case on the demise from the heirs of John Bryant ; having failed to do so, he had no right to the instruction asked for ; he had no right to recover on the demise from James B.

Clarke. The plaintiff was John Doe ; the real actors were the heirs of John Bryant, and others, as named in the 2d, 3d, 4th and 5th counts, as well as James B. Clarke. The motion *for instruction was, that the plaintiff was not barred by the possession of the defendants : this instruction, if given, would have included the heirs of John Bryant and the other lessors, as well as Clarke. To this the court refused their assent. [*342

Had the plaintiff asked a hypothetical instruction, that if the jury found from the evidence, the land within Gibson's survey was within James B. Clarke's part of the 55,390 acres, not relinquished, nor sold, nor conveyed from him, then the possession of the defendants would be no bar to the demise from James B. Clarke ; in that case, it would have been necessary to bring into view the statute of Kentucky, passed 22d January 1814, in force six months after its passage, repealing the saving in the statute of limitations, in favor of persons out of the commonwealth. 4 Litt. Laws 91 ; 2 Digest 866 ; *Kendall* v. *Slaughter*, 1 A. K. Marsh. 377–80 ; *McCluny* v. *Silliman*, 3 Pet. 277 ; *Jackson* v. *Lamphire*, Ibid. 290. Possession of twenty years by a junior patentee, within the interference, tolls the right of entry of the elder patentee to the whole extent of the junior patent. *Smith* v. *Morrow*, 5 Litt. 210 ; *Botts* v. *Shields's Heirs*, 3 Ibid. 34. Where a tenant occupied the plantation, the presumption is, that he was in possession of all the woodland belonging to the tract ; and evidence of his possession being circumscribed, must come from those whose interest requires the establishment of that fact. *Hinton* v. *Fox*, 3 Litt. 383. Written evidence of title is not necessary to create a hostile possession. *Taylor* v. *Buckner*, 2 A. K. Marsh. 19 ; *Herndon* v. *Wood*, Ibid. 44. Whether the possession was adverse or not to the plaintiff, is properly a question of fact, of which the jury are the competent triers. *Bowles* v. *Sharp*, 4 Bibb 551. Nor is it necessary, that possession should be held under color of title, to render it adverse and transferrible from one to another, so that the successive possessions may be knit together, and toll the right of entry. *Bowles* v. *Sharp*, 4 Bibb 551. A continued, uninterrupted possession for twenty years, not only tolls the right of entry, but gives a right of possession which will sustain an ejectment. Bull. N. P. 103 ; *Stokes* v. *Berry*, 1 Salk. 421.

*Story, Justice, delivered the opinion of the court.—This is a writ of error founded on a judgment of the circuit court in the district of Kentucky, in an action of ejectment, in which the plaintiff in error was the original plaintiff. The case is before us upon certain bills of exception taken by the plaintiff ; and to the consideration of these the court will address their attention, without entering upon any examination of other facts, not involved in the decision of them. [*343

Some of the defendants, professing to hold a conveyance from the lessor of the plaintiff, Clarke, made by Carey L. Clarke, as his attorney in fact, offered in evidence the deed of conveyance, and the letter of attorney, "and gave testimony conducing to prove them And Andrew Moore, the clerk of the Harrison circuit court, who brought the letter of attorney into this court, under process for that purpose, desiring to return, and considering it his duty to retain possession of that instrument, by consent of plaintiff and defendants, departed with it, leaving a copy. And at a subsequent day, Moses L. Miller was introduced as a witness to prove the letter of attorney ;

who stated, that being summoned as a witness, he met with the clerk of Harrison aforesaid, in Georgetown, who showed him an instrument, the signature of which he examined, and believed it to be the handwriting of James B. Clarke (the plaintiff's lessor), with whose handwriting he was well acquainted; and another witness was examined, tending to show that the instrument, so shown by said Moore to Miller, was the same previously read before this court, as aforesaid. When Andrew Moore (the clerk of Harrison court) was about to resume possession of the letter of attorney and to depart, the attorney of the plaintiff declared that he had no objection. It is not pretended, that any expectation of offering further proof was entertained, or intimated to the parties. To the admission of the testimony of Miller, the plaintiff objected, especially, in the absence of the letter of attorney. But the court overruled the objection, and submitted the testimony to the jury, as tending to prove that instrument."

The letter of attorney purports to be made by "James B. Clarke, of the city of New York, and Eleanor his wife," to "Carey L. Clarke, of the city of New York;" to be dated on the 7th of October 1796, and to be sealed and delivered in the presence of three witnesses. *The question is, *344] whether, under these circumstances, it ought to have been admitted in evidence?

In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. Where he is dead, or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the next best secondary evidence is the proof of his handwriting; and that, when proved, affords *primâ facie* evidence of a due execution of the instrument, for it is presumed, that he would not have subscribed his name to a false attestation. If, upon due search and inqury, no one can be found who can prove his handwriting, there is no doubt, that resort may then be had to proof of the handwriting of the party who executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence. Whatever may have been the origin of this rule, and in whatever reasons it may have been founded, it has been too long established, to be disregarded; or to justify an inquiry into its original correctness.

The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. The instrument purports to be an ancient one; but no evidence was offered in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof. It is said, that the conduct of the parties amounted to a waiver of the due proof of the original. We are of opinion, that the production of the original was, under the circumstances, dispensed with by the parties, and that a copy of it was impliedly assented to as a substitute for the original. But we do not think, that the implication goes farther, and dispenses with the ordinary proof of the due execution of the original, in the same manner as if the original were present. It would be going very far, to draw such a conclusion, from circumstances of so

equivocal a nature. The rules of evidence are too important securities for the titles to property, *to allow such loose presumptions to prevail. It would be opening a door to great practical inconvenience; [*345 and if a waiver of the ordinary proof is intended, it is easily reduced to writing.

It is also said, that the language of the exception, that the defendants gave testimony "conducing to prove" the instruments, may well be interpreted by the court to have included all the usual preliminary proofs. We do not think so: to justify the admission of the lowest kind of secondary proof, it should clearly appear, that all the preliminary steps have been taken and established. The court can presume nothing; there may not have been any preliminary proof whatsoever of the absence, death or incapacity of the witnesses; and yet there may have been some evidence "conducing to prove" the due execution of the instruments. And the very circumstance stated in the bill of exception, that Miller was introduced, "as a witness to prove the letter of attorney," repels the presumption that any antecedent proof had been given, which in point of law dispensed with the ordinary proofs. We think, then, that the testimony ought not to have been admitted, and that this exception is well founded.

The plaintiff having then given *primâ facie* evidence of title under a patent to Martin Pickett of 55,390 acres, and that the defendants were in possession of the land in controversy, and that the lessor of the plaintiff (Clarke), at the date of his deed, and ever since was, and had been, a citizen and resident of the state of New York, and having relied solely on the demise from Clarke, the defendants offered in evidence certain exhibits. One of these purported to be a release of 49,952 acres, by Carey L. Clarke, as attorney for James B. Clarke and John Byrant, on the 25th of November 1800, acknowledged before the surveyor of Scott county, and afterwards lodged with the auditor of public accounts. It recited, that James B. Clarke and Eleanor his wife, and John Byrant and Mary his wife, had appointed Carey L. Clarke their attorney, to sell, transfer and convey a certain tract on the waters of Eagle creek, in the county of Scott, and state of Kentucky, containing 100,192 acres, entered in the name of Martin Pickett, which tract of land was then held by Clarke and Byrant as tenants [*346 in common. It then proceeded to state, "Now, therefore, I, the said Carey L. Clarke, attorney as aforesaid, in pursuance of an act of the legislature of the state of Kentucky, authorizing claimaints of land within its commonwealth to relinquish, by themselves or their attorneys, any part or parts of their claims, to the commonwealth, do hereby relinquish to the commonwealth of Kentucky, all the right, title, interest, property, claim and demand of the said Clarke and Byrant of, in and to the hereinafter described tracts of land." Another exhibit purported to be a release dated on the 25th of November 1801, by Carey L. Clarke, as attorney in fact of John Bryant, in a similar form, and containing a similar relinquishment to the state, of certain tracts of land, except that the attestation clause was in these words: "In witness whereof, the said Bryant, by Carey L. Clarke, his attorney, hath set his hand and seal this 25th of November 1801. John Bryant, by Carey L. Clarke, his attorney. [L. S.]" The other exhibits need not be particularly mentioned.

To prove these instruments of relinquishment, or properly speaking,

that of James B. Clarke and wife, the defendants relied upon the power of attorney mentioned in the former bill of exceptions, and the original relinquishment from the auditor's office; and proved the execution thereof by the surveyor of Scott county. The plaintiff then moved the court to instruct the jury, that the instrument (of relinquishment), under the proof, did not bind the plaintiff, and could not bar his recovery. But the court overruled the motion, and instructed the jury, that the said relinquishment for the 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment; and on motion of the defendants, the court instructed the jury, that if they believed the execution of the power of attorney from James B. Clarke to Carey L. Clarke, and of the relinquishment in evidence (from Carey L. Clarke, as his attorney, of the date of 25th of November 1800), then it was incumbent on the plaintiff, to maintain this action, to show that the defendants, or some of them, were, at the service of the ejectment, outside
*347] of the several parts relinquished to *the state. The opinions thus given and refused constitute the second bill of exceptions.

Various objections have been taken, in the argument at the bar, upon the matter of these exceptions. It is said, that the relinquishment to the state, which was authorized by the act of 4th of December 1794 (Littell's Laws of Kentucky 222), has not been made in such a manner as to become effectual in point of law; for there has been no entry of the relinquishment in a book in the surveyor's office of the county, as prescribed in the statute, nor has the power of attorney been there recorded; and the state cannot take but by matter of record. Upon this objection, it is not, in our view of the case, necessary to give any opinion.

It is said, in the next place, that the relinquishment purports to have been made in virtue of a power of attorney, recited in the instrument itself, to be from James B. Clarke and his wife, and John Bryant and his wife; whereas, the power produced purports to be from Clarke and his wife only, and therefore, the latter power does not authorize the relinquishment, or, in other words, it was not that under which it was made. There is great force in this objection; but on this also we do not decide.

Another objection is, that the power of attorney produced, even if duly executed, does not justify the relinquishment. It purports to authorize Carey L. Clarke "to sell, dispose of, contract and bargain for all, or so much of said tract of land, &c., and to such person or persons, and at such time or times, as he shall think proper, and in our or one of our names, to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same, as he shall think proper; provided always, that all deeds for the land are to be without covenants of warranty, or covenants warranting the title to the land from the patentee, and his assigns," &c. The language here used is precisely that which would be used in cases of intended sales, or contracts of sale, of the land, for a valuable consideration, to third persons, in the ordinary course of business. In the strict sense of the term, a relinquishment of the lands to the state, under the act of 1794, is not a sale. That act, after reciting, that it is represented to the general
*348] assembly, that many persons hold tracts of land *subject to taxation, and are desirous of continuing their interest in only part thereof, and that others have claims to lands, which they wish to relinquish, without

their being subject to the expense of law-suits, proceeds to enact, that it shall be lawful for any person or persons, his heirs, or their agent or attorney, lawfully authorized so to do, to relinquish or disclaim his, her or their title, interest or claim to and in any tract or part of a tract of land that he, she or they may think proper; by making an entry of the tract, or that part thereof, so disclaimed, with the surveyor of the county in which the land, or the greater part thereof, shall lie, in a book to be kept for that purpose, which said entry shall describe the situation and boundary of the land disclaimed, with certainty, and be signed by the party, in the presence of the surveyor, who shall attest the same; and that by virtue of the aforesaid entry and disclaimer, all the interest of the party in the said tract shall be vested in the commonwealth, and shall never be reclaimed by the party, or his, her or their representatives. The object of the act is to authorize a relinquishment, either on account of the land being subject to taxation, or to avoid law-suits on account of conflicting claims.

It is not pretended, that the present relinquishment would have been authorized by the letter of attorney, on the latter account. It is supposed at the bar, to have been done on account of the taxes due on the land, though that object is not avowed on the face of the deed. There is, accordingly, spread upon the record, a transcript of the taxes laid on the land. By the laws of Kentucky (Act of 1799, § 17, 2 Litt. Laws 327), taxes constitute a perpetual lien on the land; but such taxes constitute no personal charge against non-residents. And the act of 1799 further provides, that where any person has paid, or shall, on or before the first day of December then next, pay the tax on any tract of land which shall afterwards be lost or relinquished, the person losing shall, upon application to the auditor, receive an audited warrant to the amount paid by him, with a deduction of seven and a half per cent., which shall be receivable in taxes, as other audited warrants are. The effect of the Kentucky law, then, so far as non-residents are concerned, is, that by their relinquishment, they obtain no personal discharge from any personal charge; and that *the only effect is, that, [*349
in the specified cases, if they have paid the taxes, they are, with a small deduction reimbursed.

In point of fact, then, the relinquishment gives them nothing as a compensation for the land; but restores back again only the money (if any) which they have paid. Can such a relinquishment, for the purposes contemplated by the statute, be, in any just sense, deemed a sale? We think not. It is a mere abandonment of the title; or, in the language of the act, a relinquishment or disclaimer. The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons, for a valuable consideration; and conveyance by deed, without covenants of warranty. The very reference to covenants, shows that the parties had in view the common course of conveyances, in which covenants of title are usually inserted, and the clause excludes them. The statute does not contemplate any deed or conveyance, but a mere entry of relinquishment or disclaimer of record; this entry constitutes a good title in the state; the state does not buy, nor does the party sell, in such case. It seems to us, that the nature of such a relinquishment, amounting, as it does, to a surrender of title, without any valuable consideration, ought not to be inferred from any words, however general, much less from words so appropriate to

cases of mere private sales as those in the present letter of attorney. The question, whether such a relinquishment should be made or not, is so emphatically a matter of pure discretion in the owner, in the nature of a donation, that it ought not to be presumed to be delegated to another, without the most explicit words used for, and appropriate to, such a purpose. We think, that the words of the present letter of attorney are not sufficient to clothe the agent with such an authority.

But if this objection were not insuperable, there is another, which, though apparently of a technical nature, is fatal to the relinquishment. It is, that the deed is not executed in the names of Clarke and his wife, but by the attorney, in his own name. It is not, then, the deed of the principals, but the deed of the attorney. The language is, "I, the said Carey L. Clarke, attorney as aforesaid," &c., "do hereby relinquish," &c.; and the attesting clause is, "In witness whereof, the said Carey L. Clarke, attorney
*350] as aforesaid, has hereunto subscribed *his hand and seal, this 25th day of November, in the year of our Lord 1800. Carey L. Clarke. [L. S.]"

The act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity.

The leading case on this subject is *Combe's Case*, 9 Co. 75, where authority was given by a copyholder to two persons, as his attorneys, to surrender ten acres of pasture to the use of J. N.; and afterwards, at a manor court, they surrendered the same, and the entry on the court-roll was, that the said attorneys, in the same court, showed the writing aforesaid, bearing date, &c., and they, by virtue of the authority to them by the said letter of attorney given, in full court, surrendered into the hands of the said lord the said ten acres of pasture, to the use of the said J. N., &c.; and the question was, whether the surrender was good or not; and the court held it was good. "And it was resolved, that when any has authority, as attorney, to do any act, he ought to do it in his name, who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority. And where it was objected, that in the case at bar, the attorneys have made the surrender in their own name, for the entry is that they surrendered, it was answered and resolved by the whole court, that they have well performed their authority; for, first, they showed their letter of attorney, and then they, by the authority to them by the letter of attorney given, surrendered, &c., which is as much as to say, as if they had said, we, as attorneys, &c., surrender, &c., and both these ways are sufficient. As he, who has a letter of attorney to deliver seisin, saith, I, as attorney to J. S., deliver you seisin; or, I, by force of this letter of attorney, deliver you seisin. And all that is well done, and a good pursuance of his authority. But if attorneys have power by writing to make leases by indenture for years, &c., they cannot make indentures
*351] in their own names, but in the name of him who gives the warrant." *Such is the language of the report, and it has been quoted at large, because it has been much commented on at the bar; and it points out

a clear distinction between acts done *in pais*, and solemn instruments or deeds, as to the mode of their execution by an attorney. It has been supposed, that the doctrine of Lord HOLT, in *Parker* v. *Kett*, 1 Salk. 95, and better reported in 2 Mod. 466, intimated a different opinion. But, correctly considered, it is not so. Lord HOLT expressly admits (p. 468), that the doctrine in *Combe's Case*, that he who acts under another, ought to act in his name, is good law, beyond dispute ; and the case there was distinguishable ; for it was the case of a sub-deputy steward, appointed to receive a surrender, which was an act *in pais*.

However this may be, it is certain, that *Combe's Case* has never been departed from, and has often been acted upon as good law. In *Frontin* v. *Small*, 2 Ld. Raym. 1418, where a lease was made between M. F., "attorney of J. F.," of the one part, and the defendant of the other part, of certain premises, for seven years, in a suit for rent by M. F., it was held, that the lease was void, for the very reason assigned in *Combe's Case*. Lord Chief Baron GILBERT (4 Bac. Abr., Leases and Terms for Years, I. 10, 140) has expounded the reasons of the doctrine, with great clearness and force ; and it was fully recognised in *White* v. *Cuyler*, 6 T. R. 176, and *Wilks* v. *Back*, 2 East 142. If it were necessary, it might easily be traced back to an earlier period than *Combe's Case*. 4 Bac. Abr., Leases and Terms for Years, I. 10, p. 140, 141 ; Com. Dig., Attorney, C. 14 ; Moore 70. In America, it has been repeatedly the subject of adjudication, and has received a judicial sanction. The cases of *Bogart* v. *De Bussy*, 6 Johns. 94 ; *Fowler* v. *Shearer*, 7 Mass. 14, and *Elwell* v. *Shaw*, 16 Ibid. 42, are directly in point. It appears to us, then, upon the grounds of these authorities, that the deed of relinquishment to the state was inoperative ; and consequently, the court erred in refusing the instruction prayed by the plaintiff, that it did not bind him ; and in directing the jury, that if the execution of it was proved, it was a bar to the recovery of the land described therein.

This aspect of the case renders it unnecessary to decide, whether, supposing the relinquishment good, it was incumbent *on the plaintiff to show, that the possession of the defendants, or some of them, was, at [*352 the time of the service of the ejectment, outside of the land relinquished. That point was before us in *Hawkins* v. *Barney's Lessee*, at this term (*post*, p. 457); and it was there decided, that where the plaintiff's title deed, as exhibited by himself, contains an exception, and shows that he has conveyed a part of the tract of land to a third person, and it is uncertain, whether the defendants are in possession of the land not conveyed, the *onus probandi* is on the plaintiff. Here, the deed of relinquishment is exhibited on the part of the defendants, to dispute the plaintiffs' title to the land possessed by them ; and it has been contended, that this creates a distinction, and throws the burden of proof on the defendants to show, that the plaintiff has parted with his title to the particular land in controversy. The case, however, does not call for any absolute decision on this point ; nor does it appear with certainty, from the evidence, that the relinquished land was within the boundaries of the land in controversy in the suit.

The third bill of exception states, that on the trial of the cause, the plaintiff having given in evidence the patent to Pickett, and by mesne conveyances, to Clarke, the lessor of the plaintiff, and proved that Clarke, at

the date thereof and ever since, was resident in the state of New York, and that the title deeds embrace the land in controversy, and that the defendants were all in possession, at the commencement of the suit, after the defendants had given in evidence the deed of relinquishment, and the court had given the instructions thereon, gave testimony conducing to prove that some of the defendants, viz., Hinton, Hughes, Vance, Gillum, Antle, Sally Courtney, &c., were not within the limits set forth in the relinquishment: and these defendants all relying in their defence upon their possession, they gave in evidence a patent to James Gibson, 1st of March 1793, under a survey of 1783, and a patent to Sterrett and Grant, 24th of October 1799, under a survey in 1792 (reciting them), and gave testimony conducing to prove, that Sally Courtney, &c., were within the boundaries prescribed by the patent of Grant and Sterrett; and Hinton, Hughes, Gillum, Vance and Antle were within the bounds of the patent to Gibson; and touching the possession within Gibson's patent, the witness stated, that in 1796,
*353] *Hinton entered within the patent of Gibson, claiming a part of the tract under that grant, and that the tenement has been occupied ever since; and at subsequent periods, the other tenants claiming under the said Hinton, had settled in the same manner, under other parcels, claimed by them as parts of Hinton's purchase; and from the time of their respective settlements, their possession had been continued. The witness knew not the extent or boundary of any of the purchases, and no title papers were produced. And touching the possession within the patent to Sterrett and Grant, the witness stated, that in 1791 or 1792, Griffin Taylor entered under that patent, that the tenements have been still occupied by Taylor and his alienees; and at periods subsequent, the other tenants had entered and taken possession, claiming under the said Taylor, within the limits of the patent to Sterrett and Grant. No written evidences of purchase were offered.

Thereupon, the plaintiff moved the court to instruct the jury: 1. That the possession of these defendants was no bar to the defendants' action: 2. That the statute of limitation could only protect the defendants to the extent that they had actually inclosed their respective tenements, and had occupied for twenty years preceding the commencement of the suit. The court overruled the motion, and instructed the jury, that adverse possession was a question of fact; that, under the adverse patents given in evidence, it was not necessary to show a paper title derived under those adverse grants, to make out adverse possession; but such hostile possession might be proved by parol; that an entry under one of the junior grants given in evidence by one of the defendants, and within the boundaries of the elder grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession, to the whole extent of the abuttals and boundaries under which such entry was made. To this refusal and opinion, the plaintiff excepted; and the question now is, whether the court erred in either respect?

In considering the points growing out of this exception, it may be proper to advert to the doctrine, which has been already established in respect to the nature and extent of the rights growing out of adverse possession.
*354] Whether an entry *upon land, to which the party has no title, and claims no title, be a mere naked trespass, or be an ouster or disseisin of the true owner, previously in possession of the land, is a matter of fact,

depending upon the nature of the acts done, and the intent of the party so entering. The law will not presume an ouster, without some proof; and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseised, yet the latter is not bound to consider a mere act of trespass to be a disseisin. If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter. But in such case, the possession of the trespasser is bounded by his actal occupancy; and, consequently, the true owner is not disseised, except as to the portion so occupied. But where a person enters into land, under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised, to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For, if the true owner be, at the same time, in possession of a part of the land, claiming title to the whole, then, his seisin extends, by construction of law, to all the land which is not in the actual possession and occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain; both parties cannot be seised, at the same time, of the same land, under different titles, and the law therefore adjudges the seisin of all, which is not in the actual occupancy of the adverse party, to him who has the better title. This doctrine has been on several occasions recognised in this court. In *Green* v. *Liter*, 8 Cranch 229–30, the court said the general rule is, that if a man enters into lands, having title, his seisin is not bounded by his occupancy, but is held to be co-extensive with his title; but if a man enters without title, his seisin is confined to his possession by metes and bounds. Therefore, the court said, that as between two patentees in possession, claiming the same land under adverse titles, he who had the better legal title, was to be deemed in seisin of all the land not included in the actual close of the other patentee. The same doctrine was held in **Barr* v. *Gratz*, 4 Wheat. 213, 223; where the court said, that where two persons are in possession, at the same time, under different [*355 titles, the law adjudges him to have the seisin of the estate, who has the better title. Both cannot be seised, and therefore, the seisin follows the title. And that where there was an entry, without title, the disseisin is limited to the actual occupancy of the party disseising. And in the reference to the facts of that case, the court held, that in a conflict of title and possession, the constructive actual seisin of all, the land, not in the actual adverse possession and occupancy of the other, was in the party having the better title. In the *Society for Propagating the Gospel* v. *Town of Pawlet*, 4 Pet. 480, 504, 506, which came before the court upon a division of opinion, upon a state of facts agreed, the court held, that where a party entered as a mere trespasser, without title, no ouster could be presumed, in favor of such a naked possession; but that where a party entered under a title adverse to the plaintiffs, it was an ouster of, or adverse possession to, the true owner.

It appears to us also, that the doctrines, thus recognised by this court, are in harmony with those established by the authority of other courts; and especially, of the courts of Kentucky, in the cases cited at the bar. See also Johnson's Digest, Ejectment, V, *b*; Bigelow's Dig., Seisin and Disseisin, A, B, C, D.

It remains to apply these questions to the present exception. The court was called upon, in the first instruction, to declare, that the possession of the defendants was no bar to the action. This obviously required the court to give an opinion upon matters of evidence proper for the consideration of the jury, and which might be fairly open to controversy before them. It was, therefore, properly denied. The second instruction required the court to declare, that the statute of limitations could only protect the defendants to the extent, that (they) had actually inclosed their respective tenements, and occupied, for twenty years preceding the commencement of the suit. The difficulty upon this instruction is, that no evidence was adduced, or, if adduced, it was not competent for the court to decide upon it, that either Pickett, the patentee, or the lessor of the plaintiff, at the time of the entry and ouster by the defendants, had any actual seisin or possession of any part
*356] of the land included in *the patent; so as to limit their possession to the bounds of their actual inclosures or occupancy. The entry of the defendants was certainly under a claim of title, under the patents of Gibson and Sterrett, and Grant. If Pickett, or his grantees, were then in possession under his patent, the defendants, upon the principles already stated, would have been limited, as to their adverse possession, to the bounds of their actual occupancy. But that not being shown, the question resolves itself into this, whether a party entering into land under a patent, but without showing a paper title to any particular portion of the land included in that patent, is not to be deemed as claiming to the abuttals of the patent, against adverse titles held by other parties, not then in seisin or possession under their titles.

The opinion of the circuit court was (as the instruction given shows), "that adverse possession was a question of fact" (which might be true, as applicable to the case before it, though it is often a mixed question of law and of fact); "that under the adverse patents given in evidence, it was not necessary to show a paper title, under those adverse grants, to make out adverse possession, but that such hostile possessions might be proved by parol" (which, as a general proportion, is certainly true, as adverse possession may exist independent of title); and what is the material part of the instruction, "that an entry under one of the junior grants given in evidence by the defendants, and within the boundaries of the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttal and boundaries, under which the entry was made." The prayer of the plaintiffs, then, was, or might have been, rejected, because it assumed the decision of a question of fact; that is, that the defendants entered without any claim of title by metes and bounds: and the instruction given was, that an entry under the junior grants, by one claiming under them, by no other abuttals than those of the grants, was to be deemed an entry and adverse possession to the extent of those abuttals. This decision is fully supported by the cases in 2 A. K. Marsh. 18, and 1 Ibid. 376. Looking, therefore, to the instruction, in the qualified manner in which it is given, and with
*357] reference to the fact that no *seisin was shown in Pickett, or the lessors of the plaintiff, in any part of the tract included in his patent, at the time of the entry of the defendants, it seems to us, that, according to

the local decisions, the refusal was right, and the instruction given was correct in point of law.

We think it proper to add, that no notice has been taken of the fact, that Clarke, the lessor of the plaintiff, was a non-resident; because it does not appear, that any of the instructions were asked or given, in reference to the legal effect of his non-residence.

The judgment is, therefore, reversed, for the errors stated in the first and second bills of exception; and the cause remanded to the circuit court, with directions to award a *venire facias de novo.*

BALDWIN, Justice, dissented, as to the possession.

THIS cause came on, &c.: It is considered by the court here, that there was error in the circuit court in admitting the testimony of Moses L. Miller, under the circumstances set forth in the first bill of exceptions. And that there was error in the circuit court in refusing to instruct the jury, upon the motion of the plaintiff, that the instrument stated in the second bill of exceptions, under the proof, did not bind the plaintiff, and could not bar his recovery; and in instructing the jury, that the relinquishment stated in the same bill of exceptions for 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment, as set forth in the same bill of exceptions. But there is no error in the court, in refusing to instruct the jury, on the motion of the plaintiff, that the possession of the defendants was no bar to the plaintiffs' action; and that the statute of limitations could only protect the defendants to the extent that (they) had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of the suit, as set forth in the third bill of exceptions; and that there was no error in the court, in giving the instruction to the jury, set forth in the same bill of exceptions, in the manner and under the circumstances therein set forth. And, &c.

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*JOHN TAYLOE, Plaintiff in error, *v.* EDWARD THOMSON'S Lessee, [*358
Defendant in error.

Lien of judgment.—Execution.—Insolvency.

It seems, there is no act of assembly of Maryland which declares a judgment to be a lien on real estate, before execution issued and levied; but by an act of parliament of 5 Geo. II., c. 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold.

It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors; and that this construction has been uniform throughout the state.

As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely of enactments of their own, or the statutes of England, in force or adopted by the legislature; the decisions of their courts; the settled and uniform practice and usage of the state in the practical operation of its provisions, evidencing the judicial construction of its terms; are to be considered as a part of the statute, and as such, furnish a rule for the decisions of the federal courts; the statute and its interpretation form together a rule of title and property, which must be the same in all courts. It is enough for this court, to know, that by ancient, well-established and uniform usage,

it has been acted on and considered as extending to all judgments in favor of any persons, and that sales under them have always been held and respected as valid.

Though the statute of 5 Geo. II. does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence, that it has always been so considered and acted on.[1]

The plaintiff in a judgment has an undoubted right to an execution against the person and the personal or real property of the defendant—he has his election; but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution; his remedies are cumulative and successive, which he may pursue until he reaches that point at which the law declares his debt satisfied.

A *capias ad satisfaciendum* executed, does not extinguish the debt for which it issued; if the defendant escape, or is discharged by operation of law, the judgment retains its lien, and may be enforced on the property of the defendant; the creditor may retake him if he escape, or sue the sheriff.

We know of no rule of law which deprives the plaintiff in a judgment of one remedy by the pursuit of another, or of all which the law gives him; the doctrine of election, if it exists in any case of a creditor, unless under the statutes of bankruptcy, has never been applied to a case of a defendant discharged under an insolvent act, by operation of law.

The greatest effect which the law gives to a commitment on a *capias ad satisfaciendum*, is a suspension of the other remedies, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them as fully as if he had never made use of any.[2]

*359] *The escape of the defendant, by his breach of prison-bounds, could not affect the lien of the judgment; the plaintiff is not bound to resort to the prison-bond as his only remedy; a judgment on it against the defendant is no bar to proceeding by *fieri facias*.

The 5th section of the act of congress for the relief of insolvent debtors declares, that no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, and attachment in the nature of execution, which shall have been put into the hands of the marshal antecedent to the application;" the application of this clause in the section was intended only for a case where one creditor sought to obtain a preference by process against the debtor's property, after his application; in such case, the execution shall have no effect or operation; but where the incumbrance or lien had attached, before the application, it has a priority of payment out of the assigned fund.

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 a lot of ground in the city of Washington. The defendant pleaded the general issue, and on the trial, a verdict was given for the plaintiff below, subject to the opinion of the court, on a case agreed, which is stated at large in the opinion of the court.

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

For the *plaintiff*, it was said, that the facts exhibited an extreme case, which brings up, under the strongest circumstances against it, the question of the continued lien on lands, of a judgment upon which execution has not been issued. The purchaser of a lot of ground, in possession under a complete title from the former owner, is to be deprived of it by a judgment-creditor of his grantor; who having exhausted all the personal remedies against his debtor, seeks to go back on his judgment, and to proceed against the real estate sold and conveyed, for a full and legal consideration, six years before.

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[1] Massingill *v.* Downs, 7 How. 766.

[2] Freeman *v.* Ruston, 4 Dall. 214; Spencer *v.* Benedict, 13 Johns. 533.

It is not intended to raise the question, whether any lien on lands exists under a judgment. A party having a judgment may elect to bind the lands- and he may proceed against them ; the statute having made lands subject to execution as personalty. The statute of 5 Geo. II., c. 7, made lands in the colonies subject to such execution in favor of British merchants : and although various constructions have been given *to that statute in [*360 the different states of the United States, in Maryland, it has been held to subject lands in general to execution and sale. But while it is admitted, that lands in Maryland are generally held to be subject to sale, under the lien of a judgment, no decisions of the courts of Maryland are to be found, by which this liability has been judicially established. The true construction of the statute is, therefore, within the power of this court ; and a common error as to its interpretation, if such error exists, will not support the mistaken interpretation, however universal it may be ; even if it had gone into judicial application, it will be corrected. 5 Rand. 53.

The principle on which the plaintiff below rests his claim is, that the judgment created a general lien on the land of the defendant in the judgment ; which continued and subsisted, until the debt was satisfied, or a sale was made of the land, under the judgment. It is contended, that the acts of the plaintiff amounted to a relinquishment of this lien ; and that the proceedings under the judgment against the debtor, with the effects of these proceedings, operated as an abandonment of the lien ; and that the surrender of his effects under the insolvent law, was a satisfaction of the lien.

The first process under the judgment was a *capias ad satisfaciendum ;* under which the body of the defendant was taken and committed to prison. Originally, at the common law, execution of the body was satisfaction of the debt, except there was an escape, or the party died in prison. The defendant Glover having broken the prison-rules, an action was brought on the bonds given by him, and the same was prosecuted to judgment. The effect of these proceedings was, to cancel the lien of the judgment on the real estate of the debtor. The plaintiff in the judgment has elected to proceed against the person of his debtor, and by these proceedings, and by the subsequent discharge of the defendant under the insolvent law, his powers under the judgment were exhausted.

For the plaintiff in error, it was also contended, that the operation of the insolvent law was to annul the judgment against the land, so far as to deprive the plaintiff in the suit *of the right to proceed by execution [*361 against the land, the surrender of the property of the debtor being a satisfaction of the judgment. This is the express operation of the fifth section of the insolvent law ; which directs the sale of the property of the insolvent, by the trustee, who, after satisfying all incumbrances and liens, shall divide the estate of the insolvent among the creditors, in proportion to their respective claims ; and which declares, " that no process against the real or personal property of the debtor, shall have any effect or operation, except process of execution, and attachment in the nature of execution, which shall have been put into the hands of the marshal, antecedent to the application of the insolvent." Thus all further process on the judgment was prevented ; and although the land in the hands of the trustee might be subject to the lien of the judgment, and the trustee bound to satisfy such lien out of the proceeds of the sale of the same, which he was directed to

make, the plaintiff could only obtain the fruits of the judgment through such sale.

Dunlop and *Key*, for the defendant.—It has been contended by the counsel for the plaintiff in error, that a judgment is no lien on lands in this district; that the true construction of the statute of 5 Geo. II., under which the lien is set up, does not warrant it; and that this court ought to take up the subject as *res integra*. We say, the question is no longer open; it is *res judicata*, and has long since been settled by judicial decisions and the practice or Maryland, of which this county formed part, before the cession. *McEldery* v. *Smith*, 2 Har. & Johns. 72; 3 Har. & McHen. 450; 3 Har. & Johns. 64.

The judgments, in June 1818, bound the premises in controversy. Glover had then, as the case admits, a valid title. The plaintiff in error bought afterwards, and was bound to take notice of the judgments. Upon *fieri facias* issued upon the judgments, the defendant in error acquired his title by purchase; and it is upon the plaintiff in error to show, that the judgments and executions were invalid, or satisfied, or the lien discharged.

*362] *It is not pretended, that there was any actual payment or satisfaction. To show a legal satisfaction, or, at least, an extinguishment of the lien on the lands, the plaintiff alleges: 1. The previous writs of *ca. sa.* against Glover, upon which he was committed and gave a prison-bounds bond, under the act of the 3d March 1803, § 16 (Burch's Digest 244). A recommitment on these executions, after the year, under the act of the 24th June 1812, § 3; and his release under the insolvent law. (Burch's Digest 277.) It is said, these writs and the proceedings under them satisfied the judgment in law; or, at least, amounted to an election by the judgment-creditor, to pursue his remedy against the body, and discharged the land. It is no case of election. The judgment-creditor could not pursue both remedies at once; but he could, successively, until he got the suits of his judgment. If one failed, he had a right to resort to the other.

Taking the body in execution is not payment; but, in the language of Coke, "a gage for the debt." His body is taken, "to the intent that he shall satisfy, and when the defendant pays the money, he shall be discharged from prison." It is true, if the plaintiff, after taking the body, release the debtor, or assent to his release, he cannot afterwards proceed on the judgment. He is presumed by law to be satisfied. But here there is no assent of the creditor; the proceedings, both as to the prison-bounds bond, and the discharge under the insolvent law, are had against him *in invitum*. They are for the easement of the debtor; and are statutory discharges, without the consent of the creditor, or power in him to resist them. "The plaintiff (says Lord Coke) shall not be prejudiced of his execution by act of law, which doth wrong to no one." "The death of the defendant is the act of God, which shall not turn to the prejudice of the plaintiff; and he shall have a new execution."

The authorities are clear, that an escape from the sheriff, or a statutory discharge, shall not prejudice the creditor, or extinguish his original judgment. Though in the case of escape, the creditor may sue the sheriff, he may also retake the debtor, and "until he be satisfied in deed, debtor can-

not have *audita querela;*" because "peradventure the sheriff may be worth *nothing." *Blumfield's Case*, 3 Co. 86 *b*; *Nadin* v. *Battie*, 4 East 147; *United States* v. *Stansbury*, 1 Pet. 573. The taking the body in [*363 execution, and the statutory discharge, without the assent of the creditor, does not extinguish the judgment or the lien, unless the statute says so. Here, the statute negatives the idea of a discharge. The insolvent law only releases the person, and the judgment is left in full force against property. The prison-bounds bond statute authorizes a recommitment, after the year. It looks to the judgment and execution, as in force, and only suspended, from motives of humanity to the debtor. If the debtor stays in the bounds, he is recommitted after the year; the execution not being discharged. Can he be better off, by breaking the bounds? Can he prejudice the creditor, by his own wrongful act, by violating the law, and abusing the privileges which its humane provisions gave him? The intent of the act of 1812 was, to limit the duration of the privilege of the bounds to the debtor, to force payment or a discharge under the insolvent law, at the end of the year. If, as is contended, the breaking of the bounds, and the forfeiture of the debtor's bond, releases the original judgment and execution, the very evil the statute meant to remedy will continue undimished. If the debtor's breach of the prison-bounds, discharges the original judgment, and gives the creditor, in substitution for it, the bond and sureties, the same course may be renewed by his sureties upon the executions against them, and so on, *ad infinitum*. There might be no end to the plaintiff's pursuit.

Again, it is argued, if the forfeiture of the prison-bounds bond did not extinguish the original judgment and lien, we had our election, to take the bounds-bond and sureties, or a *ca. sa.;* that we could not have both. That we elected the bond. We say, the bond is additional security; that it is a cumulative remedy; and that we can pursue both, until satisfaction of the debt. They are not incompatible, but may well stand together, like the case of appeal bonds. Both are given at the instance and for the benefit of the debtor, without the *creditor's consent, or his being consulted; and [*364 ought not to prejudice him. This is like the case of an escape; it is, in fact, an escape; the debtor, by the prison-bounds bond, is taken out of the custody of the sheriff, put into the custody of his sureties in the bond, and escapes. The creditor may sue the sheriff, or the bond sureties, and also retake the defendant. Peradventure, as Coke says, in *Blumfield's Case*, the sheriff or the sureties may be worth nothing. Esp. N. P. 611; Bull. N. P 69; *Ford* v. *Gwyn's Adm'r*, 3 Har. & Johns. 497.

Lastly, it is said, the fifth section of the insolvent law (Burch's Digest 242) makes void the *fi. fa.* under which we claim title. That section forbids process against the real or personal property of the debtor, not issued, or in the marshal's hands, previous to the debtor's application for relief. Its intent was, to pass the debtor's remaining property, not already bound by execution, into the trustee's hands, for equal distribution amongst his creditors. In this property (the lot now in controversy), there was no remaining interest of Glover to pass to the trustee. Subject to the plaintiff's lien, the whole remaining interest was in Tayloe, the alienee of Glover, and the plaintiff in error. The fifth section of the insolvent law does not apply to, and was never meant to cover, any such case.

BALDWIN, Justice, delivered the opinion of the court.—In the court below, this was an action of ejectment, brought by Thomson, to recover possession of a lot in the city of Washington. It came up on a case stated by the parties, which contains all the facts on which the cause depends, and is as follows:

In this case, it is agreed, "that one Charles Glover was seised in fee of the messuage, &c., in dispute, on and before the 15th May 1815, and so continued seised, until the 4th January 1819, when he bargained and sold the premises to the defendant, John Tayloe, as hereinafter mentioned; that on the 15th June 1818, Owen & Longstreth obtained two judgments at law
*365] against the said Glover, as indorser of two *promissory notes, passed to the said Owen & Longstreth; the one for $681.74, with interest from the 15th February 1817, till paid, and costs; the other for $674.20, with interest from the 15th December 1816, till paid, and costs; which judgments, by an arrangement between said Owen & Longstreth, and the lessor of the plaintiff, or the lessor of the plaintiff, together with his partner Maris, trading under the firm of Thomson & Maris, were transferred, with other choses in action, by Owen & Longstreth, to the lessor of the plaintiff, or to said Thomson & Maris, so as to place the proceeds of said judgments at the disposal of said Thomson, or Thomson & Maris, and make the same applicable to the security of said Thomson, or Thomson & Maris, against certain engagements entered into by him or them, for Owen & Longstreth; and were prosecuted for the benefit of said Thomson, or Thomson & Maris. "That *ca. sas.* were issued on said judgments, on the 10th May 1820, returnable to June term 1820, and duly served on said Glover, who was duly committed to the jail of the county aforesaid, under the said execution. That he was thereupon admitted to the benefit of the prison-rules, upon giving bonds and sureties, pursuant to the act of congress in such case provided. That the said Glover having broken the prison-rules and the conditions of his said bonds, suits were brought upon the same against him and his surety, returnable to October term 1822, at the instance and for the benefit of the said assignee or assignees of the said judgment; and judgments were duly obtained in said suits against said Glover (but not prosecuted to judgment against his surety, he having died, and no administration on his estate in this district), for the respective amounts of said original judgments, with interest and costs, at October term 1823; upon which judgments so obtained against Glover, on said prison-bounds bonds, *fi. fas.* were duly issued, returnable to December term 1824, and then returned *nulla bona.* That at the same term of December 1824, the attorney upon the record of the said Owen & Longstreth, still acting at the instance and for the benefit of the said assignee or assignees of the said original judgments, moved the court to recommit the
*366] said Glover, *under the original *ca. sas.* issued on said judgments, and before execution as aforesaid; the ground of which motion was, that more than twelve months had expired since the said Glover had been admitted to the benefit of the prison-rules, as aforesaid, and that the act of congress in such case provided, had limited the benefit of such prison-rules to the term of twelve months; upon which motion, the said Glover was recommitted, by order of said court, under the said *ca. sas.*, to the common jail aforesaid; where he remained, in virtue of his said recommitment, until

the 5th February 1825, when he was duly discharged as an insolvent debtor, pursuant to the act and acts of congress for the relief of insolvent debtors within the district of Columbia; he, the said Glover, having, in all things, complied with the requisites of the said act, to entitle him to such discharge. That after the said original judgments were rendered against the said Glover, as aforesaid, to wit, on the 4th January 1819, he bargained and sold the said messuage, &c., now in dispute, to the said John Tayloe, in fee-simple, for and in consideration of, the sum of $———, then and there duly paid to him by the said Tayloe, and conveyed the same to him in fee, by a deed of bargain and sale, duly executed, acknowledged, certified, and recorded according to law, by virtue of which bargain, sale and conveyance, said Tayloe entered upon said bargained and sold premises, and ever since has held, possessed and enjoyed the same. That no evidence is offered by plaintiff, that at the time of the said bargain, sale and conveyance, and of the payment of the said purchase-money to Glover, Tayloe had any actual notice of the said original judgments, or either of them; that is, no other than the constructive notice arising from the records of said judgments. That after said Glover had been discharged as an insolvent debtor, as aforesaid, *fi. fas.* were issued from the clerk's office on the said original judgments, at the like instance, and for the like benefit, of the said assignee or assignees of those judgments, returnable at May term 1825; and were levied upon the said bargained and sold premises (besides other real property, which had been before sold and conveyed to other persons by said Glover), then in possession of, and held by, said Tayloe, under his said purchase; and the said bargained and sold premises were afterwards exposed to *sale by the marshal, under said executions, and purchased by the lessor of the plaintiff, to whom they were conveyed by the said marshal, by a deed in the usual form, duly executed, acknowledged and recorded. That the lessor of the plaintiff, by whose order the said executions issued, had actual notice of the said bargain, sale and conveyance, from Glover to Tayloe, and of the possession of Tayloe, before the issuing of the said executions. That for the purchase-money, the lessor of the plaintiff paid nothing; but entered credit on said judgments, or one of them, for the amount of the same. Upon the foregoing case stated, it is submitted to the court, if the lessor of the plaintiff be entitled to recover the said messuage, &c.; and if the law be for the plaintiff, upon the facts aforesaid, then judgment in the usual form to be entered for the plaintiff; otherwise, for the defendant. It is agreed, the premises in dispute are of the value of $1000 and upwards."

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Upon the case stated, judgment in the court below was given for the lessee of the plaintiff, for his term yet to come, and unexpired, &c. To which judgment, the defendant below sued this writ of error.

The first point made by the plaintiff in error is, that by the law of Maryland, which it is admitted is the rule by which this point is to be determined, a judgment is no lien on real estate, before execution issued and levied. It seems, there is no act of assembly of that state applicable to the case; but that by an act of parliament of 5 Geo. II., 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; that this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold. It is admitted, that though this statute extends in terms only to

executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors. The plaintiff's counsel do not assert that this construction has ever been questioned, or that it has not been uniform throughout the state; but asks this court to review this construction, and give to the statute such an one as will confine it to the only case for which it makes a provision.

*368] *As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland; which does not consist merely in enactments of their own, or the statutes of England in force, or adopted by the legislature. The adjudications of their courts, the settled and uniform practice and usage of the state, in the practical operation of its provisions, evidencing the judicial construction of its terms, are to be considered as a part of the statute: and as such, furnishing a rule for the decisions of the federal courts. The statute and its interpretation form together a rule of title and property, which must be the same in all courts. Had this question occurred in the courts of that state, they would be bound to say, that it was now too late to overlook the practical construction which this statute has received for a century, and on which numberlesss titles depend. Property would be held by a very precarious tenure, and infinite confusion would be introduced, if any court should now resort to its terms as furnishing the class of cases in which lands could be sold on execution, and declaring it to extend to none other. It is enough for this court to know, that by ancient, well-established and uniform usage, it has been acted on and considered as extending to all judgments in favor of any persons; and that sales under them have always been held and respected as valid titles. The circuit court were right in deciding that the plaintiff below was entitled to all the benefits of the statute of 5 Geo. II. Though it does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence, that it has always been so considered, and so acted on.

Though the researches of the counsel for the defendant in error have not enabled them to furnish the court with any express judicial decision on this particular question, yet the evidence adduced is not less satisfactory to show that it has long since been settled. The case of *Dorsey* v. *Worthington*, in 4 Har. & McHen. 533, &c., shows, that so early as 1771, it was adopted as an established principle; and the later cases in 3 Har. & McHen. 450; 2 Har. & Johns. 64, 73; 3 Ibid. 497, are founded on it, as a well-known pre-existing rule, not questioned even by counsel; but apparently of a time so remote as to be beyond not only the memory of any living jurist, but the

*369] reported decisions of any *court. The decisions in the cases referred to are wholly unsupported and unaccountable, on any other construction of the statute, than the one contended for by the defendant in error.

If a judgment was not a lien from its date, an alienation before execution would prevent it from attaching afterwards. Yet the plaintiff may proceed and sell lands aliened after judgment, without a *scire facias* against the alienee. 2 Har. & Johns. 72. So of lands in the hands of a purchaser under a younger judgment, 3 Har. & McHen. 450; or against a *terre-tenant*, after the defendant had been arrested on a *ca. sa.* on the same judgment, imprisoned, escaped, and a judgment against the sheriff. 3 Har. & Johns. 497; s. p. 4 Har. & McHen. 533. There can, therefore, be no doubt, that

from the earliest period, the courts of Maryland had established it as a rule of property, which had become unquestioned, long before the cession of this district to the United States, that a judgment is a lien, *per se*, on the lands of the defendant.

The next question which arises is, whether the proceedings which have been had on the judgment in question, prior to the execution on which this lot was sold, have impaired or annulled its lien. The plaintiff had an undoubted right to an execution against the person, and the personal or real property of the defendant—he has his election; but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative and successive, which he may pursue, until he reaches that point at which the law declares his debt satisfied. A *ca. sa.* executed does not extinguish it. If the defendant escape, or is discharged by operation of law, the judgment retains its lien, and may be enforced on his property. The creditor may retake him, or sue the sheriff for the escape. A judgment against him does not amount to a satisfaction of the original debt, but it retains its lien, until the plaintiff has done or consented to some act, which amounts in law to payment; as the discharge of defendant from custody; or, in some cases, a levy on personal property. But we know of no rule of law, which deprives a plaintiff in a judgment of one remedy, by the pursuit of another, or of all which the law gives him. The doctrine of election, contended for by the plaintiff in error (if it exists in any case of a creditor, unless under the statutes *of bankruptcy), has never been applied to a case of a [*370 defendant in execution discharged under an insolvent act, by operation of law; a contrary principle is recognised, as well settled, in 5 East 147.

The greatest effect which the law gives to a commitment on a *ca. sa.* is, a suspension of the other remedies on the judgment, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them all, as fully as if he had never made use of any. The cases cited by the defendant from Bull. N. P. 69; 5 Co. 86 *b* (*Blumfield's Case*), and those in the courts of Maryland, fully support, and are decided on this principle. In 1 Ves. 195, Lord HARDWICKE decided, that where a defendant was in custody under a *ca. sa.*, and a *fi. fa.* was afterwards taken out on the same judgment, and a farm levied on and sold, the purchaser, being a stranger, should hold it, as the *fi. fa.*, though irregular and erroneous, was not void. The authority of this decision has never been questioned, and fully establishes the position that a *ca. sa.* neither extinguishes the debt, nor annuls the subsequent proceedings on a *fi. fa.*; though the case would have been different, had the plaintiff in the judgment been the purchaser. In the present case, we must consider Thomson as the plaintiff in the judgment on which the lot in controversy has been sold, and that the sale may be open to objections, which would not be good against a stranger purchaser; but we can perceive in the case stated no facts which in any manner legally invalidate his purchase. He had a right to make use of the *ca. sa.*, until he obtained satisfaction. The escape of Glover, by his breach of prison-bounds, could not effect the lien of the judgment. The plaintiff was not bound to resort to the prison bond as his only remedy; a judgment on it against Glover was no more a bar to a

fi. fa., than a judgment against the sheriff for an escape ; and Glover could place himself in no better situation, by breaking his bond, than by remaining a true prisoner. Whether he escaped, or remained in prison-bounds, the marshal was bound to recommit him to close custody, after the expiration of twelve months from the date of the bond. (3d sect. of the act of June 1812, Burch 277.) This was a measure directed by law, without any application
*371] to the creditor ; its being done *in this case, on his motion, cannot vary the effects ; for Glover, in either case, must remain in custody, until the debt for which he was committed was paid, or he be discharged under the act of congress for the relief of insolvent debtors. Up to this time, no act was done by the judgment-creditor which could impair the legal effect of his judgment, by any rule of the common law, the laws of Maryland, or the district of Columbia ; or by any legal adjudication of the courts of that state on the construction of the statute.

It remains only to consider the effect of the proceedings under the insolvent law of the district, under which Glover was discharged. The counsel for the plaintiff in error relies on the last clause of the fifth section of this law, as conclusive against the proceedings on the judgment, subsequent to Glover's discharge. "And no process against the real or personal property of the debtor shall have my effect or operation, except process of execution, and attachments in the nature of executions, which shall have been put into the hands of the marshal antecedent to the application." The true meaning of this clause can be ascertained from the provisions of the preceding part of the law ; the debtor is to make out a list of all his property, real, personal and mixed, and offer to deliver it up to the use of his creditors ; the court then appoint a trustee, who is required to give bond with surety for the faithful performance of his trust. The debtor is then directed to execute to the trustee a deed, conveying all his property, rights and credits.

The lot in question was not the property of Glover, at the time of his application for the benefit of the law ; he had conveyed it in fee, in January 1819, and received the purchase-money, and therefore, neither could have any property in the lot, or right or credit arising from the sale ; nothing to deliver up to his creditors or convey to the trustee ; no question could arise between them and the judgment-creditor ; and the trustee could have no right to sell the lot, and distribute the proceeds among the creditors of Glover. The fifth section applies only to the property which passed to the trustee, by the deed from the insolvent, not to what he had conveyed to Tayloe, in 1819, six years before Glover's discharge. The trustee acquired
*372] what the debtor had at the time of his application, *or was in any way entitled to, that he could sell, and must distribute ratably among all the creditors, after satisfying incumbrances and liens. The application of the clause of this section, before recited, was intended only for a case where one creditor sought to obtain a preference, by process against the debtor's property, after his application. In such case, it declared, it should have no effect or operation ; but where the incumbrance or lien had attached, before the application, it had a priority of payment out of the assigned fund. Thus understood, the case is perfectly plain. This law can have no application to real estate, which never did, and never could, come into the hands of the trustee for distribution ; but left the judgment-cred-

itor with all his rights to enforce the lien of his judgment on lands of the debtor, in the hands of the plaintiff in error; who purchased after his rendition, and must hold it as the debtor did, subject to his lien.

It is not alleged, that the proceedings subsequent to the levy on the lot are erroneous or void; they appear to have been regular, and therefore, vested the title to the lot in controversy in the lessor of the plaintiff. The judgment of the circuit court is affirmed, with costs.

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

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*Bernard G. Farrar and Joseph C. Brown, Plaintiffs in error, [*373
v. United States.

Official bonds.—Action on bond.—Responsibilities of sureties.

F. and B. were sureties in a bond for $30,000, given to the United States, as sureties for one Rector, described in the bond as "surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas;" upon looking into all the laws on this subject, it can hardly be doubted, that this officer was intended to be included in the provisions of the act of congress of May 3d, 1822, requiring security of the surveyor-general; literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general; the indiscriminate use of this appellation in the previous and subsequent legislation of congress on this subject, will lead to this conclusion.

The surveyors of public lands are disbursing officers, under the provisions of the act of congress.

The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach that at the time of execution of the bond, there were in the hands of Rector, as surveyor, to be applied and disbursed by him, in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done; the jury found for the plaintiff, and assessed the damages for the breach of the condition at $40,000, and the judgment was entered "*quod recuperet*," the damages, not the debt: This judgment is clearly erroneous.

It would seem, that in adopting this form of rendering the judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject; that section, if it sanctions such a judgment at all, is expressly confined to three cases: default, confession or demurrer.

The plaintiffs in error are sureties in an official bond; and if it is perfectly clear, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which, of course, can only be, where it is less than the penalty; the statute expressly requires, that the surveyors of the public lands shall give bond for the faithful disbursement of public money, and in this bond, the words which relate to disbursement are omitted, and the only words inserted are "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party.

Rector was commissioned surveyor of the public lands, on the 13th of June 1823, and the bond bears date the 17th August 1823; between the 3d of March and the 4th of June, in the same year, there had been paid to Rector, from the treasury, the sum of money found by the jury, and thus it was paid to him, before the date of his commission, and before the date of the bond. For any sum paid to Rector, prior to the execution of the bond, *there is but one [*374
ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money in bank or otherwise; if still in his hands, he

was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language; the sureties have not undertaken against his past misconduct; they ought, therefore, to have been let in to proof of the actual state of facts so vitally important to their defence; and whether paid away in violation of the trust reposed in him; if paid away, he no longer stood in the relation of bailee.[1]

Such a case was not one to which the act applies which requires the submission of accounts to the treasury, before discounts can be given in evidence; since this defence goes not to discharge a liability incurred, but to negative its ever existing.

ERROR to the District Court of Missouri. This was an action of debt, brought by the United States, in the district court of the United States for the district of Missouri, against Bernard G. Farrar, Joseph C. Brown and others, upon a bond dated the 7th day of August 1823, in the penal sum of $30,000, conditioned, that "whereas, the President of the United States had, pursuant to law, appointed William Rector surveyor of the public lands in the states of Illinois and Missouri, and in the territory of Arkansas; now, therefore, if the said William Rector shall faithfully execute and discharge the duties of his office, then the obligation to be void."

The defendants pleaded, that William Rector had performed his duties as surveyor. The breach assigned in the replication was, that at the time of the execution of the bond, "there were in the hands of the said William Rector, as such surveyor, to be by him, in the discharge of the duties of his office, applied and disbursed for the use and benefit of the plaintiffs, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of $44,780.38; and that the said William Rector hath not applied and disbursed the same, or any part thereof, for the use and benefit the plaintiffs, as in the execution of the duties of his said office he ought to have done." Upon this plea, issue was taken, and under the instructions of the court, the jury found the issne for the plaintiffs below, and *assessed the damages at $40,456.20; and judgment was rendered for that sum in damages.

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At the trial, the plaintiffs produced and read in evidence a duly certified copy of this bond, and a transcript from the books and proceedings of the treasury, certified by the register of the treasury, and authenticated under the seal of the department. The certificate so annexed, was in the following words: "I, Joseph Nourse, register of the treasury of the United States, do certify, that the foregoing report and statement, No. 47,798, of the account of William Rector, late surveyor of public land in the states of Illinois and Missouri, and the territory of Arkansas, are true copies of the originals on file in this office." The defendants objected to the reading of this evidence, and the court overruled the objection.

The defendants then offered competent evidence to prove that Rector, before the execution of the bond declared on, had expended for his own private use all the money charged to have been received by him from the United States, which proof the court refused to admit. The defendants then offered to prove, that Rector, before the execution of the bond, had expended $32,000 of the balance appearing against him in the account given in evidence, in legal payments to deputy-surveyors; but the court refused

[1] S. P. United States *v.* Boyd, 15 Pet. 187; United States *v.* Linn, 1 How. 104; United States *v.* Irving, Id. 250; Bruce *v.* United States, 17 Id. 437.

to admit the evidence, because no claim for credits on account of said payments, or any of them, had been made at the treasury department.

They also gave in evidence a letter from John McLean, commissioner of the land office, to William Rector, dated 13th of June 1823, as follows: "Inclosed you have a commission from the President of the United States, appointing you, by and with the advice and consent of the senate, surveyor of the public lands in the states of Illinois and Missouri, and in the territory of Arkansas, for the term of four years from the date thereof, the 20th of February 1823. You will please to qualify yourself, by taking an oath to support the constitution of the United States, and by entering into bond with one or more good securities, in the sum of $30,000; the securities to be *approved by the United States district judge or attorney, whose certificate must be indorsed on the bond, a form of which is inclosed. [*376 The bond and oath to be sent to this office."

As has been stated, the bond sued on was dated on the 7th of August 1823, and it appeared by Rector's account with the government, exhibited in the bill of exceptions, that the money now sought to be recovered of the sureties, was intrusted to Rector, at various times, from the 3d of March to the 4th of June, inclusive, of the same year.

The defendants below prayed the court to instruct the jury, that "if they find from the evidence, that William Rector, at the time the money with which he is charged was received, had not received a commission, as surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas, the present defendants are not liable to this action, upon the breach assigned," which instruction the court refused to give; but instructed the jury, "that all moneys which had been received by the said William Rector, as surveyor of the public lands in the states of Illinois and Missouri, and territory of Arkansas, prior to the execution of the writing obligatory declared on, and which had not been duly disbursed by him, in the discharge of the duties of his office, or paid back to the government, would be considered in his hands, in the sense of the issue joined between the parties in this case; and that whether the moneys so received were received between the date of his appointment, and the time when the commission came to his hands, or after the last-mentioned time, was immaterial; and whether he had given bond and taken the oath of office before the receipt of the money, as aforesaid, was equally immaterial." And further instructed the jury, "that the transcript aforesaid might be received by them as evidence that the money charged in the account had been received by him, as surveyor as aforesaid, and was evidence that there were moneys in his hands, at the date of the said writing obligatory, as stated in the account contained in the said transcript, to be disbursed in the due discharge and execution of the duties of his office, or accounted for to the government, as surveyor as aforesaid; subject, however, to be impeached by evidence on the part of the defendants. That the letters testamentary and of administration, in evidence in the present *case, on the part of the defendants, entitle them [*377 to the benefit of a credit for the amount of the items which appear by the account to have been suspended, for want of proof of the executorship of William Rector, and the want of proof that letters of administration had been granted to Thomas C. Rector, against the balance appearing on the accounts."

The defendants then moved the court to instruct the jury, "that upon the whole evidence, the plaintiff could not recover," which instruction was refused.

The defendants, by their counsel, moved the court for a new trial; for a repleader; in arrest of judgment; and for judgment for the defendants, *non obstante veredicto;* all which motions were overruled. They then prosecuted this writ of error.

The case was argued by *Geyer* and *Benton*, for the plaintiffs in error; and by *Berrien*, Attorney-General, for the United States.

For the plaintiffs in error it was contended: 1. That the judgment is erroneous. 2. That the act of congress requiring surveyors-general to give bond and security, does not apply to Rector, who was not a surveyor-general. 3. That the bond sued upon is not such a one as the act of congress prescribes. 4. That it was no part of the duties of the office filled by Rector, to disburse moneys. 5. That the money alleged to have been put into his hands was before he had been commissioned, and before the bond in question was given. 6. That the treasury transcript of Rector's account, admitted on the trial, was not in this case evidence under any act of congress. 7. That the appellants had a right to have proved that Rector had applied the money put into his hands to the public use. 8. That the court below erred upon all these points, as set forth in the record and bill of exceptions; and also erred in refusing a new trial, and overruling the motion in arrest of judgment.

Geyer and *Benton*, for the plaintiffs in error, argued, that this was an action of debt on a penal bond; judgment has *been rendered in dam-
*378] ages, for an amount exceeding the penalty; and although the excess may be corrected by a *remittitur*, there is error in the form of the judgment, which the statute referred to (authorizing breaches to be assigned and damages assessed) does not cure; that statute expressly declares that the judgment is to be entered as theretofore had been usually done.

A surveyor like Rector was not bound to give a bond with security. (Land Laws 698, 818, Acts of Congress, passed 6th February 1806, 7th May 1822.) He was a subordinate officer, and the law applies only to the surveyor-general; and he only is required to give a bond. Nor was it a part of the duty of this officer to disburse public money; it not being a part of the regular duties of this inferior officer to receive and pay the public funds his sureties are not answerable for any violation of a trust illegally or without authority cast upon him.

Unless the bond sued on was authorized by some act of congress, it is not obligatory. Although the power of making contracts is inherent in every sovereignty, and may be exercised in every government which has a constituted agent authorized to exert that power, and an existing code of laws ascertaining the obligation of such contracts; yet the United States not having by the constitution of their government committed the exercise of this attribute of sovereignty to any officer or agent, it cannot be exercised, in the absence of any expression of the legislative rule. The common law of England cannot be referred to, for the purpose of ascertaining the powers, or measuring the capacity, of this government or its agents. The

United States recognise no common law. To make a valid contract, the party must not only have a capacity to contract, but the means of exercising that capacity, by expressing their assent to its stipulations. The power of this government to make contracts can only be exercised by an agent delegated for that purpose; though inherent, it remains dormant, until it is called into action by law. It has been contended, that this portion of sovereignty has been delegated to the executive. This proposition is inadmissible. It accords to the president, as a part of his constitutional power, a right to contract in the name and to pledge the faith of the nation in any manner, for any purpose, and to an infinite extent, in the absence of all law. To this extent is the power claimed. The authority to make one contract, in the absence of *law, can only be defended by the assertion of the [*379 general right to make any contract whatever. This power is said to have been delegated to the president in that clause of the constitution which declares that "he shall take care that the laws be faithfully executed:" but it is submitted, that before he can execute a law of the Union, it must have been enacted by the legislature; he cannot, in the absence of law, exercise the power of making contracts, and much less, as in this case, against the expression of the legislative will.

Again, a contract can have no validity, in a legal sense, unless there be a law to ascertain and fix its obligation. If it be true, that this government has no common law, nor any general statute law, defining the obligation of contracts with the government; it follows, that every such contract must derive its obligation by an act authorizing it, or it has no obligation. We maintain, therefore, that no contract with the United States can be valid, which is not previously authorized by an act of congress appointing an agent to express the assent of the government, and referring the contract, when made, expressly, or by implication, to some law to govern its obligation.

But the power of making contracts, thus admitted to be inherent in the government, whatever may be its incidents, is subject to be controlled, modified and regulated by the legislature of the Union. They have, in the act of 1822, under consideration, exercised this controlling power; they have created an agent to take bonds of surveyors, and have prescribed the very terms in which it shall be drawn; by the terms of art employed, and the form of the instrument to be executed, they refer to the law of its obligation. This expression of the legislative will cannot lawfully be departed from; it excludes the idea that any other officer than the secretary of the treasury should act in behalf of the United States, or that any other contract than that prescribed, should be entered into in the particular case. If the act has any force as a law, it narrows the general power to contract; and implies a dissent on the part of the government, that any other than the bond prescribed should be taken. Any other construction of this act would deny its force as a law, by allowing a discretion in the executive officers to exercise their pleasure, notwithstanding the expression of the sovereign will. This bond, not being in *conformity with the act, is not [*380 only taken without authority, but against law.

The surveyor of the public lands for the states of Illinois and Missouri, and territory of Arkansas, was not, by law, a disbursing officer; consequently, the breach assigned is not within the condition of the bond. Not one of the several acts of congress, defining the powers and duties of this

officer, make it his duty to receive or disburse money; his salary and fees are fixed by law; he is no where authorized to receive or pay out money; he receives no commission for any such service, nor is he authorized or required to do any act rendering it necessary that he should disburse money; nor do any regulations of the department appear to have been before the jury, by which it became his duty to act as a disbursing officer. The legislature expressly required a condition for the faithful disbursement of moneys, to be inserted in the bond; as well as the condition for the faithful performance of the duties of the officer. The bond sued on does not contain the first condition. The legislature did not suppose that the last would include the first, or they would not have required the double condition. The words in the bond are not more comprehensive than the last condition required by the law. The first condition being omitted, the other cannot now, by any fair construction, be held to comprehend both.

The plaintiffs in error cannot be held liable for moneys received by their principal, before the date of their bond; even if its obligation is admitted, and Rector be a disbursing officer. The condition of the bond is prospective, and the act of congress of 1822, declares, that the bond shall be given before the surveyor shall enter upon the duties of his office. No money could lawfully be placed in his hands, before the date of the bond; in the sense of the issue, he could not have received the money, as such surveyor, &c., until he was authorized; certainly, not while he was forbidden to act. Until the 7th of August, he was a debtor of the United States; not an officer holding their money according to law. The credit had been given on his individual responsibility; and the subsequent execution of the bond, which is prospective, and provides for the faithful performance of future official duties, cannot be converted into a security for a pre-existing private debt, to legalize the *unlawful acts of the treasury officers, and convert the past conduct of Rector into a breach of the bond, the moment it was signed.

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The treasury transcript of Rector's account was improperly admitted in evidence. The account should contain every item of charge and discharge, so that the party should have full notice of every part of the claim. Revenue officers, or officers accountable for public money, are those against whom the transcripts from the treasury are evidence. The provisions of the law do not apply to sureties; as to them, as they cannot be supposed to be cognisant of the accounts of their principal, there should be the usual mode of proof, and they should have all the means of defence which are known to the law. A contrary principle is pregnant with injustice as to the sureties; no notice is given to them of the settlement of the account, and they will be subjected to charges which they had no opportunity to repel or disprove. They cannot make the affidavit which the law demands, to enable them to resist, on the trial, the claims of the United States; or to maintain the right of their principal to credits which have been withheld by the treasury department.

The first item in the account is for a balance of $14,000, ascertained on some previous settlement, before the 3d March 1823; consequently, before the date of the bond; a default ascertained, for which these sureties cannot be held liable. This evidence was not only improperly admitted, but the court instructed the jury, that the whole amount of the account, including this item, must be presumed to have been in Rector's hands at the date of

the bond: assuredly, a default (of which the ascertainment of a balance is evidence) happening before the date of the bond, cannot be charged on the sureties.

The court erred in rejecting the evidence offered by the defendants below. The court presumed, that the money received by Rector, before the 4th June, remained in his hands on the 7th August 1823. The defendants ought to have been allowed to rebut this presumption, by proving the facts to show that what had been placed in his hands on his individual responsibility, and against law, had been wasted or disbursed, *lawfully or unlawfully, before he became entitled to have any money in his official [*382 character; and that the default had actually happened before the date of the bond. The evidence was not offered, for the purpose of establishing credits; but to show that the defendants ought never to have been debited; that the money had passed out of Rector's hands before, and consequently, was not in his hands on the 7th August 1823.

The judgment ought to have been arrested. The breach assigned, and the facts found and admitted, do not amount to a breach of the bond. Money is alleged by the plaintiff to have been in Rector's hands on the 7th of August 1823, to be applied and disbursed in the discharge of the duties of his office, and that he neither disbursed nor accounted for it. It is not averred, and consequently, neither found by the jury, nor admitted by the pleadings, that there ever was occasion to disburse money, or that Rector ever was required to account. If there was any money in his hands, in his official character, he had a right to retain it, until demands which he was bound to pay were presented, or the government required him to account for it. The facts alleged in the replication were true, the moment before the execution of the bond, and the very moment it was signed. In fact, the court so instructed the jury. The substance of the instruction given is, that the money must be presumed to have been in Rector's hands, undisbursed and unaccounted for, on the 7th of August. These sureties are then held liable, because the money committed to their principal remained, after the execution of the bond, in the very condition in which it was before, without the averment or proof of any duty requiring a change of that condition.

Berrien, Attorney-General, for the United States.—This is an action of debt for the performance of covonants. The principal in the bond was a surveyor of public lands, bound to perform certain duties, under the laws of the United States, and by virtue of his commission. The judgment must, therefore, be in damages; being for the amount which, by the breach of the obligations of the principal, was due to the United States. If the judgment is beyond the penalty of the bond, the difference may be, and will be released. This may be done in court. 2 Pet. 327.

*A bond voluntarily given to the United States by a public officer [*383 is good, although no law requires that such bond shall be executed. The absence of authority to take such a bond does not make the condition illegal. The cases establish the following principles:

1. That a bond given by or to a public officer, or to the government, is not invalid, merely because there is no law which specifically authorizes the one to demand, or requires the other to give it. That it is only void where

the condition is against law requiring, 1st. Something to be done which is *malum in se*, or *malum prohibitum*: 2d. The omission of a duty: 3d. The encouragement of crimes or misdemeanors.

2. That as the statute which authorizes a bond to be taken may have specified the terms of the condition, it does not, therefore, render void a bond voluntarily given, although the condition be variant from that prescribed by the statute.

3. That a bond is not less voluntary, because it has been required by a public officer, if the condition be not contrary to law. *Mitchell* v. *Reynolds*, 1 P. Wms. 181; 2 Str. 745, 1137; 2 Ld. Raym. 1459, 1327; 6 T. R. 588; 2 Dall. 118; 6 Binn. 292; 5 Mass. 314; 12 Ibid. 367; *Postmaster-General* v. *Early*, 12 Wheat. 136; 9 Cranch 28; 1 Ibid. 137.

The United States may be indorsees of a bill of exchange, and sue as such. 3 Wheat. 172. If they may do this, on the same principles, they may become the assignees of a bond; or may be the obligees of a bond, in the same manner as an individual, and with all the rights and privileges of such assignee or obligee. The government of the United States have always acted on these principles. Where acts of congress have directed bonds to be given, without saying to whom, they are taken to the United States. If the United States may take a bond, it must be directed by the executive. It is a part of his constitutional power, under which he is to see that the laws are executed, to designate the manner and the form to be employed; and this in any way not forbidden by law. The president appoints officers to execute the laws; and if, in his opinion, the most appropriate means to secure their execution by those so appointed, is by requiring bonds for the performance of the duties intrusted to them, he may require them.

*384] *The bond, then, on which this suit has been brought must be considered as having been taken under the direction of the President of the United States, acting under the constitution.

The disbursement of the public money was a part of the duty of the surveyor; it was necessarily involved in the performance of the trust delegated to him. He must have had assistants, and they were to be paid. They were to be provisioned, and those supplies could only be procured by the payment of money. His office was, therefore, one peculiarly requiring a bond, with security.

The office of surveyor of the public lands, which was held by Rector, was authorized by law. The provisions of the land laws are not confined to the surveyor-general, but the legislation of congress applies to those who were employed to perform the duties of making surveys of the public lands, and those persons are in the acts of congress recognised as surveyors-general.

The treasury-transcript is evidence, although no notice was given to the sureties (9 Wheat. 651): and the transcript was made out according to the law of 1796 (1 U. S. Stat. 468); and to the forms which have been constantly pursued at the treasury. If the transcript was evidence, no payments could have been shown on the trial, but those which had been previously submitted to the accounting officers of the treasury. In this there is no difference between the principal debtor to the United States and his sureties. 6 Wheat. 135; 9 Cranch 212. If Rector was an officer within the meaning of the laws which make the transcript evidence, it was properly admitted

by the court. The giving a bond and taking the oath of office was not necessary to authorize him to enter on the duties of the office.

By the settlement, it does not appear that he was in default at the date of the bond, nor until 1824. Conceding that the sureties are not bound for the acts of Rector, before the date of the bond, August 1823, yet the duty of the principal to pay continued afterwards; and unless the balance which was afterwards ascertained to be due was paid, they are liable. The default of Rector did not occur until he was called upon to *account, and this was after the execution of the bond, in 1824. The case of the *United States* v. *Giles*, 9 Cranch 212, was cited and commented upon. [*385

Johnson, Justice, delivered the opinion of the court.—This was a suit instituted below, against the plaintiffs here, to recover a debt of $30,000, for which they had become bound to the United States, as sureties for one Rector; who is described in the bond as "surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas." The plea was performance, and the breach alleged in the replication is in these words: "that at the time of the execution of the bond, there were in the hands of the said William Rector, as such surveyor, to be by him, in the discharge of the duties of his office, applied and disbursed for the use and benefit of the plaintiffs, divers sums of money, amounting, &c., and that the said William Rector hath not applied and disbursed the same money, or any part thereof, for the use and benefit of the plaintiffs, as in the execution of the duties of his said office he ought to have done." On this plea, issue was taken, and at the trial, a bill of exceptions was taken to sundry instructions of the court, given or refused, which will be considered in their proper place. Two questions of a more general character must first be disposed of.

The first arises on the form of the judgment; the jury having found for the plaintiffs below, on the breach assigned, assess the damages for breach of the condition, at $41,000; and the judgment rendered is "*quod recuperet*," the damages, not the debt aforesaid. The parties, plaintiffs in error, are the sureties, and it is perfectly clear, that as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is actually due; which, of course, can only be, where it is a sum less than the penalty. It is proposed, on behalf of the United States, to release the surplus, and such is their right; but this still leaves the form of the judgment uncured and unamended. It would seem, that in adopting this form of rendering judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject. If so, it is a clear misapprehension; since that section, if it sanctions such *a judgment at all, is expressly confined to three cases—default, confession, or demurrer; with neither of which is the present case affected. There is no doubt, then, that the judgment must be reversed on this ground; but as other points, as well as those made in the bill of exceptions, might again embarrass the cause in the court below, and would most probably bring it back again here, it becomes necessary to consider those points. [*386

The seeond preliminary point alluded to is, whether the bond was not taken without law, or contrary to law, so as to be illegal and invalid. This turns on the official character assigned to Rector in the bond, or on that in

which, in fact, he is to be regarded in law. He is described as "surveyor of public land" in certain districts, not as surveyor-general. And such, in fact, was his literal character, for the office of surveyor-general still exists, nominally unique, although a large proportion of his powers and duties have been transferred to the surveyors of public lands in certain districts, subsequently detached from the region over which his powers were originally extended. In deciding on this point, three questions are to be considered; 1st, whether he was bound to give bond at all; 2d, whether the words of the condition embrace the duties of a disbursing officer; and 3d, whether those duties were incident to his office.

Upon looking through all the laws passed upon this subject, it can hardly be doubted, that this officer was intended to be included in the provision of the act of May 7th, 1822, requiring security of the surveyor-general. Literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general. The indiscriminate use of this appellation in the previous and subsequent legislation of congress on the subject, will lead us to this conclusion. Until the passing of the act of Febuary 28th, 1806, all the surveying for the United States was carried on under the provisions of the act of May 18th, 1796, as amended by the act of May 10th, 1800; and under the control and superintendence of the surveyor- general.

*387] In the year 1806, after the *purchase of Louisiana, the powers of that officer were extended to the country newly acquired, and he was enjoined to appoint a sufficient nnmber of skilful surveyors, as deputies, one of whom, to be appointed with the approbation of the secretary of the treasury, was to assume the character of principal deputy, and to exercise over the co-deputies the general power vested in and exercised previously by the surveyor-general. The subordinate character of all these officers was distinctly marked by that act; and yet we find, that in the act of March 3d, 1807, in the second section of the act, the epithet of surveyor-general is expressly applied to that individual of them who should have been employed in surveying the public lands south of the Tennessee. (2 U. S. Stat. 440.) Yet at a subsequent day, to wit, March 3d, 1815 (3 Ibid. 229,) we find the same officer designated generally as a surveyor of that district of country. So also, when the act of April 29th, 1816, was passed, which abolished the appointment of these deputies, and conferred the appointment of their present substitutes upon the president, the latter are simply designated as a surveyor, and not surveyor-general. Yet when the act of May 7th, 1822, is passed, requiring bond to be given by these officers, it is expressed altogether in the plural number, as recognising the existence of more than one surveyor-general.

There were, then, no other officers in existence, besides the actual surveyor-general, who could come within the literal enactments of that statute; unless we include a surveyor appointed under the provisions of the act of Aprll 29th, 1816. That is the present obligor. And if further confirmation be required to establish the necessary extension of the provisions of that law to tho present cause, we have it in the act of May 26th, 1824, in the second section of that act; the language of which expressly recongises the existence of more tnan one surveyor-general. It is clear, then, that from the

time that the appointment of deputies by the surveyor-general was superseded by the appointment of surveyors by the treasury department, the independent character in which whose officers then acted, identified them with the surveyor-general, so far as to have led to the use of language by congress, adapted to confounding them with the surveyor-general. We, therefore, have no doubt, that they were included in the *provisions of the act which required bonds to be taken on their accession to [*388 office. Nor do we think that there is any more doubt, that the law contemplates them as disbursing officers. It is express in requiring them to give bond for the faithful disbursement of public money; and *cui bono* do this, if they were not regarded as disbursing officers?

But the words of the statute which relate to disbursements are omitted from the condition of this bond, and the only words inserted are, "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party. But the question is one of much more difficulty, whether, where the law is express that the condition shall be both for the faithful disbursement of money, and the general discharge of duty, and the latter only is inserted; the former may still be held to be comprised within the general words of the latter. But for the language used in the statute, the court has no doubt, that the case would have been open to proof, that the disbursement of money was one of the known and habitual duties of the office, and included in the general words; but whether the omission of the express words which imposed this liability does not preclude a resort to their restoration incidentally by proof, is a question on which the court have felt much difficulty, and which they will not now decide.

The next questions to be considered are those presented by the bill of exceptions, and of these, that which goes to the sufficiency of the certificate, has already been disposed of in the case of *John Smith T.* v. *United States* (*ante*, p. 233), in which the same form of certificate was held to be a substantial compliance with the law under which it was resorted to as proof.

The remaining questions grow out of this state of facts. Rector was appointed surveyor, or, at least, commissioned as such, on the 13th of June 1823; and this bond bears date the 7th of August 1823. Between the 3d of March and the 4th of June, in the same year, there had been paid to him from the treasury, the sum of money found by the jury. So that it was paid to him before the commission, and before the bond in proof. *On this state of facts, the bill of exceptions asserts three grounds of [*389 defence: 1. That the sureties could not be made liable at all for the money so paid: 2. That if at all, they ought to be let into proof that Rector had appropriated the money to his own use before the date of the bond: or, 3. That he had paid it, or enough of it to cover the penalty of the bond, to the use of the United States, before they became bound for him.

On these points we feel no difficulty in affirming, that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money, in bank or otherwise. If still in his hands, he was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the

government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct; they ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defence; and whether paid away in violation or in execution of the trust reposed in him; if paid away, he no longer stood in the relation of bailee. It was not, then, a case to which that act applies, which requires the submission of accounts to the treasury, before discounts can be given in evidence; since this defence goes not to discharge a liability incurred, but to negative its ever existing. In giving instructions to the jury on these points, therefore, the court erred, as well as in refusing to let the defendants into proof, as prayed; since such testimony presents a direct negative to the breach alleged, which is, that the obligor then had the money in his hands.

Judgment reversed, and *venire facias de novo* awarded.

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*390] *Alexander B. Shankland, Plaintiff in error, *v.* The Mayor, Aldermen and Common Council of Washington, Defendants in error.

Lotteries.—Parol evidence.—Delegation of authority.

The plaintiff was the owner of a half ticket in "the fifth class of the National Lottery," authorized by the charter granted by congress to the city of Washington; the number of the original ticket was 5591, which drew a prize of $25,000; the whole ticket was in the hands of Gillespie, to whom all the tickets in the lottery had been sold by the corporation of Washington; and his agent issued the half ticket, which was signed by him, as the agent of Gillespie, the purchaser of all the tickets in the lottery; after the drawing of the prize, and before notice of the interest of any other person in the ticket No. 5591, Gillespie returned the original ticket to the managers or commissioners of the lottery, and the agents of the corporation, and received back from the corporation an equivalent to the value of the prize drawn by it, in securities deposited by him with the corporation for the payment of the prizes in the lottery: *Held*, that the corporation of Washington were not liable for the payment of half of the prize drawn by ticket No. 5591, to the owner of the half ticket.

The purchaser of tickets in a lottery, authorized by an act of congress, has a right to sell any portion of such ticket, less than the whole; the party to whom the sale has been made would thus become the joint owner of the ticket thus divided, but not a joint owner by virtue of a contract with the corporation of Washington, but with the purchaser in his own right, and on his own account; the corporation promise to pay the whole prize to the possessor of the whole ticket, but there is no promise on the face of the whole ticket, that the corporation will pay any portion of a prize to any sub-holder of a share; and it is not in the power of a party, merely by his own acts, to split up a contract into fragments, and to make the promisor liable to every holder of a fragment for a share.[1]

It is certainly very difficult to maintain, that in a court of law, any parol evidence is admissible, substantially to change the purport and effect of a written instrument, and to impose upon it a sense which its terms not only do not imply, but expressly repel.

It is a general rule of law, that a delegated authority cannot be delegated.[2]

This case came before the court under an unusual agreement of the parties, by which matters of fact, properly cognisable before a jury, are submitted to the judgment of the court. The court desire to be understood, as not admitting that it is competent for the parties by any such agree-

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[1] S. P. Tiernan *v.* Jackson, *post*, p. 580.

[2] Pearson *v.* Jamison, 1 McLean 197; Pendall *v.* Rench, 4 Id. 259.

ment to impose this duty upon them; the peculiar circumstances of this case furnish a sufficient apology for this agreement, but it is not to be drawn into precedent.

Shankland *v.* Washington, 3 Cr. C. C. 328, affirmed.

THIS case was brought up by writ of error to the Circuit Court of the District of Columbia, for the county of Washington, and after argument, at January term 1830, was held under advisement until this term.

*The facts of the case, with the exception of those stated more particularly in the opinion of the court, in this case, are the same [*391 with those of the case of *Clark* v. *Corporation of Washington*, reported in 12 Wheat. 40.

The case was argued by *Wirt* and *Swann*, for the plaintiff; and by *Jones* and *Key*, for the defendants.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting in the county of Washington. The original action was brought by the plaintiff in error, to recover the amount of one-half of the prize of $25,000, which was drawn in a lottery authorized by the corporation of Washington, by ticket No. 5591, of which the plaintiff asserted himself to be the owner and possessor, in the manner hereafter stated. The declaration was for money had and received; and it was agreed by the parties, to state a case, and if upon the case so stated, the court should be of opinion, that the corporation were liable to the plaintiff for the half of the prize sued for, judgment should be rendered upon the declaration for the amount due him accordingly. It was further agreed, that the question of the admissibility, competency and sufficiency of the evidence to maintain the action, should be submitted to the court; and that in considering the evidence, the court should draw from it, so far as it was admissible and competent, every inference of fact and law which it would have been competent for a jury to have drawn from it. Upon this case, the circuit court gave judgment for the corporation, and the present writ of error is brought to review that judgment.

The lottery was the same, which was brought before this court for consideration in the case of *Clark* v. *Corporation of Washington*, 12 Wheat. 40; and the leading facts being the same, it is unnecessary to do more than advert to those facts, which are peculiar to this case, and furnish the ground of argument to distinguish it from the former.

The decision in that case was, that the lottery was the lottery of the corporation; that the tickets issued were the tickets of the corporation, contained a promise of the corporation, *made by its authorized agent, to [*392 pay such prizes as should be drawn by them; that the sale of all the tickets in the lottery to Gillespie, under the contract made by him with the managers, was not a sale of an independent right to draw the lottery for himself, and on his own responsibility alone, but was in effect a sale of the profits of the lottery for a given sum. And the reasoning in the case shows, that Gillespie became the absolute owner of all the whole tickets signed in behalf of the corporation and delivered to him, but not of those unsigned; and of course, the possessors of such signed tickets, whether himself or subsequent purchasers, were entitled to the prizes drawn to them from the corporation as promisees. If, therefore, the plaintiff in the present case had been the possessor of the whole ticket, which drew the prize of $25,000, he

would have been clearly entitled to recover it from the corporation. But the whole ticket was in the hands of Gillespie, as possessor; and it was (as the state of the facts shows) delivered by him to the corporation, after the prize was drawn, without any notice on their part of any sub-interest in another; and that upon such delivery, Gillespie received back from the corporation an equivalent value, in securities previously deposited by him with the corporation for the payment of prizes. As between Gillespie and themselves, the corporation have paid the prize; they have paid it to the possessor, according to the terms of the ticket; and the question is, whether, under these circumstances, they are still liable to pay to the plaintiff, as owner of the half ticket, one-half of the amount, notwithstanding they had no notice of his interest or title?

It is in evidence in the case, that all tickets sold in the lottery were sold by Gillespie, or his agents, and for his benefit; and all the moneys arising therefrom were received by him or his agents. This was, on his part, a proper proceeding; for by the very terms of the contract, he was entitled to all the tickets signed and delivered to him; and when he sold these tickets, he sold them as owner, on his own account, having already acquired a legal title thereto from the corporation. No half or quarter tickets were ever signed or issued by the managers of the lottery, or any of them. But it is
*393] in evidence, that one Webb, as clerk of Gillespie, was in the habit *of selling whole tickets, half tickets, and quarter tickets, and that, as the clerk of Gillespie, he sold to the plaintiff one-half of the ticket No. 5591. The whole ticket No. 5591 was signed by the president of the board of managers. The half or sub-ticket, purchased by the plaintiff, was in the following terms: "National Lottery:—Gillespie's lottery office:—No. 5591. This ticket will entitle the possessor to one-half of such prize as may be drawn to its number, if demanded within twelve months after the completion of the drawing; subject to a deduction of fifteen per cent; payable sixty days after the drawing is finished. Washington City, February 7th, 1821. D. Gillespie, *per* John F. Webb:" and in the margin there was an abstract of the prizes to be drawn in the lottery. Does this sub-ticket constitute a contract, by which the corporation were bound to pay half the prize to the possessor, or is it the mere private contract of Gillespie? Upon the face of the paper, it purports to be a contract, not for or on behalf of the corporation, but for and in behalf of Gillespie, by his agent Webb. Gillespie, and not the corporation, promises to pay the half prize drawn to it. In what manner, then, can it bind the corporation?

In the first place, it was entirely competent for for Gillespie to enter into such a contract on his own account. As owner and possessor of the whole ticket, if he had made sale of the whole, it would have been on his account; for he, who sells as owner, cannot, in any just use of language, be said to sell as agent. He would have conveyed his own title, as he then held it, and not as agent of another. He would have substituted another as possessor and transferee, to whom the original promise of the corporation would then have attached. But Gillespie, as owner, had also a perfect right to sell any portion of such ticket, less than the whole. The party to whom he should sell would thus become a joint owner with him; but not a joint owner in virtue of any new contract made by the corporation, but by Gillespie, in his own right, and on his own account. The corporation promise to pay the

whole prize to the possessor of the whole ticket; but there is no promise on the face of the whole ticket that the corporation will pay any portion of the prize to any sub-holder of a *share; and it is not in the power of a party, merely by his own acts, to split up a contract into fragments, [*394 and to make the promisor liable to every holder of a fragment for his share.

The language of this court in *Mandeville* v. *Welch*, 5 Wheat. 277, 286, leads to a very different conclusion. If this had been the case of a bank-note, payable to bearer, there is no pretence to say, that a person claiming a moiety by contract with the bearer, could have maintained a suit against the bank upon such contract, for the moiety, when the note itself had been surrendered up to the bank by the bearer. In what respect does such a case differ from the present? Suppose, after this sub-ticket was issued, Gillespie had sold and delivered the whole ticket to another person, having no notice; would not the latter have been entitled to recover the whole prize from the corporation? If so, would the corporation still be liable to pay the half prize to the plaintiff? If not, in what respect does the case at bar differ in principle from that put; since, in legal effect, the prize has been paid to the real possessor of the whole ticket? By the contract contained on the face of the whole ticket, the corporation promised to pay the possessor of it, the prize drawn by it. They have done so. How then can their liability upon the face of the instrument be extended to claims by persons entering into sub-contracts with the holder of the ticket?

But in the next place, it is said, that Gillespie was the agent of the corporation in signing and issuing these sub-tickets, and that they are, therefore, evidence of a contract by the corporation with the holder of the sub-ticket, that the corporation will pay the proportion of the prizes drawn by them. Let us see, how far this proposition is borne out by the evidence. In the first place, the only evidence of such a contract with the plaintiff, is the sub-ticket itself; and that, as we have seen, purports on its face to be a contract, not of the corporation, but of Gillespie. It is certainly very difficult to maintain, that in a court of law, any parol evidence is admissible, substantially to change the purpose and effect of a written instrument, and to impose upon it a sense, which its terms not only do not imply, but expressly repel. Even if it were otherwise, there is not the slightest evidence in this case, that Webb was ever authorized by the corporation to be their agent for any purpose *whatsoever. On the contrary, Webb [*395 himself expressly states, that he issued and sold this sub-ticket, and signed the same, as clerk of, and for, Gillespie; and he adds, that all the tickets sold in the lottery were sold for the benefit of Gillespie. So that his own view of the matter is, that he was the agent, not of the corporation, but of Gillespie.

But it has been argued, that Gillespie was himself the agent of the corporation in the sale of the whole tickets, and by fair implication, in the sale of the sub-tickets also. If it were so, it would still be difficult to show, that he had right to delegate such authority to his clerk, or that without such delegation, the act of the clerk bound the corporation; for the general rule of law is, that a delegated authority cannot be delegated.

But waiving any consideration of this point, let us see, whether the evidence contains any such authority to Gillespie himself. In the first place, did he act as agent of the corporation, in selling the whole tickets, or as

owner of them? The evidence in the case (as has been repeatedly stated) is, that he was the owner of the whole tickets; that he sold them and received the moneys for them on his own account. And if he was the owner, it is difficult to perceive, how he could act as agent of another in the sale of what was exclusively his own property. But the whole tickets were signed by the president of the managers, and with their consent; and thus bound the corporation as the act of their authorized agent. None of the sub-tickets were so signed or issued; but they were signed in behalf of Gillespie only. This alone shows, that the managers did not contemplate the issue of any but whole tickets to bind the corporation. If they had contemplated any issue of sub-tickets, why where the latter not also signed by the president and delivered to Gillespie? The contract between the managers and Gillespie does not contain any provision respecting the issue of sub-tickets; nor does it appear, that Gillespie ever requested the managers to sign or deliver any. But it is said, that it may be inferred from the other circumstances of the case, that Gillespie was authorized to issue such sub-tickets; and the advertisements published in the papers by Gillespie, in which he announces the prizes, the names of the managers, and the offer of whole, half and quarter tickets for sale, raise an irresistible presumption of the *fact. We do not think so. Those circumstances are, to say the least, quite as consistent with the exercise of this right on his own account, as with the exercise of any right as agent of the corporation. He was owner of all the whole tickets; and he certainly had a right to dispose of them in any manner which he might deem best for his own interest, whether it was in was in wholes, or halves or quarters, or any other subdivisions. The corporation had no authority to obstruct or limit him in the full exercise of this right; and any contract, which he should make with third persons, for the sale of sub-interests in a single ticket, the corporation had as little to do with, as they would have with a contract to sell a hundred or thousand tickets to the same persons. Their contract was to pay the possessor of the whole ticket any prize which it might draw. Beyond that, they were not bound to inquire into or take notice of any sub-interest, whether equitable or legal, acquired under Gillespie. In point of fact, it should seem, as well from Webb's testimony, as from the conduct of Gillespie, that he so understood the matter; for there is no evidence that he ever made any returns to the managers of the issues of such sub-tickets, or in any other manner consulted them on the subject; or that they took any step to guard themselves from a double issue of the whole ticket, or of sub-tickets of the same number. When the managers took so much care to limit and control the issue of whole tickets, by refusing to sign them, except as Gillepsie furnished them with security for payment; is it to be believed, that they had yet intrusted him with an unlimited power to issue sub-tickets binding the corporation, which might, and indeed, would, defeat the whole effect of these precautions? It seems to us not. And the very form of the sub-ticket itself, is strong corroborative evidence to repel the presumption, that the corporation intended to bind themselves otherwise than by the written signature of one of their own managers, who were specially deputed to conduct the sale and drawing of of the lottery; and there is much reason to doubt, if the managers could have deputed their rights or duties in this

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respect to any third person, so that he could enter into contracts for and to bind the corporation.

Upon the whole, it is the opinion of the court, that the plaintiff in this case is not entitled to recover, his *contract not being with the corporation or their agent, but solely with Gillespie. This view of the case [*397 renders it unnecessary to consider the other question made at the bar, whether the lottery was or was not illegal in its scheme and origin.

This case has come before the court under an unusual agreement of the parties, by which matters of fact, properly cognisable by a jury, are submitted to our judgment. We desire to be understood, as not admitting, that it is competent for the parties, by any such agreement, to impose this duty upon the court. The peculiar circumstances of this case furnish a sufficient apology for this agreement. But it is not to be drawn into precedent. The judgment of the circuit court is affirmed, with costs.

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

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*Thomas Hinde and wife, Plaintiffs in error, *v.* The Lessee of [*398 Charles Vattier.

Evidence.—Public documents.—State decisions.

The book called the Land Laws of Ohio, published by the authority of a law of that state, is evidence in the circuit court of the United States, of an application made in 1787 for the purchase of a tract of land on the Ohio river, between the mouths of the Great and Little Miami, by John Cleves Symmes and his associates, and of the various acts of congress relative to that application and purchase, and of a patent from the president of the United States, pursuant to an act of congress, granting to Symmes and his associates the land described therein: the production of any other evidence of title in Symmes was unnecessary.

It would be productive of infinite inconvenience to settlers and all persons interested in the lands embraced in this patent, if its publication among the laws of the state, and the admission of the book of laws as evidence of the grant, after its solemn adoption by the supreme court of Ohio, as a settled rule of property, should be questioned in the courts of the United States.

There is no principle better established and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do; the rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of the state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the constitution, treaties or statutes of the United States do not otherwise provide.[1]

Error to the Circuit Court of Ohio. The case was submitted to the court by *Doddridge*, on the following case.

"This is an ejectment originally brought in the common pleas of Hamilton county, in the state of Ohio, and afterwards removed to the circuit court of the United States for the district of Ohio, for a part of lot No. 86, in the city of Cincinnati, in the county of Hamilton, in said state, by the defendant against the plaintiffs in error. At the trial, a verdict and judgment were

[1] Sims *v.* Hundley, 6 How. 1.

rendered for the plaintiffs below, to reverse which the present writ of error is prosecuted. During the progress of the trial, the counsel for the defendants in error tendered a bill of exceptions, which was signed and made part of the record; which states, in substance, that on the trial of this cause, the counsel for the plaintiff, to maintain the issue and prove title in his lessor,
*399] offered in evidence *an official copy of a deed of conveyance from John Cleves Symmes and wife, duly recorded, dated the — of July 1795, for the said lot 86, to Abraham Garrison. A copy of a conveyance from the said Garrison to James Finly, for the said lot, duly executed and recorded, and dated the 9th of August 1815; and also a copy of a deed from the said Finly, for the same lot, duly executed and recorded, to the lessor of the plaintiff, dated the 20th of April 1818. The bill of exceptions then states, that the foregoing deeds were offered as evidence of title in the plaintiff's lessor, without offering therewith or before, any grant to Symmes, or to any person under whom he claims, or any copy thereof; to which evidence, unaccompanied by the further evidence before mentioned, the counsel for the defendant objected. But the court permitted the counsel of the plaintiff, instead of such further evidence, to offer in evidence and read from a certain book called 'Swan's Land Laws of Ohio,' published by authority of a law of that state, all that is contained in that book between page 25 and page 34, the latter included; and the court thereupon declared their opinion to be, that the production of any other evidence of title in John C. Symmes was unnecessary—the court being satisfied, that the supreme court of Ohio have solemnly settled it as a rule of property, in cases arising within the Miami purchase, where the lot aforesaid is situated, to produce any further evidence than before mentioned."

For the plaintiff in error, it was contended:—1. That by the settled rules of evidence, the plaintiff in the court below was bound to derive to John C. Symmes, a title from the United States, either by a grant to him directly, or to some person under whom he claims. 2. That this title, as a general rule, could only be proved by the production of the grant, or an official or sworn copy. 3. That a solemn decision of the supreme court of Ohio, in a mere matter of evidence at common law, is not obligatory on the United States courts. 4. That the assertion of the doctrine of the supreme court of Ohio, stated in the bill of exceptions, is no evidence of the establishment
*400] of a rule of property in Ohio.

**Doddridge*, for the plaintiffs; *Caswell*, for the defendant.

Baldwin, Justice, delivered the opinion of the court.—The suit in the court below was an ejectment brought, by the defendant in error, to recover part of lot No. 86, in the city of Cincinnati. The plaintiff offered in evidence of his title an official copy of a deed of conveyance from John Cleves Symmes and wife, duly recorded, dated July 1795, for the said lot No. 86, to one Abraham Garrison, and a regular chain of title from Garrison to the lessor of the plaintiff; which was objected to by the defendant, because no title was proved in Symmes. In order to prove this, the court permitted the counsel for the plaintiff, instead of offering a deed or grant from the United States to Symmes, to offer in evidence and to read from a book, called the Land Laws of Ohio, published by authority of a law of that state, an application made in 1787, for the purchase of a tract of land on

the Ohio river, between the mouths of the Great and Little Miami rivers, by John Cleves Symmes and his associates; also various acts of congress relative to said application and purchase, authorizing the president of the United States to convey to said Symmes and his associates certain lands therein referred to; also a patent from the president, pursuant to an act of congress, passed the 5th of May 1792, granting to Symmes and his associates in fee, a tract of land containing 311,000 acres, bounded south by the river Ohio, on the west by the Great Miami river, on the east by the Little Miami river, and on the north by a parallel of latitude to be run from the Great to the Little Miami rivers, so as to include the quantity aforesaid. The court, thereupon, declared their opinion to be, that the production of any other evidence of title in Symmes than what had been so exhibited, was unnecessary; and further, declared, they were satisfied that the supreme court of Ohio had solemnly settled it as a rule of property in cases arising out of conflicting titles within the tract of land so granted to Symmes and his associates, which is called the Miami purchase, and comprehends Cincinnati, that no further evidence of title in Symmes, than what appears in the book so read, is ever necessary.

The admission of this book in evidence, and the declaration *of the court that it was sufficient evidence of title in John Cleves [*401
Symmes, under whom the plaintiff claimed, presents a case clear of all doubt. It would be productive of infinite inconvenience to suitors, and to all persons interested in the lands embraced in this patent, if its publication among the laws of a state, and the admission of the book of laws as evidence of the grant, after its solemn adoption by the supreme court of Ohio as a settled rule of property, should be questioned in the courts of the United States. There is no principle better established, and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. *Wilkinson* v. *Leland*, 2 Pet. 656. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the constitution, treaties or statutes of the United States do not otherwise provide. The judges who tried this cause were satisfied that it had been solemnly settled by the supreme court of Ohio, as a rule of property, in the trial of all cases affecting the title to lands within the boundaries of the patent to Symmes, that the book of land laws was to be taken as sufficient evidence of the grant by the United States to him, of all the land embraced within it. The record affords no reason for any doubt of the existence of such a rule; which we think reasonable, highly conducive to the convenience of suitors, and fully within the power of the state court to adopt. This court would decide contrary to the spirit of all their former decisions on similar subjects, in declaring the evidence received in this case inadmissible, or insufficient to show title in the plaintiff. It is their unanimous opinion, that the judgment must be affirmed. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

*James Jackson, *ex dem.* Martha Bradstreet, Plaintiff in error, *v.* Henry Huntington, Defendant in error.

Disseisin.—Election to stand disseised.—Adverse possession.—Statute of limitations.—Tenants in common.

Where one having no title, conveys to a third person, who enters under the conveyance, the law holds him to be a disseisor.

That an actual or constructive possession is necessary, at common law, to the transmission of a right to lands, is incontrovertible; it is seen in the English doctrine of an heir's entering in order to transmit it to his heirs; but whatever be the English doctrine, and of the other states, as to the right of election to stand disseised, it is certain, that the New York courts have denied that right, both as to devises and common-law conveyances, without the aid of a statute repealing the common law.[1]

This court can only reverse a judgment, when it is shown that the court below has erred; it cannot proceed upon conjecture of what the court below may have laid down for law; it must be shown, in order to be judged what instructions were in fact given, and what were refused.

Adverse possession is a legal idea, admits of a legal definition, of legal distinctions; and is, therefore, correctly laid down to be a question of law.

Adverse possession may be set up against any title whatsoever, either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession.

The common law generally regards disseisin as an act of force, and always as a tortious act; yet out of regard to having a tenant to the *præcipe*, and one promptly to do service to the lord, it attaches to it a variety of legal rights and incidents.

Rights accruing under acts of limitation are recognised in terms as, *primâ facie*, originating in wrong, although among the best protections of right.

If there be a tenancy in common, the law appears to be definitively settled in New York, that the grantee of one tenant in common for the whole, entering under such conveyance, may set up the statute against his co-tenants in common.

Error to the District Court of the Northern District of New York. The plaintiff in error, in 1824, instituted an action of ejectment in the district court of the United States for the northern district of New York, for the recovery of a tract of land, situated in the village of Utica, and the county of Oneida, in the northern district of New York. The cause was tried at January term 1827, and a verdict and judgment were rendered for the defendant. The plaintiff excepted to the opinion of the court on various
*403] points of evidence and of law, presented in the course *of the trial, and the court sealed a bill of exceptions. The plaintiff sued out a writ of error to this court. The bill of exceptions stated at large all the evidence and proceedings on the trial of the cause.

The title of the lessor of the plaintiff and that of the defendant, as exhibited in the evidence contained in the bill of exceptions, was as follows: Philip Schuyler purchased Cosby's manor, sold by the sheriff of the county of Albany for arrears of quit-rent, under a warrant from the chief justice of the state of New York, dated May 7th, 1772. This property was conveyed to Philip Schuyler, by a deed executed by the sheriff of the county of Albany, dated July 20th, 1772.

General John Bradstreet made his last will and testament, on the 23d

[1] S. P. Webster *v.* Gilman, 1 Story 499; Thomas *v.* Perry, Pet. C. C. 49; Longworth *v.* Close, 1 McLean 282; Bowman *v.* Wathen, 2 Id. 376; United States Bank *v.* Benning, 4 Cr. C. C. 81; Fraser *v.* Hunter, 5 Id. 470; Carroll *v.* Dawson, Id. 514; Dubois *v.* McLean, 4 McLean 486; Wakefield *v.* Ross, 5 Mason 16. See Dudley *v.* Brown, 79 N. Y. 390, as to the doctrine of adverse possession to avoid a deed, in that state.

September 1774. The will, after providing for the adjustment of his accounts, he being in the British service, and devising a farm to John Bradstreet Schuyler, son of Colonel Schuyler, and some legacies, proceeded— "All the rest of my estate, real and personal, I devise and bequeath to my two daughters, equally to be divided between them, as tenants in common, in fee; but I charge the same with the payment of one hundred pounds sterling *per annum* to their mother, during her life. Notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts, and execute all instruments, which they may conceive to be requisite to the partition of my landed estate, and I devise the same to them as joint-tenants, to be by them sold, at such time and in such manner as they shall think most for the interest of my daughters, to whom the net produce shall be paid, in equal shares, the sum of one hundred pounds sterling *per annum* being first deducted, or a capital to secure the same set apart, for an annuity for my wife, as aforesaid. I order that Doctor Bruce have one hundred pounds for his trouble and for his kindness to me; my watch I give to Mr. Gould, as a mark of my friendship. I leave funeral expenses to the discretion of my executors, and I appoint for the execution of this my will, the said Colonel Philip Schuyler and William Smith, Esq., of New York."

Martha Bradstreet, one of the daughters of General Bradstreet, made her will on the 15th of May 1781, and devised to *her mother, Mrs. Mary Bradstreet, the produce and interest of her estate, real and personal, [*404 during her life; and after her decease, she devised one equal third of her estate, real and personal, to her sister Elizabeth Livius, her heirs and assigns to be at her disposal, independent of her husband; one-third part to Samuel Bradstreet and Martha Bradstreet, children of her late brother, Samuel Bradstreet, and to their heirs, with benefit of suvivorship, the produce of such one-third part, and part of the principal, to be applied to their maintenance and education, if necessary. The remaining one-third she gave to her sister Agatha, wife of Charles Du Bellamy, during her life, independent of her husband; after his death, she surviving, to her in fee, but if she died before her husband, to her children; but if she survived her husband, and had no children, and should not dispose of the same by will, the same should go to Elizabeth Livius and her heirs. A like devise of the share given to Elizabeth Livius was made in favor of her sister Agatha, if she should die without disposing of her share, and without issue. Sir Charles Gould was appointed sole executor of this will, and authorized to act relative to the estate of the testatrix in America, by the following provision: "And I do authorize my said executor to sell and dispose of such real estate as I may be entitled to in North America, or elsewhere, and to execute conveyances for the same, and to place out my moneys upon such securities as he shall deem proper, and in such manner and form, as to the shares devised to my sister Agatha, and to my nephew and niece, Samuel and Martha, respectively, as shall be conformable to the provisions of the will in respect to each of those shares." It was in evidence, that Martha Bradstreet, the testatrix, and John and Mary Bradstreet, were deceased.

The will of Elizabeth Livius, deceased, purporting to be executed on the 20th of November 1794, was offered in evidence. The court not considering it duly proved, refused to permit it to be read to the jury, to which opinion

an exception was taken by the plaintiff. By that will, Mrs. Martha Bradstreet, the lessor of the plaintiff, and the daughter of Samuel Bradstreet, the brother of Mrs. Livius, then deceased, was made her sole heir. The provisions of the will were: "I hereby constitute and appoint my dear niece,
*405] Martha Bradstreet, *daughter of my late brother Samuel Bradstreet, major of the fortieth regiment of foot, to be my sole heir, to whatever estate, real or personal, I may die possessed of, to be paid or delivered unto her, at the age of twenty-one years, or day of marriage, whichever may first happen; provided she marries with the consent of my most respected friend, Sir Charles Morgan, Bart., whom I hereby appoint executor of this my last will and testament. But in case she should die before she attain twenty-one years of age, or before she be married as aforesaid, I then appoint her brother, Samuel Bradstreet, a lieutenant in the 25th regiment of foot, to be my heir, in her place and stead."

Martha Bradstreet, the devisee and the lessor of the plaintiff, afterwards, with the consent of Sir Charles Morgan, married Matthew Codd, but being divorced from her husband, she resumed her original name. The evidence to prove the assent of Sir Charles Morgan to this marriage was excepted to by the counsel for the defendant, and the exception was sustained. To this ruling of the district court, the plaintiff excepted.

The plaintiff also gave in evidence a map of the whole tract of land conveyed to Philip Schuyler by the sheriff of the county of Albany, in 1772; and proved by Mr. John R. Bleecker, who was sworn as a witness, that said map was in the handwriting of his grandfather; that he, the witness, received it of his own father, Rutger Bleecker, deceased; and that he, the witness, held certain parts of said land, under title derived from his said father, who also in his lifetime was in possession of the same, pursuant to a partition deed thereinafter mentioned, and according to the allotments on the said map; which said map appeared to have been made on the 31st day of August 1780, and was stated to be in pursuance of a survey of said tract.

And there was also given in evidence, a deed of partition between Philip Schuyler and Rutger Bleecker, dated the 19th day of December, in the year of our Lord 1786, whereby and wherein, lot No. 97, as described on the map, was released by Rutger Bleecker to Philip Schuyler; and the counsel for the said James Jackson, also gave in evidence and proved, that the premises in question upon the trial of that issue, were part of the lot No. 97.

*406] *On the 16th of May 1794, a deed was executed by Philip Schuyler and others, of which the following is an abstract: "The parties were Philip Schuyler, of the county of Albany, in the state of New York, Esquire, executor of the last will and testament of John Bradstreet, deceased, and hereinafter mentioned, of the one part, and Agatha Evans, of the city of New York, in the state of New York, widow, one of the daughters of the said John Bradstreet, deceased, and Edward Goold, of the same place, merchant, attorney to Sir Charles Gould, Knight, the only executor of the last will and testament of Martha Bradstreet, deceased, the other daughter of the said John Bradstreet, of the other part." It recited the will of General John Bradstreet, and that Philip Schuyler, at the time of the making thereof, was seised in trust for the said John Bradstreet of one undivided fourth part of the tract of land

described in the partition deed executed by himself and Rutger Bleecker (together with other lands); the death of William Smith, his co-executor; and that Agatha Evans, formerly Agatha Du Bellamy, was one of the daughters of John Bradstreet. It also recited the will of Martha Bradstreet, the daughter of John Bradstreet, and the devises in the same of one-third to Samuel and Martha Bradstreet, children of her brother Samuel Bradstreet, deceased, one-third to his sister Agatha, then the wife of Charles Du Bellamy, afterwards Agatha Evans, the wife of Charles John Evans, and the remaining one-third to her sister Elizabeth Livius; and that partition had been made among the proprietors of the tracts in the manor of Cosby, describing the lots which fell to Schuyler, as trustee of John Bradstreet, and among them lot No. 97; and that the same had, with other lots which fell to Schuyler in his own right, been conveyed to him by the deed of partition. The deed stated, that the said Philip Schuyler, "as well to invest the said Agatha Evans with a legal title to her proportion of the said lands and tenements, devised to her by virtue of the will of the said John Bradstreet and Martha Bradstreet, as to convey the rest and residue thereof to the said Edward Goold, in trust for the said persons who may be entitled to the benefit thereof, under the will of the said Martha Bradstreet;" and in consideration of ten shillings, &c., had, "by virtue, also, of the power and authority with which he is so as aforesaid invested, and of all *other powers which he may lawfully claim as executor," and did "grant, bargain, [*407 sell, alien, release and confirm," to Mrs. Evans and Edward Goold, and their heirs and assigns, the said lands which fell to the share of the said Philip Schuyler, as a trustee for the said John Bradstreet (describing them at length, and including lot No. 97), with the reversion and reversions, &c., and all the right, title, &c., in law or equity, &c. (in the usual form); to have and to hold, &c., to the said Agatha Evans and Edward Goold, their heirs and assigns, in manner following, viz: Two equal undivided third parts to Mrs. Evans, and the remaining one undivided third to the said Edward Goold, his heirs and assigns; "and upon the following trusts—that is to say, to sell the same, from time to time, as may be most expedient, and every or any parcel thereof; and after deducting the charges of sale, and other contingent expenses attending the said trust, to divide the residue of the money to arise from such sale, to and among the said devisees, Samuel Bradstreet and Martha Bradstreet, and the said Elizabeth Livius, and their heirs, executors and administrators, according to their several interests in the estate of the said Martha Bradstreet, by virtue of her will, or to such persons as would be entitled thereto, upon the happening of any of the said contingencies in the said will mentioned," &c. The deed further contained covenants against Schuyler's own acts or incumbrances, and for further assurance.

It was in evidence, that Mrs. Martha Bradstreet was twenty-one years of age on the 10th August 1801; that she and her husband came to the United States to reside, in 1797, and that she had ever since resided therein. The acts of the legislature of New York, which enable aliens to take and hold lands, were also in evidence.

A deed was given in evidence by the plaintiff, of the following purport. It was executed on the 22d October 1804, at the city of New York, by Edward Goold to Martha Codd, late Martha Bradstreet, wife of Matthew

Codd, of Utica, of New York. It recited the conveyance executed by Philip Schuyler, on the 16th of May 1794, Agatha Evans and the said Edward Goold, merchant, and attorney to Sir Charles Gould, the only executor of Martha Bradstreet, deceased, a daughter of General Bradstreet, and all the purposes of that indenture; and that Martha Codd, late Martha
*408] Bradstreet, by the will of *Elizabeth Livius, had, since the execution of the deed from Philip Schuyler, become entitled to all the estate of Elizabeth Livius, conveyed by the deed of Schuyler to Edward Goold, in trust for Sir Charles Gould, as executor of the will of Martha Bradstreet, not sold or conveyed according to the trust; and that Edward Goold having became a bankrupt, had been ordered by chancery to transfer and convey to Martha Codd, all the estate vested in him as trustee, and that he was willing to convey to the said Martha Codd all the estate vested in him as aforesaid, as her trustee, to which she might be entitled under the will of Martha Bradstreet. The deed then proceeded to convey to Martha Codd, her heirs and assigns, all the real estate held by Edward Goold, at the time of his becoming a bankrupt as aforesaid, as trustee as aforesaid for the said Elizabeth Livius, by virtue of the several indentures of release executed by the said Philip Schuyler as aforesaid, and the several wills therein referred to; and also all the real estate held by him, the said Edward Goold, at the time of his becoming a bankrupt as aforesaid, as trustee for the said Martha Codd, by virtue of the said several indentures and wills above referred to; to have and to hold unto her, the said Martha Codd, her heirs and assigns, to the only proper use, benefit and behoof of her, the said Martha Codd, her heirs and assigns for ever.

The defendant gave in evidence a deed of indenture, executed by Charles John Evans and Agatha his wife, and Daniel Ludlow and Edward Goold, conveying lot No. 97, the property in controversy, to Stephen Potter. This deed, dated the 24th December 1790, was executed by Charles John Evans, Agatha Evans, Sir Charles Gould, executor of the last will of Martha Bradstreet, by Daniel Ludlow and Edward Goold, his attorneys, in the following words:

"This indenture, made the 24th day of December, in the year of our Lord 1790, between Charles John Evans, now of Brooklyn, in the county of Kings, gentleman, and Agatha his wife, one of the daughters and devisees of John Bradstreet, Esquire, deceased, and Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, the other daughter and devisee of the said John Bradstreet, by Daniel Ludlow and Edward Goold,
*409] of the city of New York, merchants, his attorneys, of the one part, *and Stephen Potter, of Whitestown, Montgomery county, state of New York, of the other part; witnesseth, that the said Charles John Evans and Agatha his wife, and Sir Charles Gould, for and in consideration of the sum of four hundred pounds, lawful money of the state of New York, to them in hand paid by the said Stephen Potter, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released and confirmed, and by these presents, do clearly and absolutely grant, sell, alien, release and confirm unto the said Stephen Potter, and his heirs and assigns for ever, all that certain lot, piece or parcel of land situate, lying and being in the county of Montgomery, and state of New York, part of a larger tract granted to Joseph

Worrell and others, by patent dated the 2d day of January, in the year of our Lord 1734, which lot, upon a late division of the said tract, was distinguished by No. 97, and contains 400 acres of land, with the rights, members and appurtenances thereof; and all easements, advantages and hereditaments whatsoever to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents and services of the same, and all the estate, right, title, interest, property, claim and demand whatsoever, either at law or in equity, of them the said Charles John Evans and Agatha his wife, and Sir Charles Gould, and every of them, of in and to the same, and of in and to every part and parcel thereof, with the appurtenances: To have and to hold the same lot of land, hereditaments and premises, unto the said Stephen Potter, his heirs and assigns, to the only proper use and behoof of the said Stephen Potter, his heirs and assigns for ever. And the said Charles John Evans, for himself, his heirs, executors and administrators, doth hereby covenant and agree to and with the said Stephen Potter, his heirs and assigns, that he the said Stephen Potter, his heirs and assigns for ever, shall and may peaceably and quietly have, hold and enjoy the said lot of land, hereditaments and premises, free and clear of all incumbrances, titles and charges made by the said John Bradstreet, or any person or persons claiming, or to claim, by, from or under him. And that the said Charles John Evans, and his heirs, the said lot of land, hereditaments and premises, with the appurtenances, to the said *Stephen Potter, his heirs and assigns, against all and every person or persons whomsoever, shall and will warrant and for ever defend, by these presents." [*410

"Received on the day of the date of the within indenture, of the within Stephen Potter, the sum of four hundred pounds, being the full consideration money within mentioned. CHARLES JOHN EVANS,
LUDLOW & GOOLD."

It was proved on the part of the defendant, that Stephen Potter, the grantee, entered upon and took possession of lot No. 97, under this deed, immediately on its execution; claiming to be sole and exclusive owner of the same; and continued in such possession until his death, fifteen or sixteen years before the trial; having made large and valuable improvements thereon. That after his decease, his son, with other members of his family, succeeded to and continued in possession of, such parts of the lot as remained unsold by their father, claiming to be owners of the land; and that being in possession, and so claiming the land, Stephen Potter, the son, conveyed the premises in the ejectment to Henry Huntington, the defendant. No deed was produced, or proved, except by parol, as stated; and the son of Stephen Potter, and other persons deriving title from his father to parts of the lot, continued in possession of the residue of the lot, claiming the absolute ownership thereof; and the defendant had ever since been in possession and actual occupancy of the same, claiming the ownership in fee, by virtue of his purchase. But no building had been erected on that part of lot No. 97, for the recovery of which this suit was brought, until since 1824, and at that time, a part of the premises were without fence.

The death of General John Bradstreet, prior to the death of his daughter Martha Bradstreet, and the death of Philip Schuyler, on the 18th of November 1804, were also admitted.

The bill of exceptions concluded as follows: "Whereupon, the said counsel for the said James Jackson did then and there insist before the said judge, on the behalf of the said James Jackson, that the said matters so produced and given in evidence, on the part of said James Jackson, as aforesaid, were sufficient, and ought to be admitted and allowed as decisive
*411] evidence, to entitle the said James Jackson to a *verdict, on the said issue, in this cause. And the said counsel for the said James Jackson also insisted, that the said deed from Charles John Evans and Agatha his wife, and Daniel Ludlow and Edward Goold, as attorney of Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, deceased, to the said Stephen Potter, for the said lot No. 97, was void; as to all, except the interest of the said Charles John Evans and Agatha his wife, and could not be the foundation of an adverse possession. And the said counsel for the said James Jackson also insisted and objected, that there was no proof of the existence of any power of attorney from the said Sir Charles Gould, the executor of the said last will and testament of the said Martha Bradstreet, to the said Daniel Ludlow and Edward Goold, authorizing them to sell and convey the estate or interest of the said testatrix in the said lot No. 97, nor indeed, of any power of attorney whatever. And the said counsel for the said James Jackson also insisted, that if the deed aforesaid to the said Stephen Potter were valid and sufficient to pass anything more than the rights and interests of the said Charles John Evans and Agatha his wife, yet, that from the recitals in the said deed, the said Stephen Potter had notice that he could only purchase an equitable interest, the rights merely of *cestuis que trust*, and could not, therefore, hold adversely to the said Philip Schuyler, the trustee and executor of the said will of the said John Bradstreet. And the counsel for James Jackson also insisted, that the said Stephen Potter, claiming to hold the same identical title of the lessor of the plaintiff, neither he, nor those claiming under him, could set up his possession as adverse to that title.

"And the counsel for James Jackson did then and there pray the judge to admit and allow the said matters, so produced and given in evidence for the said James Jackson, to be conclusive in favor of the said James Jackson, to entitle him to a verdict in this cause; and to this the counsel learned in the law for the said Henry Huntington, did then and there insist before the said judge, that the said matters so given in evidence on the part of the said James Jackson, were not sufficient, nor ought to be admitted or allowed, to
*412] entitle *the said James Jackson to a verdict; but that the said matters so produced and given in evidence on the part of the said Henry Huntington, were sufficient, and ought to be admitted and allowed to bar the said James Jackson of his action aforesaid.

"And the judge did then and there deliver his opinion to the jury, that although the several matters so produced and given in evidence on the part of the said plaintiff, made out a clear paper title to the equal undivided part claimed of that parcel of the said lot No. 97, which was in the possession of the said defendant, and were, therefore, sufficient in law, to entitle the said plaintiff to recover, unless such title was defeated by the adverse possession set up on the part of defendant; and that although the above-recited deed from Charles John Evans and Agatha his wife, and Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, deceased by

Daniel Ludlow and Edward Goold, his attorneys, to Stephen Potter, without further proof of the authority of Daniel Ludlow and Edward Goold to execute the same, was insufficient of itself to convey a legal title to the undivided share of the premises sought to be recovered in the present action; yet, that there was nothing appearing upon the face of this deed, nor anything in the circumstances connected with its execution, so far as they had been shown, which in law would preclude the defendant from availing himself of possession under it, as a bar to the plaintiff's action; or prevent the possession of the said Stephen Potter, taken under and in virtue of the said deed, from being considered adverse to the title of the lessor of the plaintiff, and to the title of the said Philip Schuyler, the executor and trustee of the said John Bradstreet; provided, the proof was sufficient in other respects to establish the fact of such adverse possession: and the judge did then and there also further deliver his opinion to the jury, that the effect of an adverse possession in the said Stephen Potter, at the time of the execution of the said above-mentioned and recited deed from the said Philip Schuyler, executor as aforesaid, to the said Agatha Evans and Edward Goold, would be to render the said deed inoperative and void as to the said lot No. 97, and prevent any title from the said Philip Schuyler to the said Agatha Evans and *Edward Goold, passing by the said deed, in or to the said lot [*413
No. 97: and the said judge did then and there further deliver his opinion to the jury, that although it was generally true, that one tenant in common was not permitted to set up his possession as adverse to the title of his co-tenant, yet that one entering into possession of land under a deed for the whole, and claiming the entire interest, would not be thus precluded; although it should subsequently appear, that such deed conveyed only an undivided share. Whereupon, the said counsel for the said James Jackson did then and there, on the behalf of the said James Jackson, except to the aforesaid opinion of the said judge, and insisted on the said several matters as sufficient to sustain the said action on the part of the said James Jackson.

"And thereupon, the judge after explaining to the jury what in law constitutes an adverse possession, and submitting to them as a question of fact, whether such a possession had been proved, directed them, with the assent of the counsel on both sides, if they should agree upon their verdict, before the opening of the court next morning, to seal up their verdict. And upon the opening of the court, on the next morning, the jury came in with a sealed verdict in favor of the said Henry Huntington; but upon being called upon by the clerk, at the request of the counsel for the said James Jackson, severally to answer whether such was their verdict, two of the said jurors dissented therefrom. One of the jurors thereupon stated to the court, that the doubt in his mind was, whether he was bound to decide according to law or according to evidence; and that it appeared to him, that according to the evidence, the plaintiff ought in justice to have the land. And the judge thereupon replied to the juror, that a juror was certainly not at liberty, in making up his verdict, to disregard the law; that if the law required alteration, it was the province of the legislature to alter it; but that it was the duty of judicial tribunals to administer it as they found it; that it was the province of the judge to decide questions of law, and that the jury were bound to respect such decision; that the question, whether or not it was competent for the defendant to set up the defence of *adverse [*414

possession, under the deed to Stephen Potter, was a question of law, and had been decided against the plaintiff; that what in law constitutes an adverse possession was also a question of law, and that it was for the jury to say, under the instructions which had already been given to them upon that point, whether such possession had been proved; that if they believed from the evidence, that such a possession had been established, they were bound to and a verdict in favor of the defendant. Whereupon, the said juror, after some hesitation, assented to the said verdict; and the said counsel for the said James Jackson, did then and there, in behalf of the said James Jackson, except to the opinion of the said judge so declared to the said juror. By the direction of the court, the other juror who dissented was then called upon by the clerk to answer, whether he agreed to the said verdict. But the said juror still persisted in his dissent; and stated, that he entertained the same doubts which had been expressed by his fellow-juror; whereupon, the said judge directed the said jury to retire and again deliberate upon their verdict. And the said counsel for the said James Jackson did then and there, in behalf of the said James Jackson, except to the said last-mentioned direction of the said judge. And the jury thereupon retired, and after a short absence, returned again into court, with a verdict in favor of the said Henry Huntington. Whereupon, the said jury were again polled, at the request of the counsel for the said James Jackson, and severally assented to the said verdict."

The points presented for the consideration of the court, on the part of the plaintiff in error were:

1. That Martha Bradstreet, formerly Martha Codd, the lessor of the plaintiff, acquired the equitable interest in and title to the one equal undivided fourth part of the premises in question, by virtue of the respective wills of Martha Bradstreet (one of the two daughters and devisees of General John Bradstreet) and Elizabeth Livius.

2. That the deed from Edward Goold to Martha Codd, (now Martha Bradstreet), the lessor of the plaintiff, by virtue of the decree of the court of chancery of the state of New York, conveyed to her the legal title to the one equal undivided fourth part of the premises in question.

*415] *3. That even if the deed from Edward Goold to the lessor of the plaintiff did not convey the legal title, yet, that on the death of General Philip Schuyler, on the 18th of November 1804, without having executed the will of General John Bradstreet, the legal estate in the whole premises in question vested in the heirs of General John Bradstreet, or in their legal representatives.

4. That the respective wills of Martha Bradstreet (one of the two daughters and devisees of General John Bradstreet) and of Elizabeth Livius (one of the devisees of the said Martha Bradstreet) vested in the lessor of the plaintiff the legal as well as the equitable title to the one equal undivided fourth part of the premises in question.

5. That upon the whole record, the judgment rendered in the court below, in favor of the defendant in the court below, is erroneous, and ought to be reversed.

The case was argued by *Mayer* and *Webster*, for the plaintiff in error; and by *Storrs* and *Spencer*, for the defendant.

Webster and *Mayer*, for the plaintiff in error.—1. There is no evidence of an authority being given by Sir Charles Gould to Edward Goold, to convey the land in question; but even if there were such evidence, it could not avail; since Sir Charles Gould's power to sell could not be delegated. Shep. Touch. 448; *Combe's Case*, 9 Co. 656; Sugd. Pow. 174–5; 1 Com. Dig. 771; 4 Johns. Ch. 368; 2 Atk. 88; 2 Sch. & Lef. 330; 3 East 410. A sale under such a power must be strictly pursued, and the power is limited by the object for which it is declared to be created. 8 Wheat. 535; 6 Johns. 73.

2. He who acquires the legal title, with notice of the equity of another, becomes trustee for that other; and the same principle should apply in favor of an equitable tenant in common, where his co-tenant sells his own equitable interest, and the purchaser takes possession of all the land under that title; the title giving him notice of the other equitable interest. 10 Johns. 496; 2 Caines Cas. 327; 1 Cranch 100; 6 Johns. Ch. 403; Sugd. Vend. 487. *It is true, that after the conveyance to Potter, the deed of Schuyler made Goold trustee for the interest of the plaintiff here; [*416
but that conveyance could not, by relation, make valid the deed of Goold to Potter, so as to pass the plaintiff's estate, because the deed to Potter contained no warranty from Goold; and, moreover, because Goold professed not to pass any beneficial interest of his own by the conveyance, and never had any to pass. 3 Cow. 299.

3. It will not be denied, that where there is a devise of lands, the law casts the freehold on the devisee, without entry. Co. Litt. 111 *a;* and so must be the principle as to equitable estates, to which all the rules of property apply that regulate legal estates. The fee, whether legal or equitable, was, here, in the devisees of John Bradstreet and of Martha Bradstreet. 2 Johns. Ch. 21; 8 East 248; 16 Ibid. 288.

4. It is manifest, then, when the deed of 1790 from Edward Goold, of the one part, and Evans and wife, grantees, of the other part, was executed, the plaintiff in error had the equitable estate in this land, in common with Agatha Evans; and that this deed was void as to the plaintiff's share, and availed only to pass Mrs. Evans's. It was a conveyance operating, by its tenor, to pass the several interests of two equitable tenants in common; and to be interpreted distributively as to those two estates; and as if a separate deed had been given for each share. The deed being good only as to Mrs. Evans's interest, Potter became an equitable co-tenant of the land with the plaintiff; and the equitable interest so vested in Potter, like that of the plaintiff in error, was protected by the legal estate of Philip Schuyler, the common trustee for both the parties.

5. There is no ground for imputing adverse possession, or saying, that the right of the plaintiff was, in intendment of law, so contested, as to make Edward Goold's deed to the plaintiff void, either under the common-law principle against conveying mere rights of entry, or under the statute of maintenance. The conveyance was nothing more, in effect, than the release of the trustee to the *cestui que trust:* Edward Goold being the trustee substituted for Schuyler. It was even less obnoxious than the release of a disseisee to a disseisor, which the law allows. Co. Litt. 369 *a.* The statute provided for the lawful possessor getting the release of the pretender; but the *common law allows also the converse act. The common law and [*417
the statute mean only to prevent conveyances, under sales of pre-

tended titles, where there is a transmutation of estate and possession. A court of equity would have compelled the conveyance which has here been made from Goold to the plaintiff. Can that be unlawful, when done voluntarily, which the law would enforce? The statute of uses executes, too, the possession and legal estate to the use; and nothing more has in effect been done by this conveyance. But there could have been no adverse possession against which the conveyance militated; because, Potter being only an equitable owner, the possession of the trustee, who was common to Potter and the plaintiff, was the possession of Potter; and Potter had no other possession. And the possession of the *cestui que trust* is the possession of the trustee, and is never deemed adverse to the trustee, or those *cestuis que trust* who are shielded by the trustee's legal estate. 16 East 288; 8 Ibid. 248; 2 Ves. sen. 481; 2 Vent. 329; 10 Mod. 149; 3 Atk. 728; 5 Wheat. 116, 124; 13 Johns. 552; 2 Meriv. 359; Adams Eject. 47; Angell on Lim. 74; 2 Caines 169; 7 Wheat. 159. But Huntington can, in no view, claim the benefit of the adverse possession created by the deed to Potter, because he does not connect this possession by any conveyance with Potter's right. 3 W. C. C. 479; 7 Mass. 384. The production of a conveyance by Huntington was not insisted on in the court below; it being the duty of the defendant there to sustain his own objection of adverse possession by competent proof.

6. Wherever a possession can be referred to a right, it will be referred and confined to it. Such is emphatically the case with regard to tenancy in common, where actual ouster must be proved, either by testimony directly to the fact of a literal expulsion, or by acts accompanied by long and quiet possession, raising the presumption unequivocally and irresistibly, that an actual ouster has taken place. 7 Wheat. 105, 109, 120; 1 Paine 469; 4 Mason 330; 16 East 288; 8 Ibid. 248; 3 Atk. 728; 20 Johns. 306; 12 Ibid. 368; Co. Litt. 199 *b*; 7 Cranch 471; 7 T. R. 386; 5 Burr. 2604.

*418] *In the case of tenants in common, perception of rents and profits is, *per se*, no evidence of ouster. Co. Litt. 199 *b*; 5 Mass. 351–2. Nor is it so, even where the tenant in possession levies a fine to himself. 1 East 578; 1 Salk. 286. Nor is a conveyance by one tenant in common of the whole interest in the land, an ouster; 12 Mass. 348; 14 Ibid. 434; 17 Ibid. 74; it being a fixed principle, that there can be no disseisin of an undivided moiety; that the possession of one co-tenant is the possession of the other; and that there can be no adverse possession, where it is possible for the law to impute a concurrent possession. 2 Mass. 506; 10 Ibid. 464; 2 W. Bl. 690; Cowp. 217; 1 Salk. 391; 2 Ibid. 423; 1 Atk. 493; 1 Esp. 456. The defendant has not the election to consider himself a disseisor; that is the peculiar privilege of the plaintiff, for the convenience of his remedy. The relation of tenants in common is considered fiduciary; and the law will not allow one, by a mere accident, as that of getting actual possession, to defeat the right of the passive co-tenant. 5 Johns. Ch. 388; 1 McCord Ch. 322, 360.

7. In this case, there can be no presumption of a claim of possession by Potter, under a title distinct from the plaintiff's, or paramount to it; because the recitals of the deed exhibited by the defendant, acknowledge the plaintiff's title. Where evidence is expressly offered by a party to one effect, presumptions are not allowed to any other point of fact than that which the party himself has by his evidence prescribed. 2 Har. & Johns. 336; 5 Ibid.

264; 11 East 372; 2 Str. 1267. No adverse possession can grow on an exhibited title, that is void on the face of it; as is the case here, so far as concerns the part of the plaintiff purported by the deed to Potter to be conveyed. 7 Wheat. 105; 1 Paine 457; 12 Johns. 368. It is not pretended that the title which may sustain an adverse possession must be a rightful title; that would be absurd. But the title must be at least *primâ facie* good; and not show the elements of its own invalidity. 5 Cow. 346, 484; 9 Wheat. 545; 7 Mass. 384; 2 Ves. sen. 481; 1 Paine 480; 1 East 577; 1 Salk. 286. A claim, to support adverse possession, must, either actually *or constructively, be under a distinct and paramount title. It cannot [*419
be inferred, where the defendant derives, by immediate conveyance, his title out of the present subsisting right of the plaintiff herself; and in effect exhibits, as here, an inoperative deed, to avail as from that very plaintiff. There is no room, therefore, here for constructive evidence of distinct and paramount claim; though it is not said, that the only evidence of such claim, in order to raise adverse possession, is a deduction of title or any conveyance whatsoever. 3 W. C. C. 479; 7 Wheat. 120; 18 Johns. 302; 16 Ibid. 301; 13 Ibid. 537. The allegation of exclusive claim is, by the defendant herself, referred to the title in testimony, and it must be weighed by the worth of that title. The deed to Potter, referring to all the sources of the plaintiff's title, as the sanctions of that which the deed professes to convey to Potter, is to be regarded, as if all those evidences of title were inserted in the deed, and the references give complete notice to Potter of the plaintiff's right, and made the deed operate as if her equity had been expressly reserved. As to notice of title and equities outstanding: 4 Johns. Ch. 38; 1 Paine 525; 8 Wheat. 445, 447.

8. Potter's acceptance of the deed involves him with the plaintiff's title, and refers his tenure to it; not on the principle of strict estoppel, but of evidence which will permanently rebut the circumstantial presumption of adverse holding. 10 Johns. 435; 10 East 583; 2 Stark. Evid. 1192. On the same ground of evidence, no one can claim contrary to a deed he has given. *Jackson* v. *Stevens*, 16 Johns. 110. The deed and the recital bind the grantee against averring adverse possession. Com. Dig., Evid. B; 1 Salk. 286. Any express evidence to show that the party does not claim independently of the rightful title of the plaintiff, repels the presumption of adverse holding; and the slightest evidence of a recognition of that title will take off that presumption; such as, at the time of entry, inquiring for the true owner, and seeking to procure a conveyance from him. *Jackson* v. *Sharp*, 9 Johns. 167; *Wickham* v. *Conklin*, 8 Ibid. 227; *Jackson* v. *Waters*, 12 Ibid. 368; *Smith* v. *Burtis*, 9 Ibid. 180.

*9. We have said, that the possession of Potter is to be referred [*420
to his right, as shown by his deed, by his own testimony; which, giving him the undivided moiety of Mrs. Evans, authorized his possession. Where an indenture, as was the deed here, conveys in fact, and rightfully, some estate, its operation shall be confined to that; although it purports to convey a larger estate, Co. Litt. 476; and therefore, Potter is even estopped from averring that the deed to him gave him more than Mrs. Evans's interest, which it could rightfully convey.

10. It should be borne in mind, that the law, in upholding adverse possession, means not to violate any of its principles; and particularly, not

that which forbids one from taking advantage of his own wrong; nor any of those principles which oppose fraud, and an assertion of right on a foundation of mere force. Wherever adverse possession is imputed and made to avail, it is on the presumption of title in the holder, evidenced by a long possession, accompanied by no force or fraud. The so-called repose of titles is consulted and advanced, on no other principles. All the authorities, and the reasoning particularly in 1 Paine 457, sustain this position. A possession begun by force or fraud, it may safely be said, cannot found adverse possession; at least, not until notice of such possession in this adverse character be brought home to the rightful owner. The principles of law just referred to, upon the effect of the acceptance of the deed, and as to evidence of recognition of the true title, proceed on the moral policy of adverse possession, as just stated; and these views apply to adverse possession in reference to the statute of limitations, and still more forcibly in reference to the statute or common-law principle of maintenance, or buying mere rights of entry. Hence, the entry upon land, by one having no title is, as a general principle, supposed to be in preservation of the rightful title, and in subordination to the true owner. 7 Wheat 105; 6 Johns. 218, 301; 2 Sch. & Lef. 97; 8 Johns. 227; 9 Ibid. 167; 12 Ibid. 368. And the contrary must be shown by proof, affirmatively and clearly. *Brandt* v. *Ogden*, 1 Johns. 158; 6 Ibid. 218; *Jackson* v. *Parker*, 3 Johns. Cas. 124; 4 Mass. 418. Although that proof may be of a presumptive kind, *from
*421] circumstances raising inferences not contradicted by the evidence in the case, and especially the defendant's own evidence.

11. As the law will not presume fraud, it will not, in order to sustain a defence, indulge a presumption which implies a fraud. To suppose, that Potter, who, by lawful right, was only a tenant in common, entered adversely and so held, to exclude his co-tenant, would impute a fraud to him. Fraud is no exception to the operation of the statute of limitations, after it has once been discovered by the person against whom it is to act; but the hostile purpose under the fraud must be known, before the statute can begin to apply. The same principle of notice should obtain in case of all adverse possession, where a fraud would be implied, in meditating an exclusive possession. When is this purpose of the defendant to be considered as first notified to this plaintiff? If the principles of law, as to the presumption attending entries with some or no title, be as we have represented them, the exclusive possessory claim of the defendant, in the state of the evidence in the cause, can be considered as made known only by his taking his objection of adverse possession at the trial below, and as then first notified. Angell on Lim. 127, 135; 6 Wheat. 481; 2 Sch. & Lef. 223, 307, 607; 1 Cox 28; 8 Wheat. 445; 2 Mass. 506; 14 Ibid. 296, 300; 1 Johns. 457; 1 Burr. 118; 2 Johns. Ch. 155, 158, 181; 3 Atk. 654; 1 Johns. Ch. 595.

12. The law is also settled, that there can be no adverse possession, especially, by one tenant in common against another, without notice of the claim of that possession. It is not enough, that the one tenant in common does acts, as well as conceives plans, inconsistent with the acknowledgment of a concurrent possessory right in the other tenant; but if those acts conclusively indicate the claim of sole possession, they must, to serve as proof of adverse possession, be brought actually or constructively to the knowledge of the other tenant. Where was the notice here to the plaintiff, that the

defendant pretended to a higher possessory right than the deed legally imparted; which was only to the extent of Mrs. Evans's interest? No such notice is implied, by any of the evidence; and by the record, we, therefore, date this notice of exclusive *claim, from the objection of adverse [*422
possession taken at the trial. The whole application of the rule of adverse possession, whether under limitation, or the objection of maintenance, is founded on the fact of actual or presumed acquiescence; and consequently, the possession must be notorious and avowedly adverse. Angell on Lim. 99; 6 Mass. 229; 7 Ibid. 383; 4 Ibid. 416, 418; 9 Johns. 163; 13 Ibid. 411; 3 Johns. Cas. 124. The adverse holder must, for aught that may be shown in evidence, appear, or be presumed, to have reposed on the title he may possibly have; and not only must the adverse character of the possession be proved, clearly and without doubt, and found by the jury; but the possession must be marked by definite boundaries, and is confined within the strict limits of truth. 1 Johns. 156; 2 Ibid. 230; 10 Ibid. 475; 12 Ibid. 368; 14 Ibid. 405; 3 W. C. C. 475; 10 Mass. 93; 4 Wheat. 213; Angell on Lim. 75. All these authorities show, that the mere fact of a sole possession is not, in itself, a proof of adverse possession, especially, when the defendant does not rely merely on the fact of possession, but rests it on a title which cannot justify a possession adverse to us, since it recognises our right, and professes to be a conveyance of that identical right, but is not effectually so; though purporting to be immediately from her, through persons assuming the power to act for her. This is the case meant by the books, when it is said, that there can be no adverse possession, where the plaintiff and defendant "claim under the same title;" that is, the same particular and immediate right. It is not pretended, that there cannot be adverse possession, where a defendant exhibits a deed from one, who, so far as he has a right, derives his title from the same source remotely, whence the plaintiff's is derived. But the present case is like that of *Sinsabaugh* v. *Sears*, in 10 Johns. 435, where a deed was executed by two tenants in common, but inoperatively as to one of them; and adverse possession, it was decided, did not exist against the grantor whose right was attempted, thus ineffectually, to be conveyed. The same principle was ruled in *Jackson* v. *Hinman*, 12 Johns. 293; that when the defendant sustains his possession under the particular right in question of the plaintiff himself, and by *conveyance which failed to operate as to that right; the [*423
possession cannot be called adverse, under the statute of limitations, or in reference to any other bar or disability. Till. Adams, Eject. 47–8; Bull. N. P. 104; 1 McCord Ch. 352, 360; 4 Johns. 230; 12 East 153; 1 Caines 393, 402; 9 Johns. 167. Where the younger son enters and dies, the right of entry of the elder is not taken away, but the elder may enter; because it shall be understood, the younger entered as heir to his father; that is, acknowledging the same title. Co. Litt. 242.

The cases of *Jackson* v. *Smith*, 13 Johns. 411, and 4 Mason 326, do not militate against these positions; for there, the defendant claimed under a deed, asserting under a sole and exclusive title in himself, although, in fact, he was but a tenant in common with others; and in the latter of these cases, too, the defendant's grantor had, under process of law, acquired *primâ facie* the interest of his co-tenant. There was nothing in those cases, as in this, like a recognition, at the time of the deed, of a subsisting right in the

plaintiff, and of the very right brought into question by the ejectment; and the effectual conveyance of which was necessary to make the deed itself operative according to its tenor.

The possession, to be adverse, must be shown to have been hostile in its inception, or that, having been begun in consistency with the rightful title, its character has changed; but there must be adequate cause shown for the change, or for imputing it. Where it commences under acknowledgment of the right owner's estate, the possession will retain its original quality, through any succession of occupants of the land; and will be presumed to be in subservience to the rightful interest. Angell on Lim. 105; 1 Caines 394. The strictest proof of hostile inception of the possession is required. 1 Johns. 158; 16 Ibid. 301; 3 Johns. Ch. 124; 8 Johns. 220. As to the supervening change of the possession, and that it must be proved by an accession of another title, and other circumstances furnishing a motive for exclusive claim: 1 Paine 467; 7 Wheat. 105; 12 Johns. 368.

The circumstance, that the husband of Mrs. Evans gives a general warranty in the deed to Potter, by no means argues a *denial of the plaintiff's right, but rather affirms it; as it supposes a possibility of a superior right to, at least, a part of the estate in the land. It is, at furthest, in effect, no more than a covenant for quiet possession; while it imports a guarantee that the deed will legally operate to convey the plaintiff's interest, and thus again recognises a title in her, at the date of the deed. But a warranty cannot enlarge an estate; and it is commensurate always only with the estate really created. Co. Litt. 385 *a*. So that, even with the warranty, the deed to Potter effectually conveys only the equitable estate of Mr. Evans; and the warranty is no creation of a wrongful fee, to the prejudice, or rather in denial, of the plaintiff's right which the conveyance itself affirms.

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The common law never characterizes a possession as adverse against an infant or married woman, when it commences after the accrual of the right of the infant or *feme covert*. They are both favored in cases of descent cast, and discontinuance, and wherever their entry would otherwise be affected. Co. Litt. 245 *b*, 246 *a*, 248 *a*, 327 *a*, 327 *b*, 337 *a*, 364 *b*, 388 *a*; and this cumulated exception of infancy and coverture is allowed, wherever the coverture occurs during the infancy. Co. Litt. 246 *b*. The evidence shows all these disabilities in the plaintiff's case; and consequently, there never was a commencement of adverse possession against her; at all events, not until her coverture ended in 1817. Certainly, there was none, according to these principles, when the deed was executed by Goold to the plaintiff.

The positions stated bear on adverse possession, considered with reference to the statute of limitations. They apply more cogently as to that possession, in reference to the statute of maintenance, and to the rule of the common law forbidding the conveyance of rights of entry. And it may well be contended, that in the latter instances, there should be an actual disseisin, or an actual conflict of distinct rights and deduced titles, to raise an adverse possession that shall disable the true owner from conveying his interest; and that mere possession, or possession even under a conveyance, shall not, *per se*, with any circumstances attending it, have the effect of annulling the rightful owner's conveyance. If the bar of the statute of limitations be considered as set up at the trial below, or comprehended in

the opinion of *the court, it is contended, that if adverse possession has ever begun against the plaintiff, it cannot have begun to affect her, until the year 1817 ; as she was within the three combined exceptions of alienage, infancy and coverture, until that period. And such, as to the bar of limitations, must be the conclusion we maintain ; even if the positions asserted by us on the general doctrine of adverse possession be not admitted. Not only was the plaintiff under the disabilities referred to, but it appears that Mrs. Livius, the devisor of the plaintiff, was herself under coverture to the time of her death. Under the statute of limitations, the possession runs only against the particular title in question. 7 Wheat. 59, 118 ; 4 Johns. 390.

Spencer and *Storrs*, for the defendant.—The entry of Stephen Potter, under the deed from Evans and wife and Goold, to Potter, in 1790, was adverse to the legal estate then in Philip Schuyler. Schuyler was then under no disability ; the statute of limitations commenced running, at that time, against him, as the legal owner. The right of entry "first accrued" in him (1 Rev. Laws, N. Y. 1813, p. 185), and having run for twenty years, the entry of Schuyler, and all claiming under him, is barred. When the statute once begins to run, no subsequent disability arrests it. 1 Johns. 165 ; 15 Ibid. 169 ; 13 Ibid. 513.

The equitable interest of a *cestui qui trust* cannot be noticed in this action. He has neither *jus in re*, nor *ad rem*, at law. It is of so little regard, that his entry on the land would make him a trespasser on his trustee. If the legal estate is barred, the equitable interest follows the same fate. Co. Litt. 302 *b* ; Plowd. 59 *a*.

By the deed of Evans and Goold, in 1790, a wrongful estate in fee was created, and Potter's entry under it was a disseisin of the legal owner. 2 Preston on Estates 283, 292, 295, 299. Neither Goold nor Evans had any legal estate in the land, and their deed passed nothing. The grantee is not deemed to enter according to any right, as the deed conveyed no right. It was the creation of an entire new fee, by wrong. It purported to convey the whole fee in the land, and not an undivided interest. The covenants are for the whole fee. It was created *and passed to Potter, in defiance of the legal estate then in Schuyler. The covenant for quiet [*426 enjoyment is against all persons ; and besides this, it contains an express covenant against all titles derived from John Bradstreet. The possession has been held in conformity to the deed, as an entire fee ; and Potter has always claimed to hold as the exclusive owner. 13 Johns. 118 ; 9 Ibid. 174; 18 Ibid. 40, 355. The deed of Schuyler, in 1794, to Edward Goold, under which the lessor of the plaintiff claims, was void as to lot No. 97, by reason of the adverse possession then held by Potter. Schuyler had nothing but a naked right of entry, which he could not convey, and the deed passed nothing to Goold. It was within the statutes against champerty and maintenance, and a nullity at common law. If it passed anything to Goold, as attorney for Sir Charles Gould, it operated as a confirmation of the estate he had before passed as attorney to Potter. 13 Johns. 406, 488.

Potter and his grantees are not estopped by the recitals of the descriptions in his deed, annexed to the names of the grantors—of Agatha Evans, as "one of the daughters and devisees of John Bradstreet," and Sir Charles

Gould, as "executor of the will of Martha Bradstreet, the other daughter and devisee of John Bradstreet." These recitals will not narrow the effect of the deed. It expressly conveys the whole land, and cannot be reduced by the descriptions annexed to the names of the grantors. Such a recital is not of the nature of an estoppel at law, nor, by way of analogy, an estoppel in evidence, to show that Potter meant to take an undivided interest only. If it was even analogous to an estoppel, the inference is repelled in the same deed ; for it conveys the estate entire, and expressly covenants against all persons whatsoever, in the ordinary form of general warranty. It is this very wrong, of which the lessor of the plaintiff complains, that creates the disseisin of her trustee, from whom she derives her claim. The covenant is to defend the whole fee, and the whole interest in the land, against the legal owner, and against all titles under John Bradstreet. The covenant relates to the prior granting clauses of the deed, and to the *habendum*, which convers it as an entirety ; and the possession has been exclusive and co-extensive with the grant. 8 Cow. 168. *The utmost effect
*427] of the introductory clause of the deed to Potter, would be to charge him with notice of the wills of John and Martha Bradstreet. But the wills contained nothing to show that these lands were held by Schuyler, in trust for John Bradstreet, and there is nothing in evidence, to show that Potter had any knowledge of that latent trest. In taking his deed, he is to be deemed to have taken it in hostility to Schuyler, as legal owner, in his own right, and for his own use.

But if the recitals are to impute notice to him of the interest of the other *cestuis qui trust*, it would only raise, in equity, a constructive trust in Potter, and the remedy of the lessor of the plaintiff has been barred, even in equity, by lapse of time. Potter would become a trustee by implication only. Direct trusts only are saved from the operation of the statute of limitations ; the rule does not apply to constructive trusts, or to trusts by implication ; these stand in equity like any other equitable claim. If a party is to be constituted a trustee, by a decree founded on the equity of the case, or even on fraud, his possession is adverse ; and the remedy is barred in the same time, in equity, as at law. The statute, in such cases, reaches both courts, and is adopted equally in both. Matthews on Presumption, ch. 24 ; 7 Johns. Ch. 90 ; 20 Johns. 576 ; 5 Johns. Ch. 522 ; 2 Sch. & Lef. 633 ; 6 Wheat. 481 ; 1 Ball & Beatty 119 ; 17 Ves. jr. 88 ; 8 Cow. 588 ; 3 Johns. Ch. 216 ; 10 Wheat. 152.

The lessor of the plaintiff was, in 1790, under the disability of infancy only. She could not, even in equity, tack to it the subsequent disabilities of coverture ; they are not cumulative. 3 Johns. Ch. 129 ; 5 Cow. 74 ; 7 Serg. & Rawle 109 ; 3 Conn. 227. She would have been barred in equity, therefore, in 1811, ten years after she became of age in 1801. So, if she was, even at law, a tenant in common with Agatha Evans, in 1790, she is barred in ejectment, by the statute of limitations. But, in fact, she was not tenant in common, as she had no legal estate in the land, in 1790. She can only claim any legal interest, through the deed of 1794 from Schuyler to Goold. She claims, therefore, through the legal owner, whose entry is barred. His conveyance to an infant or *feme covert* would not arrest the running of the statute—much less as to Goold. Nor was Agatha Evans *a tenant in
*428] common with Schuyler, in any sense. Potter entered, claiming the

entire title and the exclusive ownership. Such was the proof, and such it is affirmed to be by the the verdict. One tenant in common may oust his co-tenant, and hold in severalty. 5 Wheat. 124. So, he may enter originally in his own right as sole owner, and hold accordingly, adverse to his co-tenant. 9 Johns. 180. If Potter was to be deemed, in fact or in law, a tenant in common, his entry in 1790, claiming the whole fee, and his exclusive adverse possession for forty years, would be evidence of an original ouster; not an ouster at the end of twenty years, but an ouster on his first entry. Cowp. 217; 2 Har. & McHen. 160; 6 Cow. 632; 9 Johns. 180. But Potter neither entered as tenant in common, nor claiming any undivided interest. He entered under a deed for the whole interest in the land—the entire fee—and has held in conformity to it. His possession would not be less adverse, if his deed had been from a tenant in common, if it conveyed the whole fee. His entry takes its character from the conveyance, and it is immaterial, whether his deed, being for the whole interest in the land, was from a tenant in common, or any one else, having title or no title. It is the character of the possession, and not the validity of the title, which bars the entry of the owner. It is enough, that it is a colorable and not a naked possession, which inures to the benefit of the true owner. The question is, as to the character of the possession; and twenty years' adverse possession gives the positive right of possession in the land, in the action of ejectment. 2 Bl. Com. ch. 13.

It is no answer to the adverse possession, that the defendant holds under the same title, at some anterior stage of it. But in this case, Potter does not, in fact, hold under the same legal title with the lessor of the plaintiff, in any respect. He took no legal interest, on his entry, from any one whom the lessor of the plaintiff admits to have then had any legal title. Goold never had any, and her *co-cestui que trust* conveyed in law only her own claim, which was not of a legal interest. But an entry under a deed, from one co-heir of the whole fee, is a good foundation for an adverse possession. So, of an heir, where there is a devisee, and that too, where the party conveys as heir. 13 Johns. 406. So, of a conveyance as attorney or trustee; 5 Cow. 74; of a committee of a *lunatic; 3 Ibid. 229; or guardian of an infant; 5 Day 181. Yet, in all these cases, the deeds recognise, in some sense, [*429 the former right of the real owner. A purchaser does not take his possession in subservience to the title of his grantor; he holds for himself, and adversely to his grantor. 18 Johns. 355; 7 Wheat. 535; 4 Serg. & Rawle 215. There is no privity of possession between them. He holds by a claim of right paramount to his grantor, and not subordinate to him. 10 Wheat. 152; 4 Pet. 480; 7 Wheat. 535; 8 Cow. 544, 590. A contract of sale, without any deed, is a good commencement of an adverse possession. 10 Johns. 355; 6 Cow. 632. The fact of possession, and the *quo animo*, are the true tests in such a case. Hob. 120; 3 Serg. & Rawle 151, 181. So, an entry under a void deed or grant, is enough to sustain it. *Ridgway's Case*, 2 Co. 55. The entry of a younger son, as heir, works a disseisin, and is adverse. Litt. § 396; Roll. Abr. 659; 8 Johns. 479; Ibid. 91; 9 Ibid. 55; 1 Cow. 205; 3 Pet. 43. These cases fully repel the position, that the holding of both parties under the same original title, affects the adverse character of the possession.

The charge of the court below was in conformity to these principles, and

is well sustained in law; and the verdict of the jury is conclusive, as to the facts necessary to constitute the adverse possession. 9 Johns. 102.

The lessor of the plaintiff is entitled to no favor against such a length of possession; nor on the facts of the case. Sir Charles Gould clearly had power to sell her trust interest, and to expend the proceeds for her education and support. It is to be presumed, that he performed his duty faithfully. He had power to appoint an attorney here, to receive the money, if Schuyler should sell under John Bradstreet's will. The only technical informality in the defendant's title is, that Sir Charles Gould could not sell by attorney. There is no pretence, that the money was not paid over to him in 1790. The solution of the whole case is, doubtless, that Schuyler conveyed to Edward Goold, who had made the sales, as attorney for Sir Charles Gould, in confirmation of Edward Goold's sales, and to enable him to close
*430] the sales. *All has been done in good faith; and the lessor of the plaintiff now claims the land against a *bonâ fide* and innocent purchaser, whose money she keeps. A court of equity would the rather quiet the possession, by decreeing a conveyance to the defendant.

JOHNSON, Justice, delivered the opinion of the court.—The principles of law involved in this cause are few and simple, and well established; and all the difficulties consist in so arranging the facts as to apply the principles correctly; or rather to determine whether they have been correctly applied in the court below. The plaintiff here was plaintiff there, and the action being ejectment, a remedy rigidly legal, it behoved her to make out a title of the same character. The title made out by the plaintiff consisted:

1. Of a series of documentary and other evidence, received without exception at the trial, which vested in Philip Schuyler an estate, which, to all legal intendment, was an absolute fee-simple in him and his heirs; without trust or reservation, or any evidence, intrinsic or extrinsic, of his holding it, or any part of it, in a fiduciary capacity.

2. John Bradstreet's will, dated 23d of September 1774; in which he first devises all his estate to his two daughters, in common, in fee; and then says, "notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts, and execute all instruments, which they may conceive to be requisite to the partition of my landed estate; and I devise the same to them as joint-tenants, to be by them sold, at such time, and in such manner, as they shall think most for the benefit of my daughters," &c.

3. The will of Martha, one of the daughters of John Bradstreet, under which Martha, the present plaintiff, acquires an interest of one-sixth in John Bradstreet's estate, real and personal. Of this will, Sir Charles Gould is appointed sole executor, with power to sell the lands in America, and apply the proceeds to the use of the plaintiff.

4. A deed from Philip Schuyler, dated May 16th, 1794, by which, reciting that he is executor of John Bradstreet, he conveys the plaintiff's interest
*431] in the subject in controversy, to *Agatha Evans, widow, the other daughter of John Bradstreet, and Edward Goold, naming him attorney of Sir Charles Gould, in trust to sell and dispose of it, and apply it according to the interest created by the wills of John and Martha Bradstreet. This deed recites that Philip Schuyler was, at the time of making

John Bradstreet's will, and from thence to the decease of John Bradstreet, seised in fee, as tenant in common, of and in two equal undivided fourth parts of and in all that parcel or certain tract of land, &c. " (being the same of which lot 97 is part and parcel), as to one equal undivided fourth part of which said tract of land the said Philip Schuyler was seised in trust for the said John Bradstreet." This whole fourth part he conveys to Agatha Evans and Edward Goold, to the use of Agatha, as to two-thirds, in fee, and as to the remaining third, to the use of Edward Goold, in trust to sell and apply the proceeds as before stated. The above recital is the only evidence in the cause to show that the conveyance was anything but a mere bounty from Schuyler to these parties. And notwithstanding that recital, it is perfectly clear, that the case makes out the legal estate to have been in him; that the conveyance is a common-law conveyance, and operates to convey a legal estate to Mrs. Evans and Goold: as to her two-thirds, clearly so; and as to the remaining third, equally so, since the fee vested in Goold, and the interest of this plaintiff under that deed is a mere equity.

5. That equity was not turned into a common-law right, until 1804, when Goold, who survived Agatha Evans, by a deed, in which he sets out all the facts on which this plaintiff's equity rested, and among them his character of attorney to Sir Charles Gould, and in compliance with a decree of the court of equity, invests her with the legal estate.

The defence set up is adverse possession in Potter; for the double purpose of avoiding Schuyler's deed, and to maintain a bar under the statute. And to maintain this defence, a deed is introduced, executed four years prior to that of Schuyler, by which Agatha Evans, in her own right, and Edward Goold and another, professing to be attorney to Sir Charles Gould, executor of Martha Bradstreet, the elder, convey the lot 97 to Stephen Potter, by words, calculated to vest a legal fee-simple, with a general warranty by Evans, and a special covenant against all claiming under John Bradstreet. But in the actual *state of the title at that time, in the eye of the common law, this deed conveyed nothing; there was no seisin, actual or [*432 constructive; no legal right to possession; nor any remedy except in equity for acquiring a legal estate to the parties who executed this deed. The bill of exceptions shows, that the evidence proved in substance, that under this deed, and immediately after its execution, Potter entered; and from that time, he, and those claiming under him, have held it as sole and exclusive owners against all the world.

It is not questioned, that the plaintiff is, within the saving of the statute, under a continuing disability, unless the statute began to run as against Schuyler, and with equal reason, as against Evans and Goold, Schuyler's grantees, in which case, it continued to run, so as to bar her.

On this state of facts, the parties below moved for instructions, and the court gave a charge, and the verdict was rendered for the defendant. The questions which the court has to consider are: 1. Whether the plaintiff was entitled to the instruction she prayed? 2. Whether there was any error in the instruction as given? The prayer was a general one, that on the case made out, after the whole evidence and argument were gone through, she was entitled to a verdict. This, of course, implies, that she had made out a good title; and that the defendant had made out no better title or bar. The words of the prayer are, that the matters and things so given in evi-

dence were conclusive to entitle her to a verdict. From which it follows, that if there were a flaw in her title, or that the facts made out a better title in the defendant, or a bar to the action, under the statute, the plaintiff was not entitled to this instruction. The charge admits the validity of the plaintiff's deduction of title, unless interrupted by the invalidity of Schuyler's deed, resulting from an adverse possession in Potter; in which case, Edward Goold took nothing, and could transmit nothing to her, by his conveyance in 1804. The defendant's case, the court puts upon the possession under the statute alone. Now, although the court may have overlooked something in the cause, yet if the consequence is, that the charge is more favorable to *the plaintiff than it should have been, that is no ground of complaint on her part. And, individually, I think, there were some very important views of the case overlooked; views on which I doubt if Lord Coke would have hesitated a moment, to decide the better title to be in Potter, independent of the bar.

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1. Then, I care not, for the purposes of my argument, whether the deed of 1790 to Potter, be regarded as the sole deed of Agatha Evans and her husband, or their joint deed, with Edward Goold and Ludlow, attorneys to Sir Charles Gould, or of Sir Charles Gould, executed by his attorneys; either view leads to the same result. But the correct legal view leads more immediately to it; which is, that whether from the absence of proof of the power of attorney, or from any incapacity to delegate his authority, Sir Charles Gould's name must be stricken from the deed. It is the deed of Agatha Evans and husband, conveying, in language the most full and unequivocal, the whole land, and the whole fee in the land. There is not a word in it, that can give it the character of a conveyance in severalty, each conveying a distinct interest. And more emphatically so as to Evans, who warrants the whole, and covenants expressly against the plaintiff's title.

This, then, is, as to the plaintiff's interest, a conveyance by one having no title, to a third person, who enters under that conveyance. The fact of Potter's possession is distinctly affirmed; and whether by actual forcible ouster, or by a peaceable possession acquired by fraud; the law holds him to be a disseisor. The first alternative makes him so in terms; and the second is an old, but well-settled doctrine. Such is the case in Rolle's Abridgement, of a husband and wife, joint-tenants in fee; the husband commits treason, and the king seizes the land; the king cannot be a disseisor, but the lord of whom it was held, upon a false suggestion that it is his proper escheat, is put in possession by the king; the lord is adjudged a disseisor as to the joint-tenancy of the wife; and the reason assigned is, "that he got possession of the freehold by misrepresentation, by injustice, and falsehood; that therefore, the possession acquired by it must be looked upon as a possession acquired by violence open and avowed." 1 Roll. Abr. 658. So, where a guardian in chivalry, having, of course, the possession in him, assigns dower to one, as wife of the deceased *tenant, who is not wife, and she enters; she is a disseisress: and the reason assigned is, that "her possession being acquired by an act of fraud and injustice, the possession acquired by it is tortious." Bro. tit. Disseisin, 7; 1 Roll. Abr. 662. So also, of a possession delivered or permitted under void titles; as, in the case of two infants, joint-tenants, and one, being under age, releases to the other, by which the other holds the whole; he is a disseisor,

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and the reason assigned is, "that the title is utterly void." He was not held to be in of the original estate, although a joint-tenant, but to have committed a disseisin, against the clear state of positive fact, being considered as entering according to the release; not according to the state of actual title after the release was executed, which being void, left the title unaltered. Bro. tit. Disseisin, 19. And the same law was ruled in another case of much the same nature, against the notoriety of an actual feoffment; where the invalidity of the title was combined with a breach of duty, as between guardian and ward. It is also laid down, that if A. executes to B., a lease for the lands of C., and B. enters, this is a disseisin by A., and the reason assigned is, that the demise to B. is equivalent to a command to enter the land of C. Bro. tit. Disseisin, 7; 1 Roll. Abr. 662.

At the date of the deed to Potter, the legal title was in Schuyler, and he only could be legally disseised. It is not necessary to recur to authority, to prove that a release to the disseisor, by the disseisee in fee, is as good a conveyance as can be executed; or that an absolute conveyance in fee, especially, with words of release, to a disseisor, is a release to the disseisor, or to his feoffee. This last principle is expressly ruled in the case of *Jackson* v. *Smith*, decided in New York courts. 13 Johns. 406.

Here, then, we have a conveyance from Schuyler, the disseisee. to Agatha Evans, the disseisress, operating in favor of Potter, her grantee; which makes out a common-law conveyance. It is seldom that a case, in our times, savors so much of the black letter; but the course of decisions in New York renders it unavoidable, and the whole course of this argument has been calculated to involve us in it.

If the conveyance of 1790 to Potter could admit of being *consid- [*435
ered as only purporting to convey severally the interest of the parties grantors; still, we are led to the same result. It must, in that view, be considered as the several conveyance of Sir Charles Gould, by Edward Goold and Ludlow, his attorneys. But then it is in the same character, reciting himself such in his indenture, which he is estopped from contradicting, that he receives the conveyance from Schuyler. From this two consequences follow: 1st. That he receives the release from Schuyler in the same right and character in which he conveyed to Potter; and therefore, in point of right, as well as form, is the grantee of plaintiff's interest to Potter, and as such, the release of Schuyler to him is a release to Potter. 2d. That as it is through him that Mrs. Bradstreet makes title, and his deed contains the same recital, exhibiting him in the character of attorney to Sir Charles Gould, she also is estopped from denying him in that character. In this view also, then, Potter would hold a good estate at common law.

It may be objected, that if Schuyler was disseised, so as to invalidate his deed, as to the title of the plaintiff, then he was disseised so as to invalidate the deed to the disseisor. But this is not the law; for the principle does not operate as between the disseisor and the disseisee, but only as between the disseisee and a stranger. So is the common law; and so is the New York decision before alluded to, in express terms. *Jackson* v. *Smith*, 13 Johns. 406. Besides, if void against her, it is immaterial, whether void, or not, against the defendant; her title, then, breaks off midway. Thus far for my individual views.

It is objected to the charge, as it regards the plaintiff's title, that it was incorrect, in stating "that the effect of an adverse possession in Potter, at

the time of the execution of Schuyler's deed to Evans and Goold, would be to render the deed inoperative and void, and prevent any title from passing under it to Evans and Goold." If the judge could be considered as having passed upon the sufficiency of the evidence to establish the adverse possession, there might be just grounds of complaint found to this charge; but that question he expressly leaves to the jury; and then, it is obvious, that if such be the law of New York, it is idle to go further, and inquire whether
*436] disseisin and adverse possession *be convertible terms at common law; or whether either, at this day, should invalidate a transfer of property. That an actual or constructive possession is necessary, at common law, to a transmission of right, is incontrovertible. It is seen in the English doctrine of the necessity of an heir's entering, in order to transmit to his heirs; but whatever be the English doctrine and that of other states, as to the right of election to stand disseised or not; it is certain, that the New York courts have denied that right, both as to devises and common-law conveyances, without the aid of a statute repealing the common law. After the case of *Jackson* v. *Demont*, 9 Johns. 55, it is in vain to contest the point; and the principle is established by various other cases. It was then incontrovertible, in that state, that if the jury found an adverse possession (for such is the language of the New York cases; not actual ouster or disseisin), the conveyance was void: and such was the charge of the judge.

It seems to have been supposed, in the argument, that the judge founded his instructions on this point upon the statutes of maintenance. This, however, is not the fact; for it will be seen in the case of *Jackson* v. *Demont*, that the courts of that state go upon a principle having no relation whatever to the statute of maintenance. They apply to adverse possession the common-law doctrine on the effect of disseisin; according to which, the deed of one disseised of his freehold, is held to be utterly void. His freehold was then held to be out of him, to be converted into a right of entry or right of action, and as such, no more the subject of legal transfer at common law, than an ordinary *chose in action*. It being so settled in New York, it is in vain to inquire further; but, *en passant*, it may be observed, that there are few principles of more ancient or more dignified origin. It is the law of kings, that the fact of possession proves the right of possession; and the idea is thrown out by Blackstone, that it probably passed down from greater to less, until it extended to every man's close. There are, however, less questionable reasons for it, to be found in the practice and policy of the feudal and common law.

But the charge is said to be erroneous in those passages which relate to the bar of the statute. There is something unique in the form of this bill of
*437] exceptions, since, after setting out the facts, it gives us the *arguments of counsel, instead of prayers for specific instructions; and contains but one prayer on each side, each for a general instruction in the party's favor. So that we have to examine this instruction, as rendered, and reduce it, from generals, into particulars, by reference to the evidence; perhaps, aided by the specific propositions exhibited by the arguments.

The instruction, then, commences by admitting, hypothetically, that the deduction of title to the plaintiff was complete; and that the deed from Agatha Evans, and Ludlow and Goold, to Potter, was void, as to conveying away the interest of the plaintiffs; "yet," the judge affirms, "there is

nothing appearing on the face of this deed (*i. e.*, the deed to Potter), nor anything in the circumstances connected with its execution, so far as they had been shown, which in law would preclude the defendant from availing himself of possession under it, as a bar to the plaintiff's action, or prevent the possession of the said Stephen Potter, taken under and in virtue of the said deed, from being considered adverse to the title of the lessor of the plaintiff, and to the title of the said Philip Schuyler, the executor and trustee of the said John Bradstreet; provided the proof was sufficient in other respects to establish the fact of such adverse possession." And again, "that although it was generally true, that one tenant in common was not permitted to set up his possession, as adverse to his co-tenant, yet that one entering into possession of land, under a deed for the whole, and claiming the entire interest, would not be thus precluded; although it should subsequently appear, that such deed conveyed an undivided share." It then goes on to state, that the judge, "after explaining to the jury, what in law constitutes an adverse possession, and submitting to them, as a question of fact, whether such a possession had been proved, directed them," &c. And finally, the judge instructed the jury, that "the question, whether or not it was competent for the defendant to set up the defence of adverse possession, under the deed to Stephen Potter, was a question of law, and had been decided against the plaintiff; that what in law constitutes an adverse possession was also a question of law; and that it was for the jury to say, under the instructions that had already been given to them upon that point, whether such possession had been proved; that if they believed from the evidence, that *such a possession had been established, they were bound to find a verdict in favor of the defendant." [*438

Some difficulties were presented in the argument, as to the effect to be given to the words "after explaining to the jury what in law constitutes an adverse possession:" But it must always be recollected, that this court can only reverse a judgment when it is shown that the court below has erred. It cannot, then, proceed upon conjecture, as to what the court below may have laid down for law; it must be shown, in order to be judged, what instructions were in fact given, and what were refused. The passage alluded to can only be held to affirm what it expresses, to wit, "that the judge instructed the jury as to what in law constitutes an adverse possession." And in doing so, certainly there was no error—adverse possession is a legal idea, admits of a legal definition, of legal distinctions; and is, therefore, correctly laid down to be a question of law. The whole argument in this case proves it.

The whole purport of this part of the charge then, reduced to its elements with reference to the points in argument, is this: 1. That adverse possession is a question of law, on which the court has a right to instruct the jury. 2. That the fact of adverse possession, in its legal sense, was a question for the jury. 3. That the defendant in this case was not precluded from setting up an adverse possession; whether we regard him in the character of one holding under a void deed, or of a trustee, or *cestui qui trust*, or of a tenant in common, or of one holding the same, or by the same title. Or, in more unequivocal terms, that an adverse possession, where it actually exists, may be set up against any title whatsoever; either to make out a title under

the act of limitations, or to show the nullity of a conveyance executed by one out of possession.

On the first two of these propositions there can be no doubt, and none has been expressed; and as to the third, it is equally clear, that desseisin or adverse possession, as a fact, is always a possible thing, and may occur wherever force may be applied. The common law, generally speaking, regards it as an act of force, and always as a tortious act; and yet out of regard to having a tenant to the *præcipe* and one promptly to do service
*439] to the lord, *attaches to it a variety of legal rights and incidents. Rights accruing under acts of limitations are recognised, in terms, as *primâ facie* originating in wrong, although really among the best protections of right; and if any one who can commit a disseisin may claim under an adverse possession, it is not easy to preclude any one. An infant, a *feme covert*, a joint tenant in common, a guardian, and even one getting possession by fraud, may be a disseisor. 1 Roll. Abr. 658, 662; Bro. tit. Disseisor 7; Salkeld, Joint Tenant and Tenant in Common. The whole of this doctrine is summed up in very few words as laid down by Lord Coke (1 Inst. 153) and recognised in terms in the case of *Blunden* v. *Baugh*, Cro. Car. 302, in which it underwent very great consideration. Lord Coke says, "a desseisin is when one enters, intending to usurp the possession, and to oust another of his freehold; and therefore, *quærendum est à judice quo animo hoc fecerit*, why he entered and intruded." So, the whole inquiry is reduced to the fact of entering, and the intention to usurp possession. These are the elements of actual disseisin; and yet we have seen, that one may become a disseisor, though entering peaceably under a void deed, or a void feoffment, or by fraud; and that the intention to desseise may, under circumstances, be imputed to those who, by a general rule of law, are, in ordinary cases, incapable of willing, or not bound by an exercise of the will. This analogy has been freely extended to adverse possession, and even gone beyond it, as well by the decisions of New York, as will hereafter appear, as by the repeated ruling of this court. In the case of *Pawlet* v. *Clarke*, 4 Pet. 504, it is distinctly intimated, that a possession may be adverse, wherever an ouster may be presumed: and also unanimously ruled, that it may be adverse, and maintain a bar under the statute, even where ouster is in terms repelled, and not to be presumed from the very circumstances of the case. The words of the court are, "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 of this court in *Blight's Lessee* v. *Rochester*, 7 Wheat.
*440] 535." If this be the correct doctrine of this *court, and there can be no doubt it is, it seems to follow, that wherever the proof is, that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others; whatever relation, in point of interest or privity, he may stand in to others. Such certainly is the view taken of the law, in the reasoning of this court, in the case of *Willison* v. *Watkins*, 3 Pet. 53; and with express reference to lessors, mortgagors, trustees and tenants in common. In the case of *Mc Clung* v. *Ross*, the chief justice says, "that one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act that can amount to an ouster, or give notice to his co-tenant that his pos-

session is adverse, ought not, we think, to be construed into an adverse possession ; the principles laid down in *Barr* v. *Gratz*, 4 Wheat. 213, apply to this case." This is perfectly consistent with the language of the case of the *Town of Pawlet ;* for the fact to be determined is, whether the party holds possession for himself or for another ; and this can only be determined by evidence, or circumstances to prove the one or the other. It is the inquiry into the "*quo animo.*" In all these cases, there is no intimation found, that the adverse possession may not be set up ; the only point maintained is, that the "*quo animo*" must be established, as well as the fact. But in finding the *quo animo*, the jury must, of course, be left to their own view of the effect and sufficiency of the evidence. Actual ouster is clearly not requisite, either to be presumed or proved ; adverse possession may exist without it ; and notice, as a fact, may clearly be deduced from circumstances, as well as be positively proved.

The bill of exceptions states, that the defendant proved (that is the word used) that Potter : 1. Entered under his deed, and by virtue thereof : 2. Immediately after the execution thereof : 3. Claiming to be sole and exclusive owner thereof ; and in a subsequent part, it is amplified by the expressions, claiming the absolute ownership, and the ownership in fee. Much of the discussion has turned upon the sufficiency of proof to the effect stated, to sustain the finding of an adverse possession ; and it has been insisted, that it neither supplies the exigency of actual ouster or notice. The only prayer of the plaintiff, it will be recollected, is for a general instruction in *her favor, "upon the matters so produced and given in evidence in her behalf." The court were, therefore, not called upon by the plaintiff to instruct the jury, upon the competency of this evidence, to sustain a finding of adverse possession ; and accordingly gave none, unless it was incidentally ; and if, therefore, the evidence was insufficient, it could only be the ground of a motion for a new trial ; with which we have no concern. [*441

The views which I have taken of the doctrine of adverse possession would not have been necessary, but for the supposed bearing of the instructions actually given by the court upon the verdict ; and particularly in relation—1st. To that part of the bill of exceptions, in which it is said, "that the court explained to the jury what in law constitutes an adverse possession ;" which, if correctly explained, it is supposed, could not have sanctioned the verdict upon that evidence. But on this, it must be observed, that in a case, where the *quo animo* alone, with which a defendant entered, and held, was the question ; and the proof was, that he entered and held to be the sole and exclusive owner of the land, and to hold an absolute ownership in fee ; if ouster and notice, like other facts, may be presumed from long and undisturbed possession, or other circumstances, it would be difficult to say, that the testimony in this cause was not competent to sustain a finding of an adverse possession. It is impossible, upon this view of the case, to impute to the court any other instruction than what may be covered by the terms of the proof in the case ; that is, that if the judge instructed the jury, "that one who enters under a deed purporting to convey to him an estate in fee, claiming to be sole and exclusive, and absolute owner in fee thereof, for forty years, may be regarded as holding adverse to all the world ;" it would be difficult to find any legal exception to such a charge ; since it is left open to the jury to judge of the sufficiency of the evidence to prove the fact

of a claiming to be sole and exclusive, and absolute owner, in fee. Notice and actual ouster are among the most direct and ordinary proofs of such a holding; and may have been the proved or presumed ground of this verdict.

These views taken of the law of adverse possession were necessary to precede an analysis of the general *instruction given by the court upon the competency of the bar under the statute. On this instruction, it is necessary to bear in mind, that it is strictly confined to this: 1st. That there is nothing on the face of the deed under which Potter claims, that precludes him from setting up this bar. 2d. That there was nothing in the circumstances connected with its execution, that would preclude him. 3d. That there is nothing in the possession acquired under that deed, to prevent the possession acquired under it from being held adverse to the lessor of the plaintiff, or to Schuyler; provided, the proof was sufficient in other respects to establish the fact of adverse possession. There is no affirmation by the court of the sufficiency of that deed to constitute an adverse possession; or of the sufficiency of the possession acquired under it. But all the court becomes responsible for is, the negative proposition, that there is nothing in the deed, or in the circumstances attending its execution, which precludes the defendant from setting up and proving adverse possession.

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Now, it is difficult to see how this proposition can be controverted. If, in the very nature of things, there is no one who may not be actually ousted and actually held out of possession, whether lessor, mortgagor, trustee or tenant in common, as is affirmed in the case of *Willison* v. *Watkins*, and other cases; how is it possible, that any deed, or any circumstance, should preclude a resort to proof of absolute adverse possession, where it exists in fact? The charge of the court amounts to no more than a limited affirmance of that general proposition.

But as the chief difficulty in the cause arises out of that specification under the general proposition which relates particularly to a tenancy in common, we will consider that with due attention. The instruction of the court is, "that although it is generally true, that one tenant in common was not permitted to set up his possession, as adverse to the title of his co-tenant; yet that one entering into possession of land, under such a deed for the whole, and claiming the entire interest, would not be thus precluded; although it should subsequently appear, that such deed conveyed only an undivided share." The words "thus precluded" have reference to the same *terms used in the general instruction, and make this part of it to mean, "that one tenant in common entering into possession of land under a deed for the whole, and claiming the entire interest, would not be precluded from setting up an adverse possession; provided, the proof was sufficient in other respects to establish the fact of such adverse possession." And where is the objection to such an instruction? If one tenant in common may be disseised by another; if one tenant in common may set up an adverse possession against his co-tenant, provided he has adequate proof of the fact of its adversary character; it would seem, that this instruction imports no more.

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On this part of the case, however, there exists a division of opinion on the construction of the charge: three of the judges thinking that it falls short of the proposition as I have stated it; and two others concurring in my

view of its construction. In support of the construction, which those who concur with me adopt, I have further to remark:

1. That the court below might very well have withheld this instruction, since, in fact, there is no legal tenancy in common in the case. The action of ejectment deals altogether with legal estates. Mere equities are unknown to it; and yet the tenancy in common set up in this case is altogether destitute of a legal character. At no time, had the plaintiff's lessor a *scintilla* of right, known to the common law, until she received the deed of 1804. Until that time, the only estate that can be recognised in this form of action was in Schuyler, or in Evans and Goold; if not in the defendant Potter, as has before been noticed. It surely cannot be contended, that Potter held as tenant in common with Goold, since Goold, either in his own right, as assuming a false character, or in the right of Sir Charles Gould, as having acted in his true one, was one of the grantors under whom, and against whom, Potter entered.

2. There was no tenancy in common, because Potter entered in fact in his own right, under a deed conveying a fee-simple in the entirety. Such it is, as to the act of Evans and wife, and such it purports to be, as to the act of Edward Goold, or of Sir Charles Gould. It has been earnestly insisted, that the entry of Potter under that deed must be presumed to be according to the title actually acquired under it, supposing it *to be void as to [*444
Sir Charles Gould; and not according to the estate which it purports to convey. But to this there are several answers, and the first alone is conclusive; to wit, that the evidence expressly repels the presumption. He entered under that deed, as the sole, exclusive, absolute owner in fee; this is altogether inconsistent with an entry to the use of himself and another. And this seems to be no longer an open question in New York, even on the subject of legal inference. For in the case of *Jackson* v. *Smith*, which was the case where one tenant in common conveyed the whole, and this very point was made; the court repels the inference in favor of the entry as tenant in common, and declares the contrary to be the proper inference. And in the case of *Clapp* v. *Bromagham*, 9 Cow. 551–3, which was another case of a conveyance of the whole, by one tenant in common, the same doctrine is repeated in terms. That part of this bill of exceptions which relates to the proof, seems to have been nearly copied from the case of *Clapp* v. *Bromagham;* in which the bill of exceptions stated, that the defendant entered as purchaser of the whole, and held as tenant in severalty, claiming to be sole and exclusive owner. Again, although it were the true inference of law, nothing can be clearer, than that it might be repelled by proof, and that the jury might well find the contrary to be the fact; their verdict in this case is equivalent to such a finding; and for aught that we can judicially know, such a finding may have been sustained by proof of ouster, notice, forcible repulsion, leasing and receiving rents; or any other competent proof of the character of his entry, and the assertion of rights under it.

3. If there was a tenancy in common, the law appears to be definitively settled in New York, that the grantee of one tenant in common for the whole, entering on such conveyance, and holding as sole owner, may set up the statute against his co-tenants in common. And to this effect we have before us an adjudged case, in which there seems to have been neither an actual ouster, nor actual nor constructive notice to the co-tenants. This is

the case of *Clapp* v. *Bromagham*, decided in 1827, and before referred to, for another purpose; in which one of nine tenants in common sold the whole premises to the defendant, who entered and held as his sole and exclusive *property. It is distinctly shown by the court, that the only question in that case was, whether the defendant might set up his possession, to the exclusion of his co-tenants; and decided, that he might, upon the most elaborate argument and profound examination. In that case, the decision of this court in the case of *Ricard* v. *Williams*, is cited, 7 Wheat. 60, and recognised as laying down the true principle by which this class of cases must be governed; to wit, that in the absence of all controlling circumstances to the contrary, the entry of one having right shall be held to be according to that right; that an ouster or disseisin is not to be presumed from the mere fact of sole possession; but that "it may be proved by such possession," accompanied by a notorious claim of an exclusive right. This decision, according to our view of it, leaves no scope for speculation.

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4. On the subject of this equitable tenancy in common, against which we must again enter our protest as a *novus hospes* in the action of ejectment, it may be further remarked, that if it is to be regarded in our deliberations on the law of the case, it is to be presumed, that it must be treated as if we were sitting in a court of equity; and then it would certainly be appropriate to examine it in all its equitable aspects. And first, is the deed to Potter to be regarded as the deed of Sir Charles Gould, or is it not? If not, then, clearly, Potter is not to be affected by any equity which Mrs. Bradstreet might set up against Sir Charles Gould. If it is to be considered his deed, then other equitable considerations present themselves. It is his deed, executed by his attorney, Edward Goold. But Mrs. Bradstreet also makes title through Edward Goold; naming himself attorney to Sir Charles Gould, and reciting that as his character in conveying to her. Then, if Potter is to be affected with equitable notice, or equitable duties, as being his substitute; why is not Mrs. Bradstreet to be similarly affected, in the character of his alienee or substitute? If so, she is bound to do whatever Potter might in equity have claimed of Edward Goold; and that is, a conveyance in fee, in severalty, of the land in question. But I repeat, this is involving the action of ejectment in subtleties that are unknown to it.

*5. But it is insisted, that though the point of tenancy in common be gotten over, there are others in the case that are to be removed: and 1st. That as there is no proof of the power from Sir Charles Gould to Ludlow and Goold, the deed to Potter places him, as to the interest of Mrs. Bradstreet, in the relation of one having no title, or a void title. As to an entry under a void title, that has met with such pointed answers from this court, and the courts of New York, that it can scarcely require a labored examination. The bar of the statute is acknowledged to originate in wrong. In the case of *La Fromboise*, 8 Cow. 594, 596, the supreme court of New York say "that if a party have a deed, he need not produce it; and if, on production, it proves defective, that does not affect the character of the possession." And when the court of errors come to examine that doctrine, they affirm it in more general and emphatic language. The only case which suggests a doubt as to its applicability, is that of *Jackson* v. *Waters*, 12 Johns. 365, decided in the same courts. But though that case be not shaken by subsequent decisions, it is enough to observe of it, that it had

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its origin in a peculiar policy, or rather in the common-law principle that the king cannot be disseised, or be a disseisor. It was the case of a Canadian grant, conflicting with a New York grant: and the case of *Clapp* v. *Bromagham*, as well as other adjudged cases show, that as between parties to mesne conveyances, the principle ceases to apply. Thus, though the king cannot be a disseisor, his grantee shall be held such; and the reason given is, "because he has time and leisure to inquire into the legality of his title which the king is supposed to want leisure for." Bro. tit. Disseisin, 65.

6. It is further urged, that the bar is set up against the same title, and therefore, incompetent. But this reason has been repeatedly disposed of by this court, and most recently in the case of the *Town of Pawlet*, in which it is ruled, that it is no objection to setting up a possession as adverse. The passage has been already in part quoted.

7. That the deed of 1790 places Potter either in the relation of Sir Charles Gould, who was trustee to Mrs. Bradstreet, or of Mrs. Bradstreet, who was *cestui qui trust*. But this admits of two answers—either the deed as to her was void, or it *was not. If not, it destroys her interest by an effectual transfer to Potter; and if it was void, then it could not [*447 create the relation contended for. If the confirmation through the deed of Schuyler is resorted to, then the answer is still more complete; for that deed expressly recognises the right to sell; and if it does put Potter upon inquiry, the result is, that he might fairly and honestly acquire a complete title by sale, discharged of her equity, since either Schuyler or Gould might sell, consistently with the trust. So that he may have taken a void title from one or the other; but the integrity of his conduct in taking it is such, that no principle of equity can make him either trustee or *cestui qui trust*, under either the original or confirmatory deed. He may have been ill advised, in a legal point of view, in taking the one or the other title; but if there is no immoral act on his part, merely taking a void deed will not make him a trustee; nor taking an effectual deed from one who has no power to sell, and is expressly charged to sell for the benefit of plaintiff. He is not to be affected by the fraud of the trustee, when he so clearly appears to have acted innocently, and in good faith. If, in taking a title of the whole, from Evans and wife, he has, in fact, taken a void title from them for Mrs. Bradstreet's interest, he has a right to put himself upon his wrong; and if he has proved an actual adverse possession under it, he has a right to the benefit of his bar. The Evanses never were trustees to Mrs. Bradstreet, either under any of the wills, or under Schuyler's deed. Edward Goold alone was the trustee for her under the latter; legally, in his own right; equitably, as attorney to Sir Charles Gould. No fiduciary relation, therefore, is imputable to Potter, as claiming under the Evanses; because they themselves were never affected with the character of trustees: and not through Goold, because his deed, if good, was absolute against the plaintiff, and if bad, conveyed nothing to Potter. If the attempt is to impute to Potter the relation of trustee, because Schuyler was trustee, and he claims through or under Schuyler; the answer is, that if his paper title, as it is termed, is the subject to be considered, then he claims from Schuyler, through Evans and Goold; and as Goold had the legal estate in him, so must Potter have; and Mrs. Bradstreet must seek *her redress in equity. Against Goold, at law, [*448 she certainly could not recover. But even in equity, how would her

right stand? A sale by Goold was perfectly consistent with the trust for her benefit; and considering the *bonâ fide* character of Potter's purchase, I can see no ground for granting her relief as against him. Notice of her equity, without fraud or collusion, can afford none; since notice of the right in her trustee to sell, must accompany it, or rather is a part of it. If the subject of inquiry, as it relates to Schuyler, is respecting the maintenance of Potter's bar, then he need not assert his possession as adverse to Schuyler; it is enough for his purpose, if adverse to Evans, or Evans and Goold; and that it might well be so held, although he claims under them, has been, as we have seen, distinctly and repeatedly laid down in this court. If it began to run against them, it continued for the necessary length of time. That one may hold adversely to him from whom he purchases, has long been settled both in this court and in the courts of the states of the United States; the fact of possession and the *quo animo*, being still the legal subjects of inquiry.

8. It has been argued, that whatever may be the rule, in ordinary cases, in this, the proof of notice was indispensable; since these lands were wild or waste lands, notoriously uninhabited; and mere possession of which was not enough to put the trustee or co-tenants upon their remedy. To this it may be answered, that for anything appearing in the bill of exceptions, the lands may not have been waste or wild; and the proof of Potter's entering immediately, and claiming to be sole and exclusive owner, would seem to repel the fact. But the true answer is the general one, which was before given on the subject of notice, that we know not, but proof of notice, or presumption of notice, may have been the grounds on which the jury found their verdict. As a proof of a "claiming to be sole and exclusive owner," it was an adequate and natural ground; and certainly, as a fact, may have been inferred from length of possession, and other circumstantial evidence, of the weight of which they must be the judges.

Judgment affirmed, with costs.

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*449] *The Mayor, Aldermen and Inhabitants of New Orleans, Appellants, *v.* The United States, Appellees.

Practice.

The parol evidence given on the hearing of a petition, in the district court of the United States for the eastern district of Louisiana, in the nature of an equity proceeding, should be reduced to writing, and appear in the record.

Appeal from the District Court for the Eastern District of Louisiana. In that court, the United States filed a petition, stating, that the mayor of the city of New Orleans, in pursuance of an ordinance of the city council, had advertised for sale, certain lots therein described; that by virtue of the treaty of cession, all vacant lots belonged to the United States; that those lots were vacant; that the city of New Orleans had never received any grant for them, "unless in virtue of the 3d section of the act of congress of the 3d of March 1807, entitled 'an act respecting claims to land in the territories of Orleans and Louisiana.'" which was denied: whereupon, and inasmuch as the said attempts of the said city council to sell the said lands as private property, was an evasion of, and trespass upon, the rightful dominion and

possession of the United States in the premises, they prayed that the defendants "may be cited to appear and answer this petition; and that in the meanwhile, they may be inhibited by injunction from persisting in the said attempt; and after due proceedings had, that it may be ordered, adjudged and decreed, that the said injunction be made perpetual; and your petitioner, in the name, and on the behalf aforesaid, *prays all other and further relief, that equity and the nature of the case may require." On this petition, an injunction was granted, issued and served, inhibiting the sale of the lots.

The defendants, by their amended answer, denied the right of the petitioners, and set up title in themselves. 1st. Under a royal cedule, granted by the king of Spain. 2d. Under an act of congress of the 3d March 1807. 3d. As alluvial soil, formed in front of the city, which, as they averred, was, by the laws of the land, the property of the city, without any grant; *and they prayed that the cause might be tried by a jury. [*450
The plaintiffs filed a general replication, not controverting the right demanded of a trial by jury.

The defendants, in support of their plea of title, filed and produced the following documents: 1. The royal cedule. 2. The law of the United States, granting 600 yards round the fortifications to the corporation. 3. Sundry plans, showing that the premises were contained within the boundaries of the land granted by those acts, and were, moreover, alluvial soil. They also examined witnesses, but their depositions were not taken in writing.

The judge, considering the cause as one of equity jurisdiction, proceeded to hear the cause, and decreed, that the injunction should be made perpetual. And as the oral testimony had not been reduced to writing, the judge, under the 19th section of the judiciary act, gave a statement of his recollection of the facts. From this decree, the defendants appealed.

Livingston, for the appellants; *Berrien*, Attorney-General, for the United States.

Among other causes of reversal, assigned by *Livingston*, was the following: That the court ought to have directed the depositions of the witnesses to have been taken in writing, and cannot now supply the defect by a statement from the judge's notes. Upon inspecting the record—

The Court, upon the principles laid down in *Conn* v. *Penn*, 3 Wheat. 424, ordered the decree to be reversed.

In the case of *Conn* v. *Penn* the court held, that in appeals from the circuit courts, in chancery cases, the parol testimony which is heard at the trial in the circuit court, ought to appear in the record.

*The Levy Court of Washington County, in the District of Columbia, *v.* Tench Ringgold, Esq., Marshal of the District of Columbia.

Executions for fines in Washington city.

The "act concerning the district of Columbia," passed 3d of March 1801, does not require the marshal to apply to the district-attorney for executions, in all cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution issued.

The levy court of Washington county are not entitled to one-half of all the fines, penalties and forfeitures imposed by the circuit court in cases of common law, and under the acts of congress, as well as the acts of assembly of Maryland, adopted by congress as the law of the district of Columbia.

The district-attorney is specially charged with the prosecution of all delinquents for crimes and offences; and these duties do not end with the judgment or order of the court; he is bound to provide the marshal with all necessary process to carry into execution the judgment of the court; this falls within his general superintending authority over the prosecution.

Interest is not chargeable on money collected by the marshal of the district of Columbia, for fines due to the levy court, the money having been actually expended by the marshal in repairs and improvements on the jail, under the opinions of the comptroller and auditor of the treasury department, that these expenditures were properly chargeable upon this fund; although that opinion may not be well founded.

Levy Court *v.* Ringgold, 2 Cr. C. C. 659, affirmed.

Appeal from the Circuit Court of the District of Columbia, for the county of Washington.

The case was argued by *Key*, for the appellants; and by *Swann*, for the appellee.

Thompson, Justice, delivered the opinion of the court.—This was a summary proceeding in the circuit court of the district of Columbia, on the application of the Levy Court of Washington county, against the marshal of the district, to recover their proportion of the fines, forfeitures and penalties collected, or which it is alleged ought to have been collected, by the marshal, and paid over to the Levy Court, under the provisions of the 2d section of the act of congress, supplementary to the act entitled, "an act concerning the district of Columbia," passed 3d of March 1801. (2 U. S. Stat. 115.)

*452] The account containing the claim on the part of the plaintiffs *was referred to the auditor to examine and receive testimony thereon, and report to the court. By his first report, a balance of $364.46 was found in favor of the marshal. Exceptions were taken to this report, and the account was again referred to the auditor, with directions to disallow $814.95, which in the first report, had been allowed for the repairs of the jail; and upon the second report a balance of $613.31 was found against the marshal. To this report, exceptions were taken by the plaintiffs, but disallowed by the court; and judgment rendered for the balance reported by the auditor. Upon which a writ of error has been brought to this court, and the exceptions taken have been presented under the following heads: 1. Does not the law require the marshal to apply to the district-attorney for executions, in all cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution be issued? 2. Is not the Levy Court entitled to one-half of all the fines, penalties and forfeitures imposed by the

circuit court, in cases at common law, and under the acts of congress, as well as the acts of the assembly of Maryland, adopted as the law of this district, by congress? 3. Is the marshal liable to pay interest on the money found to be due from him to the Levy Court, and which he has or ought to have collected and paid over? The decisions of these questions must depend entirely upon the acts of congress and the laws of Maryland, which have been adopted as the law of Washington county in this district.

1. The act of congress of 1801, before referred to, provides, that the marshal shall have the same power regarding the collection of the fines, and be subject to the same rules and regulations as to the payment thereof, as the sheriffs of Maryland are subject to, in relation to the same. The first point turns upon the question, whether it was the marshal's duty to apply to the district-attorney for executions; and his duty to, issue them, on such application. The second section of the Maryland act of 1795, ch. 74, declares, that it shall and may be lawful for the attorney-general *of this state, [*453
or either of his deputies, *ex officio*, and they are hereby directed and required, on the application of the sheriffs of the respective counties in this state, to order a writ or writs of *capias ad satisfaciendum* to be issued, for the recovery of all fines, penalties and forfeitures, which have or may hereafter be imposed by any court of record in this state, together with the costs accruing thereon. And by the 7th section, the sheriffs are made answerable for all fines, penalties and forfeitures, imposed by the judgment of any court, where no writ of execution shall issue for the recovery of such fine, &c.; unless the sheriff shall make it appear to the satisfaction of the treasurer, that the party on whom such fine, &c., was imposed, was insolvent and unable to pay the same.

This latter section may well admit of the construction, that it applies only to cases where the party is committed by order of the court, without an execution. But if construed in connection with the second section, it will still leave the question open, whether the district-attorney was bound, on the application of the marshal, to issue a *capias ad satisfaciendum* in all cases? and if he was not, it can hardly be pretended, that the marshal is made responsible for not collecting the fine. If this question rested entirely upon the Maryland laws before referred to, there would be strong grounds for the conclusion, that it was the duty of the marshal to apply to the district-attorney to issue the executions, and that he was bound to issue them accordingly. But the district-attorney here derives his authority from the acts of congress, and not from the laws of Maryland, and his rights and duties are to be collected from those acts; and although the attorney-general in Maryland might have been bound to issue executions, on the application of the sheriff, it does not follow, that the district-attorney is alike subject to the orders of the marshal in this respect. It becomes necessary, therefore, to inquire, whether the district-attorney is bound to comply with the request of the marshal, if made; and to issue executions in all cases, without exercising his own judgment on the subject. The act of congress of the 27th of February 1801 (2 U. S. Stat. 103), provides for the appointment of a marshal and a district-attorney. The former is to have, within this district, the same powers, and perform the same duties, as is by law directed and provided in the case of *marshals of the United States; [*454
and the latter is to perform all the duties required of the district-

attorneys of the United States: and by the 35th section of the judiciary act of 1789 (1 U. S. Stat. 92), it is enacted, that there shall be appointed in each district, a meet person, learned in the law, to act as attorney for the United States in such district; whose duty it shall be, to prosecute in such district all delinquents for crimes and offences, cognisable under the authority of the United States, &c.

The marshal of this district is put on the same footing, with respect to his duties and powers, as other marshals of the United States. They are considered as mere ministerial officers, to execute process when put into their hands, and not made the judges whether such process shall be issued. And it would require the most clear and explicit provision, to clothe them with such power, so much out of the ordinary and appropriate powers and duties of the office. But to give the marshal authority to demand an execution, in all cases, is incompatible with the powers given to the district-attorney. He is specially charged with the prosecution of all delinquents for crimes and offences; and those duties do not end with the judgment or order of the court. He is bound to provide the marshal with all necessary process to carry into execution the judgment of the court. This falls within his general superintending authority over the prosecution. And whether an execution shall be issued, or not, is more appropriately confided to the district-attorney, than it would be to the marshal. We are accordingly of opinion, upon the first point, that the law does not require the marshal to apply to the district-attorney for executions; and that he is not liable for omitting to do so.

2. The next question will depend upon the construction to be given to the second section of the act of congress of the 3d of March 1801 (2 U. S. Stat. 115), which declares, that all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which, by adoption, have become the laws of this district, shall be recovered, with costs, by indictment or information, in the name of the United States, or by action of debt, in the name of the United States and of the informer; one-half of which fine shall accrue to the United States, and the other half to the informer; and the said fine *shall be collected by or paid to the marshal; and one-half thereof shall be by him paid over to the board of commissioners, &c. (the levy court), and the other half to the informer. There is certainly some obscurity in the language here used, and the construction is not entirely free from difficulty. And in this view of the law, various conjectures have been suggested, with respect to the intention of the legislature. It has been said, that no good reason can be assigned, why congress should have made any discrimination between penalties and forfeitures, affixed by statute to offences, and discretionary fines imposed by the court, in cases at common law. It is not perceived by the court, that any good reason does exists for such discrimination; but the question is, whether the act of congress has made such discrimination. And although the intention of the legislature may be taken into view by the court, in the construction of a statute, where the language is so obscure and doubtful as to admit of different interpretations, yet we do not think the act in question falls within this rule.

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The inquiry is, what denomination of fines, penalties and forfeitures, is referred to in this act? It is more a matter of description than anything

else; and is to be ascertained only by the act itself. They must be fines, penalties and forfeitures, accruing under the laws of Maryland, which, by adoption, have become the laws of this district; and which shall be recovered, with costs. This is language appropriate to the prosecution of a suit or action for some fixed and definite penalty; but is inapplicable to mere discretionary fines, which may be imposed by the court or not, at its pleasure. But this is rendered more clear, by the direction as to the mode and form in which such fines, penalties and forfeitures are to be recovered. It is to be by indictment or by information, or by action of debt in the name of the United States and of the informer. The fine, forfeiture or penalty must be of such description that it may be recovered in either of these modes. If by indictment or information, it must be in the name of the United States; if by action of debt, it is a *qui tam* action, in the name of the United States and the informer. And the disposition of money, when recovered, would seem to leave no reasonable doubt on this question. One-half *is directed to be paid by the marshal to the levy court, and the other half to the informer; and this distribution applies as well to [*456 that which is recovered by indictment or information, as to that which is recovered by action of debt. These provisions are entirely inapplicable to cases where there is no informer, who is to take one half. Those discretionary fines, imposed by the court by way of punishment for common-law offences, cannot fall within the class of fines designated in the statute; for in such cases, there is no informer. In case of a fine imposed for an assault and battery, for instance, who is the informer? The law knows of no such character; and no distribution of the fine could be made, as required by the statute. There was no error, therefore, in the direction of the court upon this point.

3. The claim for interest, we think, was properly disallowed. It appears from the auditor's report, that the money was actually expended by the marshal in repairs and improvements on the jail; and that, too, under the opinion of the comptroller and auditor of the treasury department, that these expenditures were properly chargeable upon this fund. And although that opinion may not be well founded, it would be unreasonable, to charge the marshal with interest; the money not having remained in his hands, or been applied to his own use; and the appropriation of it having been made under the sanction of the treasury department, ought to exonerate him from any charge of negligence, or intentional misapplication of the money. The judgment of the circuit court is, accordingly, affirmed, with costs.

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

*John Hawkins and William May, Plaintiffs in error, *v.* Joshua Barney's Lessee, Defendant in error.

Constitutional law.—Statutes of limitation.—Evidence in ejectment.

The decision of this court, as to the validity of the law of Kentucky, commonly called the occupying claimants law, does not affect the question of the validity of the law of Kentucky, commonly called the seven years' possession law.

The seventh article of the compact between Virginia and Kentucky declares, "all private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia, prior to such separation, shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in this state (Virginia)." Whatever course of legislation by Kentucky, which would be sanctioned by principles and practice of Virginia, should be regarded as an unaffected compliance with the compact; such are all reasonable quieting statutes.

From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, that those laws which give peace and confidence to the actual possessor and tiller of the soil; such laws have frequently passed in review before this court, and occasions have occurred in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights.

It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject; she has, in fact, literally complied with the compact, in its most rigid construction; for she adopted the very statute of Virginia, in the first instance, and literally gave her citizens the full benefit of twenty years, to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisos and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power.

It is not to be questioned, that laws limiting the time of bringing suits constitute a part of the *lex fori* of every country—the laws for administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed, that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage; yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing the limitation act were adopted, to assign her a position higher than that of a dependent on Virginia.

The limitation act of the state of Kentucky, commonly known by the epithet of the seven years' law, does not violate the compact between the state of Virginia and the state of Kentucky.

Where a patent was issued for a large tract of land, and by subsequent conveyances, the patentee sold small parts of the said land, within the bounds of the original survey; it has been decided by the courts of Kentucky, that the party *offering in evidence a conveyance of the large body, held under the patent containing exeptions of the parts disposed of, is bound, in an action of ejectment, to show that the trespass proved is without the limits of the land sold or excepted.

*458]

Error to the Circuit Court of Kentucky. In the circuit court, the lessee of Joshua Barney brought an ejectment for 50,000 acres of land, in the state of Kentucky, which he claimed under a patent from the commonwealth of Virginia to Philip Barbour, dated the 27th December 1785, and a deed from Barbour to him, dated the 7th of August 1786.

The defendants, William May and John Hawkins, derived their title under a junior grant to William May, for 4000 acres of land; and they proved, on the trial in the circuit court, that John Creemer, who had conveyed part of the land included in the grant to William May, settled on the land in 1790, and that both of the defendants in the ejectment had had possession of the land claimed by them ever since. The defendants introduced and read in evidence, a deed from Joshua Barney to John Oliver, dated the

6th of January 1812, by which the 50,000 acres, conveyed to him by Philip Barbour, were conveyed to John Oliver. The deed contained a recital that he had previously sold and conveyed to John Berryman, 11,000 acres of the land, and other small tracts to Charles Helm, in detached parcels.

The plaintiff then produced and read a deed in evidence, a deed executed by John Oliver and himself, on the 6th of January 1812, in which the former conveyances were recited, and in which it appeared, that the conveyance made by him to John Oliver, on the 6th of January 1812, was to secure the payment of $20,000 within three years, with power to John Oliver to sell the land, or any part of it, if Barney did not repay the sum which had been loaned to him by Oliver; he also produced in evidence, a deed executed by Robert Oliver, on the 21st October 1816, as the attorney in fact of John Oliver, by which the title of John Oliver, to the whole of the land, was released to Barney. This deed also recited the previous conveyances to Berryman and others.

The power of attorney from John Oliver to Robert Oliver was dated at Baltimore, on the 12th of October 1815, and was *as follows: "And further, I do hereby authorize and empower my said attorney to con- [*459 tract and agree for the sale, and to dispose of, as he may think fit, all or any of the messuages, lands, and tenements and hereditaments of and belonging to me, in any parts of the United States, or held by me in trust or otherwise. And to sell, execute and deliver such deeds, conveyances, bargains and sales, for the absolute sale and disposal thereof, or of any part thereof, with such clauses, covenants and agreements, to be therein contained, as my said attorney shall think fit and expedient. Or to lease and let such lands and tenements, for such periods and rents as may by him be deemed proper, and to recover and receive the rents due and to become due therefrom, and to give acquittals and discharges for the same, hereby meaning and intending to give and grant unto my said attorney my full power and whole authority in all cases, without exception or reservation, in which it is or may become my duty to act, whether as executor, administrator, trustee, agent or otherwise."

It was in evidence, that neither John Oliver nor Joshua Barney had ever been within the limits of the state of Kentucky, until within three months before the institution of the ejectment, when Joshua Barney came into the state. It was also proved, that the debt due by Joshua Barney to John Oliver was still unpaid.

On the trial, the circuit court instructed the jury, that the deed to John Oliver, and from Oliver to Barney, did not show such an outstanding title as the defendants could allege; and refused to instruct, generally, that the plaintiff had no right to recover. The court also refused to instruct the jury, that the plaintiff had no right to recover, unless he showed that the 11,000 acres did not cover the defendants' land recited to have been conveyed to Berryman. The court also refused to instruct the jury, that the law was for the defendants, if they found from the evidence, that the defendants had had the land twenty years in possession before the bringing of the suit. The defendants excepted to the opinion of the court, and prosecuted this writ of error.

*The case was argued by *Wickliffe*, for the plaintiffs in error; and [*460 by *Jones*, for the defendant.

For the *plaintiffs* in error, it was contended, that the defendant in error had not exhibited such a title in himself as would entitle him to recover in this action, when taken in connection with the proof introduced by the defendants below. 1. By the deed to John Oliver, he divested himself of the legal title; and the deed by Robert Oliver, the agent, does not re-invest him with that title; the mortgage money not having been paid, the conveyance was unauthorized by the letter of attorney. 2. According to the recitals in the deed of Barney to Oliver, and from Oliver to Barney, Barney had conveyed distinct parcels of the 50,000 acres to Berryman and Helm; and before he was entitled to the verdict and judgment against the defendant, it was incumbent upon him to prove, that Hawkins's possession was not only within the boundary of the 50,000 acres, but that it was without the tracts conveyed to Helm and Berryman.

The plaintiff was not entitled to recover, because the defendant proved an adverse possession, continued for more than twenty years, before the commencement of this action; and his absence from the commonwealth cannot avail him, because of the provisions of the act of the legislature of Kentucky of 1814. If, however, the provisions of the last-recited act are inoperative; that the plaintiff ought not to recover because of the provisions of the act of the legislature of February 9th, 1809; which law inhibits the recovery in this form of action, in a suit commenced after the 1st of January 1816, when the defendant had resided upon the land, claiming to hold under an adverse title in law or equity, for seven years before the commencement of the suit, or action at law.

Mr. Wickliffe argued, that Barney had not shown a right of entry to the 50,000 acres, patented by the commonwealth of Virginia to Philip Barbour. That he had not shown that he was entitled to that part of the land in possession of the plaintiff in error. The conveyance by Barney to John Oliver
*461] was absolute on *its face, and recites the former conveyances of part of the land; but by the instrument which was executed at the same time, that deed became a mortgage; the amount secured to be repaid in three years; the title remained in Oliver. The reconveyance is said to have been made in 1816, by Robert Oliver, as attorney in fact for John Oliver; but it is denied, that the power of attorney authorized that conveyance. The money which was due to John Oliver, was not paid, before the reconveyance by Robert Oliver, as his attorney; and was not, therefore, within the scope and purpose of his powers. It was, therefore, a void deed. A mortgagor cannot maintain ejectment, after the time fixed for the payment of the money, unless he can show that the same was paid. The legal estate is in the mortgagee. 1 A. K. Marsh. 52. The recitals in the deed from Barney to Oliver show, that 11,000 acres of the land had been conveyed to Berryman; and Barney was bound to show that the defendant lived out of the part so conveyed. 3 A. K. Marsh. 20; *Madison* v. *Owens*, 6 Litt. 281; 3 Ibid. 334.

The case shows an adverse possession in the plaintiffs in error for twenty years; and adverse possession under a claim of title from the commonwealth of Kentucky for seven years. The act of the legislature of Kentucky, which protects the possession of the plaintiff in error, does not depend on the same principle with the act of 1812, which has been declared void, as to the provision for occupying claimants, by the court, in the case of *Green* v. *Biddle*.

No advocate for the rights of the state of Virginia, under the compact, ever meant to deny to the state of Kentucky the right to legislate over the land within her territory, so as to quiet possessions, and prevent litigation, for the purpose of sustaining old and dormant titles. The seventh and eighth articles of the compact between Kentucky and Virginia have been supposed to be violated by the limitation law. By that compact, the rights relating to lands were to be determined by the laws of Virginia. The laws of Virginia established limitations of actions, and those of Kentucky are in the same spirit, and on the same principles with the Virginia laws from 1750 or 1760; and the same principles have been maintained and established by the *laws of other states; they are to be found in the legislative enact- [*462
ments of Pennsylvania, of Tennessee, of North Carolina, of Massachusetts, and of other states. The compact was only intended to adopt and secure the general principles of the Virginia land laws, and cannot be construed as a total inhibition to Kentucky to legislate in relation to the lands in the state. 1 Bibb 22. Such has been the uniform construction given to this compact. 1 Litt. 115; 3 Ibid. 330.

The statutes of 1809 and 1813 are only statutes of limitation, and do not impair the obligation of any contract. Such laws may by some be considered unjust; but they are prospective, and affect remedies, without operating on rights. 1 Caines 402; 2 Rand. 305; 5 Johns. 132; 11 Ibid. 168; 1 Call 194, 202; 2 Bibb. 208; 4 Serg. & Rawle 364; 2 Gallis. 141; 4 Bibb 561; 1 Litt. 173; 3 Ibid. 318, 446, 464; 4 Ibid. 313; 5 Ibid. 34; 1 A. K. Marsh. 378; 2 Ibid. 388; 1 T. B. Monr. 164; 2 A. K. Marsh. 133, 318, 319, 615; 4 T. B. Monr. 523, 554.

Jones, for the defendant in error.—The first objection is, that the plaintiff below did not make out a title. That he was a mortgagor, and could not maintain the action, after a forfeiture, without showing payment of the money advanced by John Oliver. But the evidence shows that Barney had ceased to be a mortgagor, before the suit was brought. A mortgagor may maintain a suit against a mortgagee. 19 Johns. 325. The mortgage is a mere security; and a stranger cannot set up an outstanding mortgage. But the power of attorney was sufficient to authorize all that was done under it; and this was subsequently ratified by John Oliver. The power was full to the purposes of a release; and if so extensive, its operation to that effect was all that was required.

Mr. Jones denied, that it was the duty of the plaintiff in the circuit court, to show that the land sold to Berryman was not included in that for which this suit was brought. The authorities upon this point establish the principle, that the defendant must show that fact.

He contended, that the statutes of limitations violated the *con- [*463
tract. The decisions of the state court, upon the validity of the law, are not authority. The construction and meaning of a statute of a state belongs to the tribunals of the state. But questions, which go to the validity of the statute, are subject to the supervision of this court; whether such a law be constitutional, is an inquiry here, by the express words of the judiciary act. The acts of Kentucky make a material distinction between residents and non-residents, excluding the latter entirely from its operation; it requires actual possession, by one claiming title, and the possession of a

tenant is not sufficient. The law of 1814 repeals the law of 1796, and does not affect the savings in the Virginia statutes. It is inquired, whether the act of limitations is consistent with the contract? As a general rule, it has been said, that statutes of limitation relate to the remedy. But this distinction is not sound. There can be no right, without a remedy to secure it. It is not in the power of Kentucky, by any legislation, to take away a right to land which was vested before the compact, except such as is warranted by the laws of Virginia. He denied, that any such warrant existed.

JOHNSON, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of Kentucky, brought to reverse the decision of that court, on a bill of exceptions. The suit was ejectment, by Barney, brought to recover a part of a tract of 50,000 acres of land, in possession of Hawkins, within the limits of his patent. Both parties claimed under Virginia patents, of which Barney's was the eldest. The plaintiff below proved a grant to Barbour, and a conveyance from the patentee to himself. The defendant below proved a grant to one May, a conveyance from May to Creemer, and from Creemer to himself. He then proved, that Creemer entered into possession under May, in 1796, and resided on the land so conveyed to him, until he sold to defendant below; who has had peaceable possession of the premises ever since, until the present suit was
*464] brought, which was May 4th, 1817. *This state of facts brings out the principal question in the cause, which was on the constitutionality of the present limitation act of that state, commonly known by the epithet of the seven years' law. The court charged the jury in favor of Barney, and the verdict was rendered accordingly.

It is now argued, that, by the seventh article of the compact with Virginia, Kentucky was precluded from passing such a law. And that this court has, in fact, established this principle, in their decision against the validity of the occupying claimant laws. I am instructed by the court to say, that such is not their idea of the bearing of that decision. On a subject so often and so ably discussed in this court and elsewhere, and on which the public mind has so long pondered, it would be an useless waste of time to amplify. A very few remarks only will be bestowed upon it. The article reads thus: "All private rights and interests of lands within the said district, derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." Taken in its literal sense, it is not very easy to ascribe to this article any more than a confirmation of present existing rights and interests, as derived under the laws of Virginia. And this, in ordinary cases of transfer of jurisdiction, is exactly what would have taken place, upon a known principle of international and political law, without the protection of such an article. We have an analogous case in the 34th section of the judiciary act of the United States; in which it is enacted, that the laws of the several states shall be rules of decision in the courts of the United States; and which has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined.

And yet, when considered in relation to the actual subject to which this

article was to be applied, and the peculiar phraseology of it, there will be found no little reason for inquiring, whether it does not mean something more than would be *implied without it? or why it was introduced, if not intended to mean something more? It had an almost anomalous subject to operate upon. I perceive, that in the copy of Littell's laws, which has been sent to our chambers, some one has had the perseverance to go over the legislation of Virginia, relating to the lands of Kentucky, whilst under her jurisdiction, and to mark the various senses to which the word rights has been applied, in the course of her legislation. It is curious, to observe how numerous they are. Her land system was altogether peculiar, and presented so many aspects in which it was necessary to consider it, in order to afford protection to the interests imparted by it, that it might, with much apparent reason, have been supposed to require something more than the general principle, to secure those interests. So much remained yet to be done, to impart to individuals the actual fruition of the sales or bounties of that state, that there must have been, unavoidably, left a wide range for the legislative and judicial action of the newly-created commonwealth. When about then to surrender the care and preservation of rights and interests, so novel and so complex, into other hands, it was not unreasonably supposed by many, that the provisions of the compact of separation were intended to embrace something beyond the general assertion of the principles of international law, in behalf of the persons whose rights were implicated in, or jeoparded by the transfer. Such appears to have been the view in which the majority of this court regarded the subject in the case of *Green* v. *Biddle;* when, upon examining the practical operation of the occupying claimant laws of Kentucky, upon the rights of land-holders, they were thought to be like a disease planted in the vitals of men's estate, and a disease against which no human prudence could have guarded them, or at least no practical prudence, considering the state of the country, and the nature of their interests. And when, again, upon looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their *reasoning on the subject, they will be found to acknowledge, that whatever course of legislation could be sanctioned by the principles and practice of Virginia, would be regarded as an unaffected compliance with the compact. [*465 [*466

Such, we conceive, are all reasonable quieting statutes. From as early a date as the year 1705, Virginia has never been without an act of limitation. And no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than laws which give peace and confidence to the actual possessor and tiller of the soil. Such laws have frequently passed in review before this court; and occasions have occurred, in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights? All the reasonable purposes of justices are subserved, if the courts of a state have been left open to the prosecution of suits, for such a time as may reasonably raise a presumption in the occupier of the soil that the fruits of his labor are effectually secured beyond the chance of

litigation. *Interest reipublicæ ut finis sit litium;* and *vigilantibus non dormientibus succurrit lex,* are not among the least favored of the maxims of the law.

It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject. She has, in fact, literally complied with the compact, in its most rigid construction; for she adopted the very statute of Virginia, in the first instance, and literally gave to her citizens the full benefit of twenty years to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisos and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power.

It is not to be questioned, that laws, limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed, that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia, to believe, that she *would have *467] wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented, of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and for ever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact every law applicable to real estate.

It is argued, that limitation laws, although belonging to the *lex fori*, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law; it existed in a state of nature, and is only modified by society, according to the discretion of each community. What is the evidence of an individual having abandoned his rights or property? It is clear, that the subject is one over which every community is at liberty to make a rule for itself; and if the state of Kentucky has established the rule of seven years' negligence to pursue a remedy, there can be but one question made upon the right to do so: which is, whether, after abstaining from the exercise of this right for twenty years, it is possible now to impute to her the want of good faith in the execution of this compact.

Virginia has always exercised an analogous right, not only in the form of an act of limitation, but in requiring actual seating and cultivation. In

the early settlement of the country, the man who *received a grant of land and failed, at first, in three, and afterwards, in five years, to seat and improve it, was held to have abandoned it; it received the denomination of lapsed land, was declared to be forfeited (Mercer's Abr.), and any one might take out a grant for it. The last member of the eighth article of this compact, distinctly recognises the existence of the power in Kentucky to pass similar laws; notwithstanding the restrictions of the seventh article, and also the probability of her resorting to the policy of such laws. It restricts her from passing them for six years; and what is remarkable, the protection of this restriction is expressly confined to the citizens of the two states; leaving the plaintiff below, and all others, not citizens of Virginia, to an uncontrolled exercise of such a power. Forfeiture is the word used in the old laws, and forfeiture is that used in the compact, and the term is correctly applied; since it supposes a revesting in the commonwealth: and it is remarkable, how scrupulously Kentucky has adhered to the Virginian principle in her seven years' law, since the benefit of it is confined to such only as claim under a grant from the commonwealth; thus literally applying the Virginian principle, of a revesting in the commonwealth and a regranting to the individual.

Upon the whole, we are unanimously of opinion, that the court below charged the jury incorrectly on this point; and if it stood alone in the cause, the judgment would be reversed. But as it must go back, there are two other points raised in the bill of exceptions which it is necessary to consider here.

The one is upon the sufficiency of the power of attorney executed by John to Robert Oliver, and under which the latter executed a deed to Barney, to revest in him the fee-simple of the land. Upon looking into that instrument, we are satisfied, that although not professional in its style and form, it contains sufficient words to support the deed; and there was no error in the decision of the court as to this point.

The other question is one of more difficulty. Upon the face of the deed from Barney to Oliver, and the reconveyance from Oliver to Barney, there are recited several conveyances of parcels of the tract granted to Barbour, to several individuals, and particularly of one of 11,000 acres to one Berryman. The case on which the instruction was prayed makes out that Barney proved Hawkins to have trespassed within the limits of *the 50,000 acres; but it was insisted, that he ought also to have proved the [*469 trespass to be without the limits of the tract shown to have been conveyed away by himself. On the other side, it was insisted, that the *onus* lay on Hawkins, to prove that his trespass was within the limits of one of those tracts, and the court charged in favor of Barney. This we conceive to be no longer an open question; it has been solemnly decided, in a series of cases in Kentucky, that the party, offering in evidence a conveyance containing such exceptions, is bound to show that the trespass proved is without the limits of the land so sold or excepted. 3 A. K. Marsh. 20; 6 Litt. 281; 1 T. B. Monr. 142. The only doubt in this case was, as to which of the two parties this rule applies, since both, and Hawkins first in order, produced in evidence a deed containg the exceptions. But, whether by the exceptions, or by the deed, Hawkins's purpose was answered, if he proved the whole land out of Barney. Not so with Barney; for in the act of proving the re-investment

of the estate in himself, he proved it to be with the exceptions mentioned, and therefore, the rule unquestionably applied to him. From these observations, it results, that the court below erred in refusing to instruct the jury according to the prayer of Hawkins; to wit, "that if they believed the evidence, the plaintiff, Barney, had no right of entry when this suit was instituted, and that unless he showed that the 11,000 acres recited to be conveyed to Berryman by Barney did not cover the land in question, he was not entitled to recover in that suit." The judgment is reversed, and the cause remanded for a *venire facias de novo*.

Judgment reversed.

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*470] *Josiah Lewis, Frances Lewis and William Rawle, Executors and Executrix of William Lewis, deceased, and the said Josiah Lewis, Margaret and Louisa Agaid, and Lewis H. Conover, heirs, &c., of said Lewis, and Richard Willing, Eliza M. Willing, Thomas Willing and George C. Willing, heirs, &c., of Charles Willing, deceased, Appellants, *v.* Humphrey Marshall, Jacob Feebeck, Henry Richey, John Fowler and others, Appellees.

Parties.—Statute of limitations.—Evidence of death.

By a statute of Kentucky, passed in 1796, several defendants, who claim separate tracts of land, from distinct sources of title, may be joined in the same suit.

The statute of limitations of Kentucky, under which adverse possession of land may be set up, prescribes the limitation of twenty years within which suit must be brought; and provides, "that if any person or persons entitled to such writ or writs, or title of entry, shall be, or were, under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within the commonwealth, at the time such right accrued or came to them, every such person, his or her heirs, shall and may, notwithstanding the said twenty years are or shall be expired, bring or maintain his action, or make his entry, within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards."

The entries on the register of burials of Christ's Church, St. Peter's and St. James's, in Philadelphia, and the entries of the death of the members of the family, in a family Bible, are evidence, in an action for the recovery of land in Kentucky, to prove the period of the decease of the person named therein.[1]

The statute of limitations of Kentucky is a bar to the claims of an heir to a non-resident patentee, holding under a grant from the state of Kentucky, founded on warrants issued out of the land-office of Virginia, prior to the separation of Kentucky from Virginia, if possession has been taken in the lifetime of the patentee. Had the land descended to the heirs, before a cause of action existed, by an adverse possession, the statute could not operate against them, until they came within the state; if adverse possession commenced prior to the decease of the non-resident patentee, his heirs are limited to ten years from the time of the decease of their ancestor, for the assertion of their claim.

That a statute of limitations may be set up in defence, in equity, as well as at law, is a principle well settled.[2]

Statutes of limitations have been emphatically and justly denominated statutes of repose; the best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles; nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate; labor is paralysed, when the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to the individuals. The legislature of Kentucky have, therefore, wisely provided, that unless

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[1] See Hyam *v.* Edwards, 1 Dall. 2; Kingston *v.* Lesley, 10 S. & R. 383.

[2] Peyton *v.* Stith, *post*, p. 485.

suits for the recovery of land shall be brought within a limited period, they shall be barred by an adverse possession.[1]

Lewis *v.* Marshall, 1 McLean 16, reversed, in part.

*Appeal from the Circuit Conrt of Kentucky. The appellants claimed, in their bill, under the heirs of Charles Willing, deceased, a [*471 tract of land, in the state of Kentucky, by virtue of certain entries made in the lifetime of Charles Willing, with the proper surveyor, on the 27th of December 1783, and amended on the 11th and 12th of March 1784; and carried into grant by virtue of legal and valid surveys. This entry was averred to be good and valid. The patent was dated thirty years before the filing of the bill.

The bill stated, that Thomas Barbour had, by and under a void entry, obtained a legal title, elder in date, to the title held by Charles Willing, to a large portion of the land included in the patent to Charles Willing, and that the defendants had become vested with the title to the whole or parts of the land patented to Barbour, and were in possession of the same. It prayed, that those who held the said land under the elder legal title of Barbour might be decreed to convey the same to them; and for general relief.

The defendants, in their answer, resisted the equity asserted by the complainants, and asserted, that the entries of Charles Willing were void. They set up, in addition to the entry of Barbour, other claims and entries, under which they, other than Marshall and Fowler, originally settled and held. The validity of all those entries was denied by the complainants. These defendants relied upon twenty years' adverse possession, prior to the commencement of the suit.

Humphrey Marshall resisted the equity claimed in the bill, and asserted in himself a previously-acquired title to 12,313 acres, part of the land in contest, under an entry in the name of Isaac Halbert. That he afterwards acquired from John Fowler an interest in Barbour's patent, exhibiting evidence of this asserted title. He stated, that for a valuable consideration, he had sold and conveyed, under Barbour's title, certain portions of land to his co-defendants; and exhibited the deeds showing the extent of the same, and of the possession of each under the claim of Barbour. That these defendants were found by him in possession, under claims adverse to Barbour's, and he compromised with them, and gave them conveyances.

*Thomas Barbour, on the 23d of September 1804, conveyed the [*472 4530 acres, patented by him to John Fowler. In 1813, Halbert conveyed his title to H. Marshall. Neither Fowler nor Marshall, at these dates, was in possession of any part of the land, under either title, nor had either of them ever been in possession of any part of the interference. In 1819, Marshall and Fowler entered into a contract, by which Marshall was authorized to sell and convey to persons in possession, the title of Barbour.

In support of the heirship of the complainants, as the heirs of Charles Willing, the patentee, a deposition of William Jackson was taken, who deposed that he was acquainted with Charles Willing, late of Pennsylvania, and that he died in 1798; that Thomas Willing, Richard Willing, Elizabeth Willing and George C. Willing, were his only children and heirs. Also,

[1] Leffingwell *v.* Warren, 2 Black 606.

the deposition of A. G. Bird, the clerk of Christ's Church, in Philadelphia; who swore that he had the register book of burials of said church, and copied from said book an entry which was authenticated, and read as follows: "Burial in Christ's church-yard, 23d March 1788, Charles Willing."

Richard Willing, of the city of Philadelphia, deposed, that he had the family bible of his father, Thomas Willing, who, he swore, was very particular in entering the names of the births, marriages and deaths of his, the said Thomas's, brothers and sisters; and that in said bible was the following entry of record: "Charles Willing, son of Charles and Ann Willing, died at Coventry farm, the 23d March 1788, and was interred in Christ's church-yard."

The circuit court dismissed the bill, principally, on the ground that the statute of limitations of the state of Kentucky, as applied to courts of equity, barred the claim of the complainants. The complainants appealed to this court.

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

For the *appellants*, it was contended, that the circuit court erred in dismissing the bill; as, if Fowler had parted with his interest in the land to Humphrey Marshall, then a decree should *have gone against all the *473] defendants, and particularly Humphrey Marshall, as time did not operate against the complainant, as to his title, he never having been in the possession of any part of the land. That the statute did not operate against the complainant's title, as to the defendants in possession, until they acquired the title of Barbour; because, until that title was vested in them, there was, in equity, no cause of action against them, as to the complainants in this cause. If the proof in this cause establish the fact that Charles Willing died in 1788, then the complainants are within the saving of the act of 1796, if that act be construed as is contended for, and was decided in the court below.

For the *defendants*, it was argued, that the possession of the defendants was clearly proved to have taken place in 1795, before the death of Charles Willing, who held at the time the title now set up by his heirs, he having died in 1798. The statute of limitations began to run against the complainants, and their ancestors, the time the defendants' possession commenced. He and his heirs had ten years, by special proviso, to institute suit; but failing to do it, were barred; the rule being the same in equity as law. Being non-residents, the law cast on them the privilege of ten years thereafter, within which to institute suit; they failed to do so. But in 1822, they filed their bill. Not only the ten years from the death of their ancestor were gone, but more than twenty years from the time of taking possession by defendants had elapsed. The consequence was, a total loss of the right of action, both at law and in chancery.

McLean, Justice, delivered the opinion of the court.—This suit in chancery was brought into this court by an appeal from the decree of the circuit court of Kentucky. In their bill, the complainants charge, that Charles Willing, under whom they claim, in his lifetime, made an entry with the proper surveyor, on the 27th of December 1783, and amended the same on

the 11th and 12th of March 1784, for 32,000 acres of land, on certain treasury-warrants, beginning 1280 poles south-west of the Lower Blue Licks, &c.; which entry *is alleged to be valid, and was carried into grant, after a legal survey had been made. The bill further states, that [*474 Thomas Barbour had, by virtue of a void entry, obtained the legal title, elder in date than the patent to Willing, for a part of the land covered by Willing's entry, survey and patent; and that the defendants are in possession of the land, and claim title to it under Barbour's patent and other claims. A release of their title is prayed, &c.

The defendants in their answer insist, that Willing's entry is void; and other claims than Barbour's are asserted, under which the defendants, except Marshall and Fowler, originally settled. Marshall sets up a title in himself, of elder date, under an entry in the name of Isaac Halbert, for 12,313 acres. That he afterwards purchased an interest in Barbour's patent from Fowler, and conveyed to his co-defendants. These deeds were executed several years before the commencement of this suit. The entries under which the defendants claim are, some, if not all, of prior date to Willing's; but their validity is contested by the complainants. In defence, an adverse possession of twenty years before the commencement of this suit, is relied on.

By the pleadings, the validity of the complainants' entry is involved, and also those under which the defendants claim. If Willing's entry should be held good, it might then be important to examine into the validity of the defendants' entry, which are of prior date. But if Willing's entry should be held bad, there would be an end to the controversy; as Barbour's patent, under which the defendants claim, is older than Willing's. If the title by adverse possession shall be sustained, as to all the defendants, no inquiry need be made into the validity of the respective entries.

No exception is taken to joining several defendants in the same suit, who claim separate tracts of land, from distinct sources of title. This is allowed by a statute of Kentucky, passed in 1796, which was designed to lessen the expense of litigation.

The statute under which the adverse possession is set up, prescribes the limitation of twenty years, within which *suit must be brought; and provides, "that if any person or persons entitled to such writ or writs, [*475 or such title of entry, as aforesaid, shall be, or were, under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within the commonwealth, at the time such right or title accrued or coming to them, every such person, his or her heirs, shall and may, notwithstanding the said twenty years are or shall be expired, bring or maintain his action, or make his entry, within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards." It is not pretended, that the ancestor of the complainants was ever within the state of Kentucky, after possession of the land in controversy was taken by any of the defendants; consequently, had he lived and prosecuted his action, the statute could not bar his recovery. But his representatives, in asserting their right, must bring themselves within the limitation of ten years from the time of his decease, if the adverse possession were taken prior to that period. It is, therefore, important to ascertain the time of Charles Willing's death.

To prove this, the following extract from the register book of burials in Christ's Church, St. Peter's and St. James's, in Philadelphia, is read as

evidence: "Burial in Christ's church-yard, March 23d, 1788, Charles Willing."—Signed, Albert G. Bird, clerk; and duly certified by the bishop, &c. The clerk testifies, that the extract is truly copied from the original register-book of burials. Richard Willing, a witness, also states, that he is in possession of a family bible, kept by his deceased father, Thomas Willing, Esquire, who was very particular in making entries of the births, marriages and deaths of all his brothers and sisters and their children, and that the following entry is found in the book, in the handwriting of his father: "Charles Willing, son of Charles and Ann Willing, died at Coventry farm, the 23d March 1788, and was interred in Christ's church-yard." William Jackson, of Philadelphia, being sworn, states, that he was acquainted with Charles Willing, late of the state of Pennsylvania; and that he died sometime in the year 1798; leaving by his first wife, Thomas Willing, Richard
*476] Willing and *Eliza M. Willing, and by his second wife, George C. Willing, his only children and heirs-at-law.

If the ancestor of the complainants died in 1788, it is admitted, that the adverse possession cannot bar the recovery; as possession was not taken by any of the defendants, until after that period.

The entries in the register of burials, and in the family bible, are admissible evidence, in a case like the present; and if there were no other proof of the death of Charles Willing, the ancestor of the complainants, they might be considered as showing his death in 1788. But the deposition of Jackson, who was acquainted with Charles Willing, shows that he died in 1798; and he is identified as the ancestor, by the names of his children, stated by the witness. This statement is not contradictory to the entry in the register, or in the family bible. There must have been two persons named Charles Willing, who died at the periods stated; but the latter was the person in whose name the title set up by the complainants originated.

To bring the defence within the statute of limititations, it must appear, that possession of the land was taken by the defendants in the lifetime of Charles Willing. Had the land descended to his heirs, before a cause of action existed, by an adverse possession, the statute could not operate against them, until they came within the state. But it appears in this case, that the adverse possession commenced prior to the decease of Willing; and consequently, his heirs were limited to ten years from that time, for the operation of their claim. This was not done.

By the testimony, an adverse possession by the defendants and those under whom they claim, except Marshall, for more than twenty years before the commencement of this suit, is clearly shown. John Fowler, one of the defendants, though served with process, did not answer the bill; and no decree *pro confesso* was taken against him, in the circuit court. Humphrey Marshall, another defendant, who answered the bill, sets up adverse possession specifically in himself. It appears from his answer, that he conveyed, long before the commencement of the suit, to his co-defendants.
*477] He *conveyed to them, by deeds in fee simple, "with covenants to refund the purchase-money, in case of loss by any adverse claims;" which gives to him, as he alleges in his answer, a right to defend in his suit.

That a statute of limitations may be set up in defence in equity, as well as at law, is a principle well settled. It is not controverted by the counsel for the complainants. But he insists, that the statute did not operate against

the complainants' title, as to the defendants in possession, until they acquired Barbour's title. The defendants entered under titles adverse to that claimed by the complainants. It is not, in this view, a question whether these titles were paramount to the complainants, in equity or at law. They were adverse, and within the provisions of the statute; and if the limitation had run, before the commencement of this suit, the right of entry was tolled, and no relief can be given in chancery.

Whatever may have been the state of the title, as it regards the defendants, it is difficult to conceive, how the complainants could have a right which they were unable to enforce. If the elder patent vested in Barbour the legal title, and might have been set up by the defendants, before they claimed under it, to defeat an action of ejectment brought by the complainants; they might have sought relief in a court of chancery. Their entry was made prior to the emanation of Barbour's grant; consequently, they had the right to contest the validity of his entry.

The limitation act of 1809, which requires suit to be brought within seven years after an adverse possession commences, under a connected title, in law or equity, from the commonwealth, would protect the possession of the defendants. The facts of the case bring them within the provisions of this act; but it has not been set up in the answers, nor relied on in the argument.

Statutes of limitation have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is *paralyzed, where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals. [*478
The legislature of Kentucky have, therefore, wisely provided, that unless suits for the recovery of land shall be brought within a limited period, they shall be barred by an adverse possession.

The court are of the opinion, that the defendants, except Marshall, having brought themselves within the provisions of the act of 1796, in showing an adverse possession of more than twenty years, before the commencement of this suit, have sustained their defence, and consequently, that the bill of the complainants, as to them, must be dismissed.

As the extent of the interference of Marshall's claim, under the patents of Barbour, and Halbert and others, with Willing's entry, does not appear from the proof in the cause, and as such proof is essential, to enable the court to determine on the respective rights of the parties; the cause may be certified to the court below, as to him, for further proceedings.

Fowler, one of the defendants, has not answered the bill; the merits of his claim cannot now be investigated. The cause, as to him also, may be sent down for further proceedings.

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, as to all the respondents and appellees,

except Humphrey Marshall and Fowler; and as to him, the said Marshall, it is adjudged and decreed by this court, that the decree of the said circuit court be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, as to the said Humphrey Marshall, according to law and justice, and in conformity to the opinion and decree of this court; and it is further adjudged and decreed by this court, that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein, as to the said defendant Fowler, who did not answer the bill, and against whom there was no decree.

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*479] *The Bank of the United States, Plaintiff in error, *v.* George B. Martin, Defendant in error.

Jurisdiction.

The district court of the United States for the state of Alabama has not jurisdiction of suits instituted by the Bank of the United States; this jurisdiction is not given in the act of congress establishing that court, nor is it conferred by the act incorporating the Bank of the United States.

Error to the District Court of Alabama.

Webster stated, that on inspecting the record of the proceedings in the court below, he was satisfied, the district court of Alabama had not jurisdiction of suits instituted by the Bank of the United States. It has already been decided, that the courts of the United States have jurisdiction in suits brought by the bank, only by virtue of the special provision in the charter; and the right of the bank to sue in the district court of Alabama is not given by the act incorporating the bank. He referred to the tenth section of the act of congress of September 1789: and to the act of the 21st of April 1820, constituting the courts of Louisiana. *Bank of United States* v. *Deveaux*, 6 Cranch 61.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the court of the United States for the district of Alabama, dismissing a suit brought by the Bank of the United States, in that court, for want of jurisdiction. Consequently, the jurisdiction of that court presents the only question to be considered.

The act, which establishes a district court in the state of Alabama, declares, that the judge thereof "shall in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled, 'an act to establish the judicial courts of the United States,' and an act entitled, 'an act in addition to the act entitled an act to establish the judicial courts of the United States,'" approved the 2d of March 1793. The 10th section of the judiciary act pro-
*480] vides, "that the *district court in Kentucky shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except appeals and writs of error hereinafter made cognisable in a circuit court, and shall proceed therein in the same manner as a circuit court." The 11th section of the same act describes the jurisdiction of the circuit court. A bank of the United States did not then exist; and it was determined by this court

in the case of the *Bank of the United States* v. *Deveaux*, "that the courts of the United States could not take jurisdiction of actions brought by the bank, unless the declaration contained averments which enabled the court to look behind the corporate character of the plaintiff."

The judiciary act, not having given the circuits courts jurisdiction over causes instituted by the Bank of the United States, cannot be construed to have given that jurisdiction to the district court of Kentucky. Of course, it has not been conferred on the district court of Alabama, by the act establishing that court. Neither has it been conferred by the act establishing the Bank of the United States. The judgment is affirmed, with costs.

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

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*Alexander M. Peltz *et al.*, Plaintiffs in error, *v.* Joseph S. Clarke, Defendant in error. [*481

Mortgage.

It is undoubtedly well settled, as a general rule, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor; yet the legal title is not technically released by receiving the money. This rule must then be founded on an equitable exercise by courts of law over parties in ejectment; it would be contrary to the plainest principles of equity and justice, to permit a stranger, who had no interest in the mortgage, to set it up, when it had been satisfied by the mortgagor himself, to defeat his title; but if this stranger had himself paid it off—if this mortgage had been bought in by him—he would be considered as an assignee, and might certainly use it for his protection.

The defendant in the circuit court was the owner of the equitable estate, and had paid off the mortgage, on his own account, and for his own benefit; the incumbrance, under these circumstances, was the property of him to whom the estate belonged in equity. The reason of the rule does not apply to such a case.[1]

Peltz *v.* Clarke, 2 Cr. C. C. 703, affirmed.

Error to the Circuit Court of the District of Columbia, for the county of Washington.

In the circuit court, the plaintiffs in error instituted an action of ejectment, for the recovery of a lot of ground in the district of Columbia. It appeared in evidence, that under a decree of the circuit court for the county of Washington, the estate of John Peltz, deceased, had been sold by Charles Glover and John Davis, trustees appointed for the purpose of making sale of the same, for the payment of his debts; and that the defendant in error had purchased at the sale, the property in controversy. No deed had been made by the trustees to the purchaser, in consequence of the loss of some title papers; but he had paid the greater portion of the purchase-money.

John Peltz, the ancestor of the plaintiffs in error, had, previously, to his decease, mortgaged the estate in controversy to Frederick Gammar; who

[1] See Barnes *v.* Mott, 64 N. Y. 397; Green *v.* Milbank, 3 Abb. N. C. 138.

proceeded on the mortgage, in chancery, against the trustees, Charles Glover and John Davis, and against Alexander and Michael Peltz, as heirs of John Peltz; and obtained a decree of foreclosure, and for a sale of the mortgaged premises. The defendant in error, after the decree, having been so advised *482] by the mortgagor, paid to *him, with the consent and approbation, and in the presence of Mr. Glover, one of the trustees, the whole amount due upon the mortgage; the sum paid being considered as part of the purchase-money due under the purchase from the trustees. On this payment being made, the mortgagor gave to the defendant in error, a receipt for the amount of the mortgage, and an order to enter the suit on the mortgage "settled." On the docket of the court, an entry was made in the mortgage suit, "settled, says complainant, see order."

The plaintiffs claimed the property as the heirs-at-law of John Peltz.

The plaintiffs prayed the court to instruct the jury, that the mortgage so paid was not outstanding and subsisting, so as to bar the plaintiffs' right to recover; which the court refused to do; to which the counsel for the plaintiffs excepted; and judgment having been entered on the verdict for the defendant, the plaintiffs prosecuted this writ of error.

Key, for the plaintiffs in error, contended, that although the defendant might have a good defence in equity, for the mortgage money paid by him, he had no defence at law. He cited Runnington on Ejectment 119; Esp. N. P. 457–8; 6 Johns. 34; 2 Har. & McHen. 9, 17; 3 Ibid. 399.

Jones, for the defendant, said, that on the plaintiffs' own showing, there is a mortgage in fee, a forfeiture, and a decree of foreclosure. If a mortgage is satisfied by the mortgagor, it is admitted, that the mortgage cannot be set up; but here, the purchaser, before he received a deed from the trustees, under their sale, paid off the mortgage; and he sets it up for his protection. Having paid the amount of his purchase from the trustees, within a small sum, the defendant stands on his possession, and having paid for his own benefit the outstanding mortgage.

Marshall, Ch. J., delivered the opinion of the court.—This was an ejectment, brought by the plaintiffs in error against the defendant, in the *483] circuit court of the United States for the district of Columbia. *The plaintiffs, who are the heirs of John Peltz, gave the title of their ancestor in evidence.

The defendant then proved, that the land for which this ejectment was brought, was sold under a decree of the circuit court for the district of Columbia, and purchased by him, he being the highest bidder. That he gave his notes to Charles Glover and John Davis, the trustees appointed to make the sale under the decree; was put into possession of the premises by them; had paid nearly all the purchase-money, and declared his readiness to pay the residue, on receiving a title. He also gave in evidence a deed of mortgage, executed by John Peltz, in his lifetime, conveying the premises to Frederick Gammar.

The plaintiffs then proved, that a decree for the foreclosure and sale of the mortgaged premises had been obtained by the representatives of the mortgagee. The defendant, acting under the advice of one of the trustees, appointed to execute this decree, paid in part for his purchase, the money

due upon the mortgage, and the return showed the admission of the mortgagee, that it was settled. The plaintiffs prayed the court to instruct the jury, that this mortgage was not an outstanding title which could bar the plaintiffs' right to recover. The court refused to give this instruction, and the plaintiffs excepted to its opinion. The jury found a verdict for the defendant, and the judgment rendered on that verdict has been removed into this court by writ of error.

It is undoubtedly well settled, as a general principle, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. This is fully proved by the cases cited in argument by the counsel for the plaintiffs. Yet the legal title is not technically released, by receiving the money. This rule must then be founded on an equitable control exercised by courts of law over parties in ejectment. It would be contrary to the plainest principles of equity and justice, to permit a stranger, who had no interest in the mortgage, to set it up, when it had been satisfied by the mortgagor himself, to defeat his title. But if this stranger had himself paid it off, if this mortgage had been bought in by him, he would be considered as an assignee, and might certainly use it for his protection. *In the case at bar, the defendant is the owner of the equitable [*484 estate, and has paid off the mortgage, on his own account, and for his own benefit. This incumbrance, under these circumstances, is the property of him to whom the estate belongs in equity. The reason of the rule does not apply to the case. We do not think, that the mortgagor, his interest having been sold under a decree of court, could demand a reconveyance from the mortgagee to himself, the mortgage being satisfied by the purchase under that decree. There is no error in the judgment of the circuit court; and it is affirmed, with costs.

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

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*Townsend B. Peyton and others, Appellants, *v.* Joseph Stith, [*485
Appellee.

Land-law of Kentucky.—Adverse possession.—Landlord and tenant. Constructive possession.

Jenkin Phillips, on the 18th May 1780, "enters one thousand acres on the south-west side of Licking creek, on a branch called Buck-lick creek, on the lower side of said creek, beginning at the mouth of the branch, and running up the branch for quantity, including three cabins;" a survey was made on this entry, the 20th November 1795, taking Buck-lick branch, reduced to a straight line as its base, and laying off the quantity in a rectangle on the north-west of Buck-lick; a patent was granted to Phillips on this survey, on the 26th June, 1796. This entry is sufficiently descriptive, according to the well-established principles of this and the courts of Kentucky, and gave Phillips the prior equity to the land, which has been duly followed up and consummated, by a grant, within the time required by the laws of Virginia and Kentucky, without any *laches* which can impair it. The proper survey under this entry was to make the line following the general course of Buck-lick the centre instead of the base line of the survey,

and to lay off an equal quantity on each side, in a rectangular form, according to the rule established by the court of appeals in Kentucky, and by this court.

Peyton claimed the land, under an entry made by Francis Peyton, and a survey on the 9th October 1784, and a patent on the 24th December 1785, so that the case was that of a claim of the prior equity, against the elder grant, which it was admitted, carried the legal title.

Stith took possession, as tenant of the heirs of Peyton, under an agreement for one year, at twenty dollars per year; possession was afterwards demanded of him, on behalf of the lessors, which he refused to deliver—and a warrant for forcible entry and detainer was, on their complaint issued against him, according to the law of Kentucky, and on an inquisition, he was found guilty; but on a traverse of the inquisition, he was acquitted, and an ejectment was brought against him by the lessors; eight days after the finding of the inquisition, Stith purchased the land from Phillips. This is the case of on unsuccessful attempt by a landlord, to recover possession from an obstinate tenant, whose refusal could not destroy the tenure by which he remained on the premises, nor impair any of the relations which the law established between them; the judgment on the acquittal concluded nothing but the facts necessary to sustain the prosecution, and which could be legally at issue; title could not be set up as a defence; Stith could not avail himself of the purchase from Phillips. A judgment for either party left their rights of property wholly unaffected, except as to the mere possession; the acquittal could only disaffirm the forcible entry, as nothing else was at issue; the tenancy was not determined Peyton was not ousted; and the possession did not become less the possession of the landlord by any legal consequences resulting from the acquittal.

In the case of Willison *v.* Watkins, 3 Pet. 44, this court considered and declared the law to be settled—that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure, with the knowledge of the landlord, was a forfeiture of his term; that his possession became so far adverse, that the act of limitations would begin to run in his favor, from the time of such forfeiture, and the landlord could sustain an ejectment *against him, without notice to quit, at any time before the period prescribed by the statute had expired, by the mere force of the tenure; without any other evidence than the proof of, the tenancy; but that the tenant could in no case contest the right of his landlord to possession, or defend himself by any claim or title adverse to him, during the time which the statute had to run. If the landlord, under such circumstances, suffers the time prescribed by the statute of limitations to run out, without making an entry or bringing a suit, each party may stand upon their right; but, until then, the possession of the tenant is the possession of the landlord.

*486]

From the time of the purchase by Stith from Phillips, although it became adverse for the specified purposes, it remained fiduciary for all others.

The same principles which would prevent a tenant from contesting his landlord's title in a court of law, would apply with greater force in a court of equity, to which he would apply for the quieting of a tortious possession, and a conveyance of the legal title; if the relations existing between them could deprive them of defence at law, a court of chancery would not afford him relief as a plaintiff, during their continuance; before he can be heard in either, in assertion of his title, he must be out of possession, unless it has become legalized by time; and even then, there may be cases where an equitable title had been purchased, under such circumstances as could justify a court of equity in withholding their aid to a *malâ fide* purchaser.[1]

A patent for unimproved lands, no part of which was in the possession of any one, at the time it issued, gives legal seisin and constructive possession of all the land within the survey.

Courts of equity adopt the same rule as to possession, to bar a recovery in ejectment, as courts of law.

Appeal from the Circuit Court of Kentucky. In that court, Joseph Stith, the appellee, filed a bill for an injunction, to stay perpetually proceedby the appellants, on a judgment obtained by them, in an ejectment instituted by them, as the devisees of Francis Peyton, against Joseph Stith, the

[1] It is the settled law of the country, that a tenant shall not resist the recovery of his landlord, by virtue of an adverse title acquired during his lease. Chief Justice Tilghman says, "this principle is founded on sound policy, because it tends to encourage honest and good faith between landlord and tenant." Galloway *v.* Ogle, 2 Binn. 473. And in the same case, Judge Yeates says, that to permit him to do so is manifestly against good faith, and tends to great immorality. Id. 473.

appellee. The relief sought by the complainant in the circuit court was founded on the allegation, that one Jenkin Phillips, under whom he claimed, made the first entry on the land in controversy; although it was admitted, that the plaintiffs in the ejectment held under the eldest patent.

The circuit court decreed a perpetual injunction, as to so much of the land as fell within a certain location made under a survey ordered by that court, within the bounds of Jenkin Phillips, conveyed to the complainant. From the decree, the respondents appealed to this court. The facts are fully stated in the opinion of the court.

*The case was argued by *Taylor* and *Jones*, for the appellants; and by *Bibb* and *Daniels*, for the appellees. [*487

Baldwin, Justice, delivered the opinion of the court.—The subject of this controversy is a tract of land, situated on Kingston fork of Licking creek, and Buck-lick creek, a branch thereof. Stith, the complainant below, claims title under an entry made by Jenkin Phillips, on the 18th of May 1780, in the following words. "Jenkin Phillips enters one thousand acres on the south-west side of Licking creek, on a branch called Buck-lick creek, on the lower side of said creek; beginning at the mouth of the branch, and running up the branch for quantity, including three cabins." A survey was made on this entry, on the 20th November 1795, taking Buck-lick branch, reduced to a straight line, as its base, and laying off the quantity in a rectangle on the north-west side of Buck-lick. A patent was granted to Phillips on this survey, on the 26th of June 1796, who, on the 8th of February 1814, conveyed to Stith 666 acres thereof, including the land in controversy. Stith was then in possession of the land, under the circumstances which will be hereafter referred to.

The appellant claimed under an entry made by Francis Peyton for 1000 acres, a survey on the 9th of October 1784, and a patent on the 24th of December 1785; so that the case presented was, of Stith claiming the prior equity against the elder grant, which, it is admitted, carried the legal title. No question arose on the validity of Peyton's entry, as his elder grant was conclusive, unless an equity arose in Phillips, by his prior entry; but the validity of this entry was questioned by the appellant, on several grounds, involving no general principles which are necessary to be settled by the court, but only those arrising on matters of fact and detail, which have no bearing on the merits of the case. We entertain no doubt of the validity of the entry: its calls are sufficiently descriptive, according to the well-established principles of this, and the courts of Kentucky, and give Phillips the prior equity to the land, which has been duly followed up and consummated by a grant, within the time required by the *laws of Virginia and Kentucky, without any *laches* which can impair it. [*488

This entry was much contested, both parties objecting to the survey as executed in November 1795. The circuit court were of opinion, that the entry ought to be so surveyed, as to make the line following the general course of Buck-lick, the centre, instead of the base line of the survey, and to lay off an equal quantity on each side, in a rectangular form, according to the rule established by the court of appeals in Kentucky, in Hardin 59, 367; 1 Bibb 79, 107; 2 Ibid. 122; 4 Ibid. 153, 383; and in this court, in 2 Wheat. 323, with which we fully concur. As the survey of 1795, and the

one directed by the circuit court, both embrace all the land in dispute about which any contest arises, it is unnecessary to not ce them minutely, as in our opinion, the entry and survey of Phillips gave him an equitable title which attached to the land, elder than Peyton's, and would entitle the complainant to a decree; unless the case discloses such facts as, independent of the original titles, present a bar to the relief he asks.

It is alleged by the appellant, that one Jeremiah Wilson, in the year 1792 or 1793, came to the land in question, within the lines of Peyton's patent, and resided there until the month of March 1795, when he took a lease for five years from the agent of Peyton, and continued to reside there for some years; that from Wilson's first settlement, there was a continued uninterrupted possession of the land by tenants, and persons holding under Peyton and his heirs, till Stith, the complainant, took possession, as tenant of Peyton's heirs, under an agreement with one Mitchell, who acted as their agent, under a verbal authority from some of them; and that he remained there until December 1813, when possession was demanded of him on behalf of the appellants, which he refused to deliver up. Whereupon, a warrant of forcible entry and detainer was, on their complaint, issued by a justice of peace, on the 27th of January 1814, and an inquisition taken on the 1st of February, finding Stith guilty; but that on a traverse of the inquisition, in April following, he was acquitted. An ejectment was then brought against him by the appellants, and judgment rendered for the plaintiffs, at the
*489] November term of the circuit court *1816; when the present bill was filed, praying for an injunction against further proceedings on the ejectment, and a conveyance of the legal title to the land recovered. An injunction was ordered. The respondents, in their answer, allege, that the complainant was put into possession, as the tenant of their ancestor, by his agent; but afterwards took protection under Jenkin Phillips, with the fraudulent purpose of cheating and defrauding him.

To this answer, a special replication was put in by the complainant, averring that he did not enter as tenant aforesaid; and sets up the proceedings of forcible entry and detainer, and his acquittal; and relies on them for further replication in bar of the allegation. An amended answer was, by leave of the court, and on terms, afterwards filed, averring that the complainant rented the land and entered thereon as the tenant of Peyton, and continued to reside as such tenant, until he purchased from Phillips; and that he ought not to be permitted to set up any adverse title, until he would surrender possession to the respondents. They rely on their uninterrupted possession, plead the act of limitations of 1809 as a bar to the relief sought by the bill, and aver, that the bill ought not to be sustained, as the complainant is colluding with another, contrary to every principle of morality.

To this amended answer, the complainant demurred: 1. Because the act of 1809 was a violation of the compact between the states of Virginia and Kentucky. 2. If the law is not void, the respondents cannot avail themselves of it, as they were not, and the complainant was, settled on and actually in possession of the premises in question, when the bill was filed; holding and claiming under the title set forth in his bill. 3. That the respondents had not the actual and continual possession for the number of years required by the law, next preceding the filing of the bill, but were ousted and possession held by complainant. 4. That the complainant and

respondent were in actual litigation, in the action of ejectment, of their relative rights under their titles, on the 1st January 1816, and long before, and until the filng of this bill. On these pleadings, and a great mass of depositions taken in the cause, the circuit court rendered a decree for the complainant.

On a careful examination of the whole record, we are *abundantly satisfied, that the appellants have fully established the fact of the [*490 tenancy of Stith, at the time he entered on the land. It is positively sworn to by three witnesses, and contradicted by none. His demurrer to the amended answer admits it most distinctly; as well as the continuance of the tenancy down to his purchase from Phillips. If this part of the case rested only on the evidence in the cause, unsupported by the demurrer, we should require nothing more to satisfy our minds; but connected with the solemn admission on record, it presents a case cleared of all possible doubt. The agreement by which he rented the land, was for one year, at a rent of twenty dollars, payable in November 1811. By continuing in possession, he remained a tenant from year to year, his possession being, in law, the possession of Peyton or his heirs, with all the relations of landlord and tenant subsisting between them in full force.

It appears, that Stith refused to surrender up the premises, on a demand made by the agent of Peyton, in December 1813; in consequence of which, he instituted a proceeding before a justice of the peace, in pursuance to the law of Kentucky relating to forcible entry and retainer. 4 Litt. Laws 182. This law contains provisions similar to the statutes of Ric. III., adopted or substantially re-enacted in all the states; and authorizes the same proceedings against tenants, who, after the expiration of their term, refuse to restore the possession to the landlord. On this proceeding, an inquisition was found against Stith, on the 1st of February 1814; but he was acquitted on a traverse tried in April following. The record does not state explicitly the object of this process, whether it was to proceed for the forcible entry, or only for the detainer; the warrant is in the form directed by the second section of the law, embracing both, which are charged as having been committed on the 22d of December 1813. This, connected with the proof in the cause, and the admission of the tenancy of Stith, in his demurrer to the amended answer to the bill, leaves no doubt, that the proceeding was against him as a tenant holding over, and coming within the provisions of the 16th section of the law. This is the more apparent, when there appears no evidence, that prior to the purchase from Phillips, eight days after the *finding of the inquisition, Stith has done any act disavowing his [*491 tenancy, except the refusal to surrender possession. Thus considered, the case is an unsuccessful attempt by a landlord, to recover possession from an obstinate tenant; whose refusal could not destroy the tenure by which he remained on the premises, nor impair any of the relations which the law established between them. The effect of the acquittal extended no further than to deprive the landlord of the benefits expected from this process, and turn him round to the ejectment which he afterwards brought. The judgment on the acquittal concluded nothing but the facts necessary to sustain the prosecution, and which could be legally in issue. If a case is made out, within the 16th section of the law, it declares, "the tenant shall be adjudged guilty of a forcible detainer;" and this was the matter to be inquired into. Title could not be set up as a defence; Stith could not avail

himself of the purchase from Phillips; a judgment for either party left their rights of property wholly unaffected, except as to the mere possession; and the acquittal could only disaffirm the forcible detainer, as nothing else was in issue. It was conclusive on the landlord as to that; but in all other respects, the rights and relations of the parties remained as before the institution of the process. The tenancy was not determined; Peyton was not ousted, and the possession did not become less the possession of the landlord, by any legal consequences resulting from the acquittal; unless the relative situation of the parties as landlord and tenant became changed by the purchase from Phillips, after the inquisition and before the traverse.

In the case of *Willison* v. *Watkins*, 3 Pet. 44, decided at the last term, this court considered and declared the law to be settled, that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure, with the knowledge of the landlord, was a forfeiture of his term; that his possession became so far adverse, that the act of limitations could begin to run in his favor, from the time of such forfeiture; and the landlord could sustain ejectment against him, without notice to quit, at any time before the period prescribed by the statute had expired, by the mere force of the tenure, without any other evidence than the proof of the tenancy; but that the tenant could in no case contest the *right of his landlord to possession, or defend himself by any claim or title adverse to him, during the time which the statute has to run. If the landlord suffers it to run out, without making an entry, or bringing a suit, each party may stand upon their right; but until then, the possession of the tenant is the possession of the landlord.

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Tested by these principles, the purchase from Phillips, in 1814, can have no effect on the merits of this case. Though the possession of Stith became, from that time, adverse for these specified purposes, it remained fiduciary for all others. He could not assert an adversary title, without surrendering possession. The law recognises him as having no rights of property in the lands, unless such as grow out of his tenure; his title must remain dormant, while he retains possession for a less term than prescribed by law; it may become active, whenever he abandons the possession, or it is protected by the limitation. The same principles which would prevent a tenant from contesting his landlord's title in a court of law, would apply with greater force in a court of equity, to which he would apply, for the quieting of a tortious possession, and a conveyance of the legal title. If the relations subsisting between them could deprive him of defence at law, a court of chancery could not afford him relief as a plaintiff, during their continuance. Before he can be heard in either, in assertion of his title, he must be out of possession, unless it has become legalized by time; and even then, there may be cases where an equitable title had been purchased, under such circumstances as would justify a court of equity in withholding their aid to a *malâ fide* purchaser.

It is not necessary to decide, whether this is such an one, since we are very clear, that the present complainant can, on no principle of law or equity, have any claims on the interference of this court, to prevent the respondents from obtaining, by their judgment in ejectment, a restoration of the demised premises. This is his right, by the terms and effect of the tenure; on the faith of which the one party gave, and the other received

possession. As the possession of the plaintiff has been continuous, from the first entry, as a tenant, his remaining, after the purchase from Phillips, is neither an ouster *nor disseisin of Peyton, so as to put him to the assertion of his right under his patent. The possession of Stith must [*493 be interrupted, and its continuity broken, before he can be permitted to sustain any proceeding, founded on the equitable title thus acquired. For, admitting his possession to be so far adverse, that the limitation began to run from February, 1814, the right of the plaintiffs in the ejectment to possession, on the termination of the tenancy, remains unimpaired, and is as much to be respected in a court of equity as of law; it being an attribute and incident of the tenancy which attaches to it, notwithstanding any act of the tenant, short of a voluntary restoration of the premises, or undisturbed occupation for seven years, by the law of 1809.

This view of the case is fatal to the proceeding in equity, commenced while the complainant is residing on the land demised, and before the expiration of three years from the commencement of his disclaimer, or adversary holding with the knowledge of Peyton.

There is another objection to the relief sought for by the complainant, which seems to the court to be conclusive. On an attentive examination of the evidence returned with the record, we are of opinion, that a continued and uninterrupted possession for twenty years in Peyton and his heirs, prior to the filing of the bill, has been fully proved. There appears to have been no point of time, since the first entry of Wilson, in 1792 or 1793, within which the premises have been unoccupied by him; as Peyton held the legal title, the possession under him extends to the bounds of his survey; and is as complete to the whole, as if the actual occupation was co-extensive with his grant.

It is proved, without contradiction, that the land was in the woods, wholly unimproved, when Wilson first entered; and there is no evidence to show that, when he leased from Peyton, in March 1795, any other person was upon the ground. His patent gave him legal seisin, and constructive possession, of all the land within his survey. *Barr* v. *Gratz*, 4 Wheat. 222; *Green* v. *Liter*, 8 Cranch 250. Though Wilson's first entry was without claim of title in himself or any other, his attornment to the title of Peyton, in 1795, will make his possession relate back to his first entry; *and connected with the legal possession, give to Peyton all the benefits of [*494 actual occupation, from that time. But even confining him to the period of actual occupation under his title; it appears, that twenty-one years and eight months had elapsed, before the filing of the complainant's bill. This would afford at law a complete bar to an ejectment under the title of Phillips; and courts of equity adopt the same rule by analogy. *Hughes* v. *Edwards*, 9 Wheat. 489; *Elmendorf* v. *Taylor*, 10 Ibid. 152.

The continuity of the possession does not apppear to have been broken; there is evidence of an attempt made by Phillips, and Riley, his son-in-law, to tamper and collude with the tenants to attorn him; and some of the witnesses speak of declarations of some of the tenants, of their having some sort of connection with his title; but in what way does not satisfactorily appear. There is no evidence of any agreement between him and any of them; on the contrary, there is clear evidence of the tenancy of all the occupants under Peyton, from the entry of Wilson down to the lease to Stith; and

no fact is disclosed, in any of the depositions, which would in law amount to a disclaimer of the tenure, by any of the tenants, an attornment to Phillips, or possession adverse to the landlord. There seems nothing which would make out such an adverse possession in Phillips, as would interrupt that of Peyton; and though there are some circumstances in evidence, of an equivocal character, they cannot amount to a disseisin or ouster, nor dissolve the relations resulting from the original acknowledged relations between him and his tenants, which continued until the filing of the bill. Such continued possession for twenty years, under the legal title of Peyton, constitutes a complete bar to all the relief prayed for in the bill.

It is, therefore, the opinion of the court, that the decree of the circuit court be reversed, and that the cause be remanded, with instructions to dismiss the bill of the complainants, with costs, but without prejudice to the right of the complainant, accruing or vested in him by any deed or contract with Luckett, or any other person, in relation to any part of the land contained in either of the surveys of Peyton.

Decree reversed.

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*495] *William Fowle and the Administrators of Thomas Lawrason, Appellants, *v.* James Lawrason's Executor, Appellee.

Equity jurisdiction.

After an arbitrament and award, an action was instituted at law upon the award, and the court being of opinion, the award was void for informality, judgment was given for the defendant; a bill was then filed by the plaintiff, on the equity side of the circuit court for the county of Alexandria, to establish the settlement of complicated accounts between the parties, which was made by the arbitrators; and if that could not be done, for a settlement of them under the authority of a court of chancery. This is not a case proper for the jurisdiction of a court of chancery.[1]

Although the line may not be drawn with absolute precision, yet it may be safely affirmed, that a court of chancery cannot draw to itself every transaction between individuals, in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted; it is the appropriate tribunal.[2]

Appeal from the Circuit Court of the District of Columbia. James Lawrason, the testator of the appellee, filed a bill in the circuit court of Alexandria, against the appellant, William Fowle, as surviving partner of Thomas Lawrason, who had died intestate, and who, with William Fowle, had carried on business under the firm of Lawrason & Fowle. After the decease of James Lawrason, the suit was prosecuted by his executor.

The bill charged, that the complainant, James Lawrason, being seised of one moiety of a wharf and warehouse, in the town of Alexandria, and

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[1] A bill for an account lies only when an action of account lies at law, and the case comes under some appropriate head of equity jurisdiction. Baker *v.* Biddle, Bald. 394. To sustain a bill for an account, there must be mutual demands. Porter *v.* Spencer, 2 Johns. Ch. 169; Dinwiddie *v.* Bailey, 6 Ves. 141. Equity has no jurisdiction, when the accounts are all on one side, and no discovery is sought or required. Gloninger *v.* Hazard, 42 Penn. St. 389. See Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. 180.

[2] See Cooper *v.* Hatton, 12 Price 502; Moses *v.* Lewis, Ibid.; Parrot *v.* Palmer, 3 Myl. & K. 632; King *v.* Rosset, 2 Y. & J. 33; Hemings *v.* Pugh, 4 Giff. 456.

his son, Thomas Lawrason, of the other moiety; the said Thomas being then a copartner of Fowle; the complainant agreed to rent to the copartnership, his moiety of the same, and that, on or about the — day of ———, they entered on the possession, and occupied them until the death of the said Thomas; that the complainant understood and supposed, that he was to be paid for his moiety the annual rent of $1600; and that he expected to prove that the said Thomas frequently acknowledged that to be the annual rent. That the complainant's interest in the property was worth that rent. That during the period the said *Lawrason & Fowle occupied the premises, dealings and other matters of account took place [*496 between them and the complainant; which not having been settled during the life of Thomas Lawrason, it was agreed, after his death, that the accounts between the complainant and the firm should be settled by arbitration, and that arbitrators were accordingly appointed to make the settlement. That the arbitrators awarded the sum of $2000 in favor of the complainant, which award, with the accounts on which it was founded, were exhibited. That the defendant Fowle refused to submit to the award, alleging that the arbitrators were under a misapprehension as to the complainant's interest in the rent. That the complainant brought a suit at law on the award; and the court decided, on the trial, that in consequence of some error in the submission, and in the form of the award, it could not be sustained. That the effect of this decision may be to open the accounts between the parties, and if so, they can nowhere be so correctly settled as in the court of chancery. That he considered himself, however, entitled to the benefit of the settlement made by the arbitrators; and that, although a suit at law might not be sustained on the award, yet in equity it was valid and binding; that he claimed the benefit of it; but if this could not be obtained, he must submit to another settlement to be made by order of the court. The bill concluded with a prayer for the settlement of accounts, and for general relief.

The complainant's bill having been taken *pro confesso* as against the defendant Fowle, the court, at November term 1823, directed an account to be taken by the auditor between the complainant and the defendant Fowle, as surviving partner, &c., as well in relation to the rents claimed of the firm, as to all other matters of account between them; and the auditor was authorized to take such legal testimony as should be offered by the parties, and to report, &c. At May term 1824, the complainant having died, Aaron R. Levering, his executor, was made complainant. At April term 1825, the auditor returned his report, accompanied by the depositions of Elisha and Romulus Riggs, for the complainant, and those of Thomas Irwin and Phineas Janney, for the defendant.

From the report of the auditor, it appeared, that there existed *no difficulty in the settlement of the general account (exclusively of [*497 rent) between James Lawrason and the defendant Fowle, as surviving partner. The balance on this account in favor of Fowle, being admitted to be $11,769.30. That as to the rents, the only difference that existed between the parties, was, whether the amount which had been claimed by James Lawrason, and admitted by the auditor, was to be considered as the rent of the whole of the wharf and warehouse, as contended for by the defendant Fowle; or was to be considered as the rent of the warehouse, and the com-

plainant's moiety of the wharf only, leaving Fowle still accountable to the representatives of Thomas Lawrason for the rent of his moiety of the wharf If the latter was correct, there was a balance of $2638.83, with interest from the 21st of August 1819, due the complainant from the defendant Fowle, as surviving partner. If the former, there was a balance due from the complainant to the defendant of $1295.93, with interest, &c.

From the evidence laid before the auditor, he decided, and reported accordingly, "that the amount of rents claimed by the complainant, ought to be considered, not as his share or dividend, but as a reasonable rent for the whole of the wharf and warehouse; but as the defendant Fowle admitted that Thomas Lawrason had never made nor intimated an intention to make any charge against the company for rent, on account of that half of the wharf which had been conveyed to him, this, taken into consideration with his declarations, as stated in the depositions of E. and R. Riggs, induced him (the auditor) to believe, that it was his (T. Lawrason's) intention, that the whole rent of the property should go to his father (the plaintiff) during his life; he, therefore, reported the balance of $2638.83, to be due to the complainant from the defendant Fowle."

At November term 1825, Hugh Smith and Nehemiah Carson, administrators of Thomas Lawrason, were made defendants. At April term following, the complainant filed his amended bill against them, calling on them to answer to his original bill, as if they had been originally made parties to it; *and praying that they might be bound by any decree the court should make, in the same manner, and to the same extent, as if they had been parties originally. At April term 1827, the answers of the defendant Fowle and of the administrators of Thomas Lawrason were filed.

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The answer of Fowle admitted the copartnership, commencing in 1804, and terminating by the death of T. Lawrason, in 1819. That the wharf and warehouse were rented from the complainant, then the sole owner, in 1804, at $450 per annum, which rent was placed to the complainant's credit, on the books of the firm, until the year 1808. That about that time, great improvements were made, and the property became more valuable; but as no contract was made and no sum named by the complainant for the rent, after that time, no further credits were given him. That during the existence of the copartnership, the amount to be paid for the annual rent never was fixed. That after the death of his partner, he called on the plaintiff for his account. That the account was rendered, and admitted by the defendant Fowle, except as to the rate of rent for one year only. That the account, on its face, purported to be for the rent of the whole of the wharf and warehouse, and was so understood by him, when he admitted it. That no claim for rent had ever been made by his deceased partner; and that he expected the complainant and the representatives of his deceased partner would settle between themselves the proportion the latter was to receive. That some difference having arisen between the complainant and him, relative to the account of the firm against the complainant, this, with the difference as to the amount of one year's rent, was submitted to arbitration. That the arbitrators made an award, with which the defendant was perfectly satisfied, believing the credits allowed the complainant for rent were for the entire rent of the premises, that they were so understood to be, by one of the two arbitrators. That on the award being returned, he communicated it to one

of the administrators of his deceased partner, and requested him to call on the complainant, and adjust with him the proportion of rent to be allowed to the estate of his deceased partner, that he might charge it to the complainant, and credit the administrators of his partner with it; and then, for the first time, learned, that the *complainant claimed the whole amount of credits allowed; not as the entire rent of the premises, nor under any contract or engagement with his son; but as his share of the rent, leaving the defendant Fowle, as surviving partner, still liable to the claims of the administrators of his deceased partner, for his share of the rent. That he endeavored to prevail on the complainant to open the award on this point, and to consent to a valuation or estimate of his share of the rent, but failed in his attempt. That the complainant sued on this award, and that judgment was rendered in the defendant's favor. This judgment he pleaded, and relied on as a bar to all claims on the award. He professed to be still willing to make the complainant a fair allowance for his share or proportion of rent, which he averred would fall far below the sum he claimed. He charged, that in 1812 the complainant sold and conveyed one moiety of the wharf to his son, T. Lawrason. [*499

The answer of the administrators of Thomas Lawrason charged, that in 1812, the complainant sold and conveyed to him one moiety of the wharf; they exhibited the deed of conveyance, made in consideration of the sum of $6500; they denied the complainant's right to the whole rent, and denied that their intestate ever relinquished his share to the complainant. They averred, that although he survived his son for many years, he never made any such pretension, and that he made none such in his bill. They required proof of the complainant's right to the rent of his son's share of the wharf, if a decree was asked in his favor on that ground.

The deposition of Elisha Riggs, returned by the auditor, stated a conversation between the witness and Thomas Lawrason, in 1817, in which the latter said, that the firm of Lawrason & Fowle were paying the complainant $1600 a year for the rent of the wharf and warehouse. Romulus Riggs testified to the same conversation. Thomas Irwin and Phineas Janney testified on their examination before the auditor, that they were well acquainted with the premises, the rent of which formed the subject of controversy, and that they considered the sums which the complainant had charged, and which were allowed by the auditor, as a full rent for the whole of the wharf and warehouse.

*The court, on hearing, decided, that the defendant Fowle, as surviving partner, should pay to the complainant the sum of $2638.83, with interest from the 23d of August 1819, and costs. But without prejudice to any claims which the representatives of Thomas Lawrason, deceased, might make on the estate of the said James Lawrason, for any portion of the rents thereby decreed against the defendant Fowle. No disposition was made of the case as to the administrators of Thomas Lawrason. From this decree, Fowle, and the administrators of T. Lawrason, appealed to this court. [*500

Taylor and *Jones*, for the appellants, contended: 1. That the bill presents no case to give jurisdiction to a court of equity. That the decree is erroneous, inasmuch as it does not settle the question of right between

the complainant and the executors of Thomas Lawrason. 2. That in decreeing against Fowle, the court proceeds on the principle, that the sum decreed covers the whole rent; and yet they have not protected him against the claim of Thomas Lawrason's administrators for his share. 3. If the decree be construed to afford such protection, then the administrators of Thomas Lawrason will contend, that the court possessed no power to take away their right of recovery against Fowle.

The case exhibited in the bill, answer and depositions, was plainly a case for a court of law, and not of chancery jurisdiction. No discovery is asked for; and no allegation that facts are wanted, for the development of which the aid of a court of equity is required. There is a general allegation of equity; but this does not give jurisdiction. The claim of the complainants is one founded on an account; and although it is admitted, that matters of accounts are of equity jurisdiction, yet they are so, when they are between parties who are peculiarly within the supervision of courts of chancery; such as guardians and trustees. Because the transactions between parties are of long standing, and the accounts are complicated and composed of numerous items, chancery jurisdiction is not given. There must be an original ground of equity.

*501] *Nor does the fact that the complainant's testator had instituted a suit in a court of law, and had there failed, show the existence of chancery jurisdiction. The award which was given in that suit, was not found sufficient to maintain an action; but the original cause of action remains, and may yet be pursued in a court of law.

Swann, for the appellee, stated, that after a long controversy at law, and a submission to abitrators, an award was made in favor of the testator of the appellee. An action on that award terminated in a decision, that it could not be sustained; and thus it was held, that the appellee had no standing in a court of law. Now he is to be driven from a court of equity, and hung up like Mahomet's coffin; and is to be suspended between the two courts and denied an entry to either.

The bill and proceedings show a long account between the parties, intricate, and involving many questions which can best be determined by a court of chancery. Matters of account are enumerated as the peculiar jurisdiction of such courts. Madd. Ch. 85.

MARSHALL, Ch. J., delivered the opinion of the court.—James Lawrason, in his lifetime, filed his bill in the circuit court of the United States, sitting in chancery, for the county of Alexandria, stating, that being seised of a warehouse and one moiety of a wharf, in the town of Alexandria, of which his son, Thomas Lawrason was seised of the other moiety, he agreed to rent the premises to Lawrason & Fowle, a commercial house in the said town, of which the defendant, William Fowle, is the surviving partner; the said Lawrason & Fowle entered into the premises under the contract, and retained possession thereof several years. The plaintiff says, he understood and supposed, that he was to receive $1600 each year, for the property, and that it was reasonably worth that sum; but that no express stipulation was entered into fixing the amount of rent. The plaintiff also had other dealings with Lawrason & Fowle, and the account remained unsettled, until the death of Lawrason, who was the son of the plaintiff.

Fowle v. Lawrason.

*The bill states, that the parties agreed to leave the whole subject to arbitration, and that the arbitrators reported a large sum in his favor. A suit was instituted on this award; and the court being of opinion, that it was void in law, for informality, gave judgment for the defendant. This suit is brought to establish the settlement of the accounts between the parties, which was made by the arbitrators; or if that cannot be done, for a settlement of them under the authority of a court of chancery.

The suit abated by the death of the plaintiff, and was revived in the name of his executor. It appearing, that the representatives of Thomas Lawrason, the son, who owned a moiety of the wharf occupied by Lawrason, & Fowle, were interested in the controversy, they were made parties. The answers were then filed. The defendant Fowle admits the occupation of the premises, without any specific agreement as to the amount of rent; and admits the reference to arbitrators, after the death of his partner. He understood, that the whole rent payable both for the warehouse and wharf was claimed by James Lawrason, until after the award was made; and the arbitrators, he is satisfied, made the award under this impression. On understanding that Thomas Lawrason's executors asserted a right to so much of the rent as was equivalent to his interest in the wharf, the defendant requested that it might be apportioned between them; and then discovered, that James Lawrason claimed the whole rent awarded, as being for his interest, leaving the defendant liable to the executors of Thomas Lawrason. Every effort to adjust this difference having proved unavailing, the defendant refused to perform the award; and the suit instituted thereon by James Lawrason was decided against the plaintiff. The answer of Thomas Lawrason's administrators asserts the right of their intestate, to so much of the rent as will be a just compensation for his interest in the wharf.

The accounts were referred to a commissioner, who reported the sum of $2638.83, with interest from the 26th day of August 1819, to be due to the executors of James Lawrason, should he be entitled to the whole rent accruing on the *demised premises; should the rent on the moiety of the wharf owned by Thomas Lawrason be deducted, the plaintiffs were [*503 entitled to nothing. The court decreed the sum reported by the commissioner, without prejudice to any claim which the representatives of Thomas Lawrason, deceased, may make upon the estate of James Lawrason, deceased, for any portion of the rents decreed to be paid by the defendant Fowle. From this decree the defendants appealed to this court. Two errors have been assigned. 1. The party complaining had a plain and adequate remedy at law. 2. The decree ought to have settled finally the rights of Thomas Lawrason's executor.

That a court of chancery has jurisdiction in matters of account, cannot be questioned, nor can it be doubted, that this jurisdiction is often beneficially exercised; but it cannot be admitted, that a court of equity may take cognisance of every action, for goods, wares and merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, on which different sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed, that a court of chancery cannot draw to itself every transaction between individuals in which an account between

parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted ; it is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction. 1 Madd. Chan. 86 ; 6 Ves. 136 ; 9 Ibid. 437. In the case at bar, these difficulties do not occur. The plaintiff sues on a contract by which real property is leased to the defendant, and admits himself to be in full possession of all the testimony he requires to support his action. The defend-
*504] ant opposes to this claim, as an off-set, a sum of money *due to him for goods sold and delivered, and for money advanced ; no item of which is alleged to be contested. We cannot think such a case proper for a court of chancery. We are, therefore, of opinion, that the decree of the circuit court ought to be reversed ; and the cause remanded, with directions to dismiss the bill, the court having no jurisdiction.

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 considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to dismiss the bill, the court having no jurisdiction.

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*505] *Pierre Menard, Plaintiff in error, *v.* Aspasia, Defendant in error.

Slavery.—Ordinance of 1787.—*Appellate jurisdiction.*

The mother of Aspasia, a colored woman, was born a slave at Kaskaskia, in Illinois, previous to 1787, and before that country was conquered for Virginia; Aspasia was born in Illinois, subsequent to the passage of the ordinance for the government of that territory; Aspasia was afterwards sent as a slave to the state of Missouri; in Missouri, Aspasia claimed to be free, under the ordinance "for the government of the territory of the United States north-west of the river Ohio," passed 13th July 1787; the supreme court of Missouri decided, that Aspasia was free, and Menard, who claimed her as his slave, brought this writ of error, under the 25th section of the act of 1789, claiming to reverse the judgment of that court : *Held*, that the case was not within the provisions of the 25th section of the act of 1789.

The provisions of the compact which relate to "property," and to "rights," are general; they refer to no specific property or class of rights; it is impossible, therefore, judicially, to limit their application. If it were admitted, that Aspasia was the property of the plaintiff in error, and the court were to take jurisdiction of the cause, under the provisions of the ordinance, must they not, on the same ground, interpose their jurisdiction in all other controversies respecting property, which was acquired in the north-western territory?

Whatever right may be claimed to have originated under the ordinance of 1787, it would seem, that a right to the involuntary service of an individual could not have had its source in that instrument; it declares, that "there shall not be slavery nor involuntary servitude in the territory;" if this did not destroy a vested right in slaves, it, at least, did not create or strengthen that right.

If the decision of the supreme court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the 25th section of the judiciary act, could be exercised; in such a case, the decision would have been against the express provision of the ordinance in favor of liberty; and on that ground, if that instrument could be considered, under the circumstances, as an act of congress, within the 25th section, the jurisdiction of this

court would be unquestionable. But the decision was not against, but in favor of, the express provision of the ordinance.

The general provisions of the ordinance of 1787, as to the rights of property, cannot give jurisdiction to this court; they do not come within the 25th section of the judiciary act.

ERROR to the Supreme Court of Missouri. An action of assault and battery was instituted in the circuit court for the county of St. Louis, in the state of Missouri, by Aspasia, a woman of color, to establish her right to freedom. By consent of the parties, and in conformity with the law of that state, the facts were submitted to the determination of the court, without the intervention of a jury. *The evidence, as disclosed in the bill of exceptions, established the following case: [*506

The mother of Aspasia, the defendant in error, was born a slave, and was held as such by a French inhabitant of Kaskaskia, Illinois, previous to the year 1787; and after that year, was held as a slave, by the same individual, who was a citizen of that country, before its conquest by Virginia, and before the passage of the ordinance for the government of the north-western territory, and who continued to be such, afterwards, and was such, at the time of Aspasia's birth. Aspasia was born, after the year 1787, and from the time of her birth, she was raised and held as a slave, till some time in the year 1821, when she was purchased by the plaintiff in error, who immediately after, gave her to his son-in-law, Francis Chouteau, then and now residing in St. Louis, Missouri, who held her as a slave till the 10th of October 1827, when he returned her to the plaintiff in error, in consequence of the claim she set up for her freedom.

Upon the evidence thus given, Menard, by his counsel, moved the court to decide: 1. That if it was found from the testimony, that the mother of the plaintiff, Aspasia, was a negro woman, and legally held in slavery, before, and at and after the date of the ordinance passed by the congress of the United States, on the 13th of July 1787, entitled, "an ordinance for the government of the territory of the United States, north-west of the river Ohio," at the village of Kaskaskia, in the late north-western territory, and the plaintiff, Aspasia, was born of such mother, subsequent to the adoption of the ordinance aforesaid, at the village of Kaskaskia aforesaid, the plaintiff is not entitled to her freedom; which instruction, the court refused to give. The same party, by his counsel, moved the court to decide: 2. That if it was found from the testimony, that the mother of Aspasia was a negro woman, legally held in slavery, before, and at, and after, the adoption of the ordinance entitled, "an ordinance for the government of the territory of the United States, north-west of the river Ohio," passed by the congress of the United States, on the 13th day of July 1787, by a French inhabitant of the village of Kaskaskia, in the north-western territory, and who was a citizen of the same, before the conquest of the country by Virginia, and afterwards; and that the plaintiff was born at the village of Kaskaskia aforesaid, *of such mother, while so held in slavery, by such French inhabitant, although subsequent to the date of the ordinance aforesaid, she, the [*507 plaintiff (Aspasia), was not entitled to her freedom; which instructions the court refused to give. To which refusal, in both instances, the counsel of Menard excepted, &c. And the court decided, that the defendant, Menard, was guilty, &c., and that Aspasia was not a slave, but free.

This cause was taken to the supreme court of Missouri, and the decision

aforesaid was affirmed. This writ of error was prosecuted under the 25th section of the judiciary act, passed in 1789.

The case was argued by *Wirt*, for the plaintiff in error—no counsel appearing for the defendant.

Wirt stated, that the plaintiff in error, as well as the defendant, claimed under the same act of congress. The ordinance of 1787 is an act of congress, as it has been, since the establishment of the constitution of the United States, repeatedly ratified and adopted as an act of congress. He cited, the act for the government of the north-west territory, passed in 1787; Act establishing the territory of Indiana; the Act establishing the Illinois territory. The plaintiff in error considers that the supreme court of Missouri has proceeded on a misconstruction of that ordinance, as they have applied its provisions to a class of persons in the territory, over which the ordinance did not extend, and to which it had no application. This has been done by referring the prohibitions of slavery to the French settlers, who were within the territory at the time it was adopted by the congress of the United States. The ordinance has received different constructions in the states of Illinois and Missouri, as to its operation on the people of color, who were slaves at the time of its enactment, and upon their descendants born since 1787.

This case, as to jurisdiction, is similar to that of *Matthews* v. *Zane*, 4 Cranch 382; s. c. 5 Ibid. 92; s. c. 7 Wheat. 206. He cited also, Sergeant's Const. Law, 64; *McClung* v. *Silliman*, 6 Wheat. 598.

*508] The supreme court of Missouri have also disregarded the *6th provision in the ordinance, as this case is protected by the contract contained in that provision with the state of Virginia. (1 Laws U. S. 48.) This being a question of liberty and slavery, it is addressed to our sympathies; but this is not to affect the rights of the plaintiff in error, if they are secured to him by the law and by the constitution. The ordinance stipulates protection to the French settlers within the territory, as to their persons and their property. To show that by refusing to the plaintiff in error, who is one of the descendants of those French settlers, and who claims Aspasia under a French inhabitant residing at Kaskaskia previous to 1787, the supreme court have not conformed to one of the provisions of the ordinance; it will be necessary to go back to the first settlement of Kaskaskia, and to trace down the history and condition of these people to the period of the ordinance.

The settlements in Illinois were made from Canada, when Canada belonged to France; the number of white settlers then, exclusive of troops, was about two thousand. (Pittman's Hist. European Settlements on the Mississippi 55.) These people brought with them from Canada, the French laws and customs, and among them, the law by which slavery was tolerated; under which law, they were entitled to their slaves, as property, and to the issue of the females, as property also. This country, a dependency of Canada, was ceded, with Canada, to Great Britain, by the treaty of Paris, in 1763; and when General Gage, in 1764, took possession of the country, in behalf of Great Britain, he promised, by his proclamation, to the subjects of France, then in the territory, that they should enjoy the same rights and privileges, and the same security for their persons and property, as under their former sovereign. At this period, the same laws as those of France prevailed in

the colonies of England as to slavery. At this time, there were slaves in that country, and particularly at the posts, of which Kaskaskia was one. (Pittman 43, 47.) In 1778, it was conquered by the troops of Virginia, under General Rogers Clarke. The country lay within the chartered limits of Virginia; and in the same year, it was erected, by an act of the Virginia legislature, into a county of that *state. (9 Hening's Statutes at Large 552, ch. 21.) The preamble of that statute recites, that the [*509 inhabitants had acknowledged themselves citizens of the commonwealth of Virginia, and taken the oath of fidelity to the same. By that act, it is declared, that the inhabitants shall enjoy their own religion, "together with all their civil rights and property." At this time, slave property in Virginia rested exactly on the same footing that it had done, and still did, in the French and British colonies, and was fixed to be *partus sequitur ventrem.* Thus, by the act of Virginia of 1788, the inhabitants had a guarantee of their slaves as property, and of the issue of their slaves in like manner.

The cession of territory to the United States, in 1784, was made with a full knowledge of the existence of this property; and congress recognise it in the act relative to the government of the territory, and give to the free males a voice in its organization. (9 Journals of Congress 144; Ordinance of 1787.) This ordinance is in harmony with the provisions of the act of Virginia of 1798.

It was no part of the purpose of the ordinance to change existing rights, but its purpose was a great prospective policy, looking to the future settlement of the vacant lands, and to the terms on which settlers should come in. The regulations of the ordinance applied to unappropriated lands, prescribing the terms on which those lands should be settled, not affecting in any degree the vested rights and institutions of the old French settlers. (7 Dane's Abr. 442.) A fair construction of the ordinance of 1787 is, that slave property was left untouched and unaffected by its provisions; it was not intended to operate so as to divest property lawfully acquired and held from the first settlement of the country; the laws relative to which had never been annulled, but on the contrary, had been constantly confirmed. It could not possibly have been the intention of congress to divest such property, for these reasons: 1. Because it would have violated one of the conditions on which congress had accepted the cession from Virginia. 2. Because the existence and continuance of slavery, to some extent, is acknowledged by unavoidable implication in those parts of the ordinance which refer to the number of free males. 3. Because the *French settlers [*510 are excepted from the action of the ordinance. 4. The contemporaneous construction by those who drafted the ordinance. 5. The recognition of slavery, as existing at the date of the ordinance. 6. The admission of Illinois into the Union, and the approval of her constitution, which was admitted by congress to have expounded this ordinance correctly.

Upon the whole, it must be apparent, that it never was the intention of the state of Virginia, or of the old congress, that the old French settlers, of whom the appellant is one, should be molested in their possession of this species of property. It would be a breach of faith towards them, to have allowed them to have remained in the territory, and take the oath of allegiance to Virginia, to put such a construction on this ordinance. There are but a handful of these people. Their slaves are regarded by them as chil-

dren. In the present case, Aspasia was handed over to a daughter of Menard, who had married children; so that she was still in the family. If she had remained in Illinois, she would probably never have made this question; or, if she had, we have seen, she would not have succeeded; for under their state decisions, it has become a rule of property, *partus sequitur ventrem.*

McLean, Justice, delivered the opinion of the court.—This suit was brought into this court from the supreme court of the state of Missouri, by a writ of error. An action for false imprisonment was commenced in the circuit court for the county of St. Louis, by the defendant in error, to establish her freedom. By the consent of counsel, under the statute of Missouri, the facts and law of the case were submitted to the court. The facts, as stated in the bill of exceptions, are these:

The mother of Aspasia was born at Kaskaskia, Illinois, previous to the year 1787, and was held as a slave, from her birth, by a citizen of that country. His residence commenced before the country was conquered by Virginia, and continued until after the birth of Aspasia; which was several years subsequent to the passage of the ordinance for the government of the north-western territory. She was born a slave, at the village of Kaskaskia, and held as such. In the year 1821, she *was purchased by the plaintiff in error; who immediately afterwards gave her to his son-in-law, Francis Chouteau, a resident of St. Louis. He held her as a slave, until October 1827, when he returned her to the plaintiff in error, in consequence of the claim she set up for her freedom.

*511]

Upon this evidence, Menard claimed Aspasia as his slave; but the circuit court decided against him. He appealed to the supreme court of the state; and in that court, the judgment of the circuit court was affirmed. To reverse this judgment, a writ of error is now prosecuted, and two errors are assigned. 1. Slaves in the north-western territory, before and at the time of the adoption of the ordinance of 1787, were not liberated by that instrument, but continued slaves. 2. That the offspring of such slaves follow the condition of the mother, and are also slaves.

To understand the nature of the right asserted by the plaintiff in error, a reference to the civil history of the Illinois country is necessary. By the treaty of peace, concluded in 1763, between England and France, the latter ceded to the former the country, out of a part of which the state of Illinois was formed. In the colonies of both France and England, it is well known, that slavery is tolerated. It was stipulated in the treaty, "that those who chose to retain their lands, and become subjects of his majesty, the king of England, shall enjoy the same rights and privileges, the same security for their persons and effects, and liberty of trade, as the old subjects of the king." The same assurance was given to the inhabitants of the country, in the proclamation of General Gage, in 1764. In 1778, a military force, organized under the authority of Virginia, and commanded by General Clarke, subdued Kaskaskia and post Vincent, and drove the British forces from the country. Soon after this occurrence, by an act of the Virginia legislature, a county called Illinois was organized, embracing the conquered district; and its citizens were admitted on an equality of rights with the other citizens of Virginia. This country was ceded to the United States

by Virginia, in 1784, with certain stipulations, one of which was, that "the French and Canadian inhabitants, and other settlers of the *Kaskaskias, St. Vincent's, and the neighboring villages, who have professed [*512 themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." Under the laws of Virginia, the citizens of Illinois county had a right to purchase and hold slaves; and that right was not abrogated, but protected by the cession of 1784, to the United States. In April 1784, congress passed certain resolutions, securing to the people north of the Ohio certain rights and privileges by which they were governed; and which remained in force until the adoption of the ordinance of 1787. By these resolutions, the existence of slavery is not referred to, except by implication, in using the words, "free males, of full age," being entitled to certain privileges; and also, "free inhabitants." Under these resolutions, in the manner prescribed, the free inhabitants were authorized to adopt the laws of any one of the original states. On the 13th July 1787, congress passed the ordinance for the government of the territory north-west of the river Ohio; and repealed the resolutions of 1784. In this ordinance, ten articles are adopted, which are declared to be articles of compact, "between the original states and the people and states in the said territory; and to remain unalterable for ever, unless by common consent." Among these articles, is the following: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

By an act of congress of 1789, and another of 1800, certain provisions were made to regulate the government of the territory, and make a division of it; but they do not affect the question which is made in the case under consideration. In the second section of the act of 1800, "the inhabitants of the territory shall be entitled to, and enjoy, all and singular the rights, privileges and advantages, granted and received by the said ordinance." This provision was re-enacted in the act of 3d February 1809, which established the Illinois territory. By an act of congress of the 18th April 1818, the people *of the territory were authorized to form a constitution [*513 and state government; and on the 3d December following, by a joint resolution of the senate and house of representatives, the state of Illinois was admitted into the Union, "on an equal footing with the original states in all respects whatever." The provision of the ordinance of 1787 prohibiting slavery was incorporated into the constitution. This provision of the ordinance, it is contended, could only operate prospectively; and was never designed to impair vested rights; that such was the construction uniformly given to it, under the territorial government; that the provision was understood to prohibit the introduction of slaves into the territory, by purchase or otherwise; but those who were held in slavery at the time the ordinance was adopted, were not liberated by it.

That this was the understanding of the people of the territory, at the time the constitution was adopted, it is argued, appears from the frequent reference made in that instrument, to "free white male inhabitants," in contradistinction from those who were not free; and from a law which was subsequently passed by the legislature of the state, imposing a tax on slaves. The rights of persons who claimed a property in slaves, it is urged, were not

affected by the provisions of the ordinance of 1787, or of the constitution; but remain as they were, prior to the adoption of either. That a construction, different from this, would be destructive of those rights which the citizens of the country enjoyed under the French and British governments, and which were guarantied by Virginia, and provided for in her cession of the country to the Union.

The slavery of the mother of Aspasia being established, it is contended, that under the ordinance, her offspring must follow the same condition. This is, beyond dispute, the principle of the civil law; and is recognised in Virginia, and other states, where slavery is tolerated. Whether the same principle be applicable to the case under consideration, is a question which it may not be necessary now to determine.

The plaintiff in error insists on his right to the services of Aspasia as his slave, and attempts to enforce it. To try this right, the present action was instituted; and a decision having been given against the right, the plaintiff prosecutes a *writ of error in this court to reverse the judgment. *514] Can this court take jurisdiction of the case? By the 25th section of the judiciary act of 1789, it is provided, 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 construction of any clause of the constitution, or of any treaty or statute of the United States; and the decision is against the title, right, privilege, &c., under the statute, may be re-examined and reversed, or affirmed in this court." Does the right asserted by the plaintiff in error come within any of the provisions of this section? Under what statute of the United States, is the right set up? The answer must be, under the ordinance of 1787, and the statutes that have been subsequently enacted, which have a bearing on the question.

In the second article of the compact contained in the ordinance, it is provided, that "no man shall be deprived of his liberty or property, but by the judgment of his peers." "And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner affect private contracts." This compact was formed between the original states and the people of the territory; and that part of it which prohibits slavery is embodied in the constitution of Illinois. In thus being made a part of the fundamental law of the state, a guarantee against slavery, of as high obligation as on any other subjects embraced by the constitution, is given to the people of the state.

There are various provisions in the compact which are deeply interesting to the people of Illinois, and which, it is presumed, no one would contend, could give a supervising jurisdiction to this court. In the third article, it is provided, that "religion, morality and knowledge being necessary to good government, and the happiness of mankind, schools and the means of education, shall for ever be encouraged." And in the third article, "that all fines shall be moderate, and no cruel or unusual punishment shall be inflicted." "All persons shall be bailable, *unless for capital offences, *515] where the proof shall be evident or the presumption great." These, and other provisions, contained in the compact, were designed to secure the rights of the people of the territory, as a basis of future legislation, and to have that moral and political influence that arises from a solemn recognition

of principles, which lie at the foundation of our institutions. The same may be said as to the provisions respecting the rights of property. The provisions in the compact which relate to "property," and to "rights," are general. They refer to no specific property or class of rights. It is impossible, therefore, judicially, to limit their application. If it were admitted, that Aspasia is the property of the plaintiff in error, and the court were to take jurisdiction of the case, under the provisions of the ordinance, must they not, on the same ground, interpose their jurisdiction in all other controversies respecting property which was acquired in the north-western territory? Whatever right may be claimed to have originated under the ordinance of 1787, it would seem, that a right to the involuntary service of an individual could not have had its source in that instrument. It declares, that "there shall be neither slavery nor involuntary servitude in the territory." If this did not destroy a vested right in slaves, it, at least, did not create or strengthen that right.

If the decision of the supreme court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the 25th section of the judiciary act, could be exercised. In such a case, the decision would have been against the express provision of the ordinance, in favor of liberty; and, on that ground, if that instrument could be considered, under the circumstances, as an act of congress, within the 25th section, the jurisdiction of this court would be unquestionable. But the decision was not against, but in favor of, the express provision of the ordinance. Was it opposed to any other part of the instrument? It is possible, that opposing rights may arise out of the same instrument, although it contain no contradictory provisions. The right asserted by the plaintiff in error had not its origin under any express provision of the ordinance. It is only *contended, that that instrument did not destroy this right, which had its [*516 commencement in other laws and compacts. A sanction of the right, implied more from the force of construction than the words used in the ordinance, is all that can be urged.

No substantial ground of difference is perceived between the assertion of any other right to property, and that which is set up in the present case. The provisions of the ordinance will equally apply to every description of claim to property, personal or real. And if, from the general provisions respecting property, this court shall take jurisdiction in this case; on the same principle, it may revise the decisions of the supreme courts of Illinois, Indiana and Ohio; at least, in all cases which involve rights that existed under the territorial government. Give perpetuity to this general provision, and consider it as binding upon the people of these states, and it must have an important bearing upon their interests. Instead of looking to their constitutions as the fundamental law, they must look to the ordinance of 1787. In this instrument, their rights are defined, and their privileges guarantied. And, instead of finding an end of legal controversies respecting property, in the decisions of their own courts of judicature, they must look to this court. This cannot be the true construction of this instrument. Its general provisions, as to the rights of property, cannot give jurisdiction to this court. They do not come within the 25th section of the judiciary act. The complaint is not that property has been taken from the plaintiff in error, in the language of the ordinance, "without the judgment of his peers;" nor, that

his right has been affected by any law of the territory, or of the state. It is not pretended, that his right, whatever it may be, is not secured as fully under the constitution and laws of Illinois, as under the ordinance. In support of his claim, a reference is made to the judicial decisions of the state, under its own laws.

If, then, a suit be brought by a citizen of Illinois to enforce a right in the courts of Missouri, which exists to as great an extent under the constitution and laws of the state of Illinois, as in the territorial government, under the ordinance, and a *decision be given against the right, can the party asserting it, ask the interposition of this court? The prosecution of this writ of error presents the question to this court, in the same point of view, as if the suit in Missouri had been commenced by the plaintiff in error. His title does not arise under an act of congress. This is essential to give jurisdiction, under this head. It is not enough to give jurisdiction, that the act of congress did not take away a right, which previously existed; such an act cannot be said to give the right, though it may not destroy it. This suit must, therefore, be dismissed, as this court has no jurisdiction of the case.

*517]

Writ of error dismissed.

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*518] *Clement Smith, Administrator of Samuel Robertson, deceased, Plaintiff in error, *v.* The President and Directors of The Union Bank of Georgetown, Defendant in error.

Decedents' estates.—Conflict of laws.

Robertson was domiciled at Norfolk, in Virginia, and there contracted a debt on bond to T.; he was also indebted to the Union Bank of Georgetown, in the district of Columbia, on simple contract; he died intestate, at Bedford, in Pennsylvania; leaving personal estate in the city of Washington, in the district of Columbia, of which administration was there granted. By the laws of Maryland, all debts are of equal dignity in administration, and by the laws of Virginia, where R. was domiciled, debts on bond are preferred; the assets in the hands of the administrator were insufficient to discharge the bond and simple-contract debts: *Held*, that the effects of the intestate, in the hands of the administrator, were to be distributed among his creditors according to the laws of Maryland, and not according to the laws of Virginia.[1]

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[1] The general rule is, that the law of the place of the decedent's domicil governs the distribution of the personal estate, so far as it designates the persons who are entitled to take as next of kin. Harrison *v.* Nixon, 9 Pet. 504. The succession is regulated by the law of the domicil; but administration by the *lex loci rei sitæ*. And this distinction is of infinite value to the creditor, whose action might be barred in a foreign court, by the lapse of a period that would be insufficient to bar it at home; or whose demand might, in the event of a deficiency, be subjected to a less beneficial rule in the order of payment. It is, therefore, indispensable, that the effects of a decedent be collected and administered under the control of the government, within whose jurisdiction they were, at the time of his death. Mothland *v.* Wiseman, 3 P. & W. 187–8, *per* Gibson, Ch. J. The ground on which the assets are to be collected by the authority, and administered according to the law of the country, in which they may happen to be, at the decedent's death, is the claim which its citizens have to the protection and assistance of the government, in the prosecution of their rights; this protective principle has never been relaxed by the American courts. Miller's Estate, 3 Rawle 319. But when the purposes of protection and assistance have been answered, or there are, in fact, no resident creditors to be protected, the court of the *forum* will distribute the fund in accordance with the law of the domicil. Id. And see Page's Estate, 95 Penn. St. 87; Pleasants's Appeal, 77 Id. 356.

Smith v. Union Bank.

ERROR to the Circuit Court of the district of Columbia, for the county of Washington. This case came before the circuit court on the following case agreed:

"Samuel Robertson, a native of the state of Maryland, a purser in the navy of the United States, and as such purser, for several years before his death, stationed and domiciled at Norfolk, in the state of Virginia, died, in the year 182–, at Bedford, in Pennsylvania, intestate, insolvent—whither he had gone on a visit, for the benefit of his health. He was, at the time of his death, indebted to the plaintiffs, residing in the district of Columbia, on simple contract, not under seal, entered into here, in the sum of $2228, with legal interest from the 3d November 1818, till paid; which sum of money and interest still remain due and unpaid; and the said Robertson, at the time of his death, was also indebted to Thompson, residing in Virginia, upon contracts and bonds under seal, entered into in the state of Virginia, in a sum exceeding the whole amount of assets in the hands of the defendant, as administrator as aforesaid. The said Robertson, at the time of his death, was possessed of personal assets in Washington county, in this district. The defendant, Clement Smith, took out letters of administration *upon his estate in this county, and has collected in this county, and now [*519 holds in his hands as administrator, the sum of $8390.01½. The plaintiffs claim a dividend of the assets, according to the laws of administration in force in this county. The defendant resists payment, upon the ground of the debt due to said Thompson, who claims a priority as creditor upon the said sealed contracts, and that the assets must be paid away to the creditors pursuant to the laws in force in Virginia. If the court are of opinion, that the assets are to be administered, as to creditors, according to the laws in force in this county, then judgment to be entered for the plaintiffs for the amount of their debt aforesaid, to bind assets in the hands of defendant, C. Smith, the administrator; if otherwise, then judgment of *non-pros.*"

Upon this case, the circuit court gave judgment for the plaintiff; and the defendant prosecuted this writ of error.

The case was argued by *Coxe* and *Lear*, for the plaintiff in error; and by *Key* and *Dunlop*, for the defendants.

For the *plaintiff* in error, it was stated, that the whole question in the case is, whether the law of the place, where the funds for distribution are found, at the decease of the intestate, or the law of the domicil, shall regulate and govern the distribution of these effects. For the plaintiff in error, it was contended, that the law upon this question has been settled in England and in the United States; and the principle so established is, that the law of the domicil is to govern. It is, therefore, according to the law of Virginia, where, by the case stated, the intestate had his domicil, that the administrator, the plaintiff, must pay the debts of the intestate. The funds in the hands of the administrator are the moneys received from the treasury of the United States, for a debt due to Robertson, as a purser in the navy; the same being the balance of his accounts as settled at the treasury. This question is to be settled by a reference to adjudged cases, and a careful investigation of what has been decided, rather than by an argument upon general principles. It is important, that the rule shall be settled; the whole community is *interested in its being fixed and deter- [*520

mined; and the case now before the court affords an occasion for its final decision.

It is contended, that the decisions of the courts of equity have uniformly sustained the principle, that the law of the domicil governs the distribution. The cases arranged chronologically are: Ambl. 25, decided in 1774; Ibid. 415, decided in 1762; 2 Ves. sen. 35, decided in 1750; 2 Bos. & Pul. 229, decided in 1790; 1 H. Bl. 665, decided in 1791; 2 Ibid. 402, decided in 1795; 5 Ves. jr. 750, decided in 1800. The following cases show that the courts of England sustain the law of the domicil, in bankrupt cases, in other countries, against their own attachment laws. 1 H. Bl. 131, 132. In these cases, English creditors attached debts due in England to one who was a bankrupt in Holland, and the attachments were not sustained. So also, in *Hunter* v. *Potts*, 4 T. R. 182, a bankruptcy in Rhode Island was held to vest in the assignees, a debt due to the bankrupt in England. The following cases upon this point have been decided in the United States, 1 Mason 410; 8 Mass. 506; 11 Ibid. 256. The case of *Harvey* v. *Richards*, 1 Mason 410, is considered as establishing the principle claimed by the plaintiff in error. The question in that case was, whether the circuit court of Massachusetts district, on its chancery side, had power to decide, whether the fund in Massachusetts should be sent to India to be distributed; or should be distributed by that court, according to the law of India. The other American cases are *Harrison* v. *Sterry*, 5 Cranch 289; *Dixon's Executors* v. *Ramsay's Executors*, 3 Ibid. 323; *The Adeline*, 9 Ibid. 244; *The Star*, 3 Wheat. 78; *The Mary and Susan*, 1 Ibid. 25, 56; 4 Mass. 318; 1 Binn. 336. Also cited, 6 Bro. P. C. 550, 577; Coop. Eq. Pl. 123; 3 Eden 210; 11 Mass. 256, 257; 2 Hagg. 59.

It is admitted, in some of the cases cited, that the courtesy of nations
*521] requiresthe adoption of this principle. If this be *so, between foreign states, there is a much stronger policy for its adoption between our own states. It is asked, may not the law of distribution of Virginia be considered as part of the contract? It is with a view to the laws of the country in which all contracts are entered into, that their obligations are assumed; and for which the parties look for the effect and the extent of the contracts they enter into. The counsel for the plaintiff in error also contended, that personal property has no *situs*, but follows the domicil of the party entitled to it. This is not a new principle; but is recognised to the full extent in the cases cited from 1 Mason 381, and 3 Cranch 323.

Key and *Dunlop*, for the defendants in error.—They stated that this is a case of a foreign creditor coming into our courts, under the *lex loci* of the contract, or of the domicil, and claiming to take out of the jurisdiction of the court the whole effects of a deceased debtor, domiciled abroad; although there are creditors here, for debts contracted here; and the effects are found here, and are in the course of administration. The municipal law is against this claim; and is it to be sustained by national comity, which is to overthrow our own laws, and destroy rights derived under them, and make our own courts subservient to this injustice?

1. Does the *lex loci contractus* authorize the claim in this case? It is admitted, that contracts are to be expounded according to the law of the place where they are made; but it is equally true, that the remedy for the

breach of such a contract is regulated by the *lex fori*. The priority of payment claimed for the Virginia creditors is not of the essence of the contract; but is collateral and contingent, depending on the death of the debtor, and exists only when the debtor is insolvent. This is the view of the law expressed by the chief justice of this court, in the case of *Harrison* v. *Sterry*, 5 Cranch 289. In Maryland, no such priority is given, and the law of the *forum* must govern.

2. It is said, that the *lex loci domicilii* is to decide this case; that personal effects have no *situs*, and follow the person; and *that this principle is founded on the law and practice of nations. The general [*522
rule may be in favor of the position of the plaintiff in error, but when its application would affect the rights of a third person, ascertained and secured to him by the laws of his country, and which are in opposition to the foreign law, they do not prevail: when there is such a conflict, the domestic laws, and not those which are foreign, will operate. Fonbl. Eq. 444. No case can be found to sustain a principle of a different character. *Potter* v. *Brown*, 5 East 131; *Hunter* v. *Potts*, 4 T. R. 183; 1 H. Bl. 696; 2 Ibid. 402; 4 Johns. 478–9, 488, 471–2.

It was also contended, that the laws of foreign domicil never have been applied to the payment of debts. They only govern the surplus remaining after the debts of the intestate have been fully paid. They operate on what he had a right to dispose of in his lifetime: and that being left at his death, comity gives the disposal of this to the laws of his country. As to the surplus after the payment of the debts, the country where the goods are found has no interest in its distribution. The rights of its citizens cannot be affected by its appropriation, and it is but proper, that it should be given up to the *lex loci rei sitæ*. Legatees and distributees claim from the bounty of their testator or the intestate; and the laws which governed their benefactor should regulate their rights and claims. He is supposed to have known those laws, and to have intended they should operate on his property. But creditors do not stand in the same relation to those laws. Their rights are to look to their own laws, and to their own courts, by which their contracts shall be construed and enforced; and for the appropriation and distribution of the funds which shall be within the power of their laws. It is inquired, would the bond debt of the Virginia creditor be a bar to a suit by the Union Bank against Robertson, if he were alive? Would it dissolve an attachment laid on his effects here? The administrator of Robinson may be obliged to bring suits here for the recovery of debts due to the estate; and under what law shall he proceed? Why shall not the same rule apply in prosecuting a suit, which prevails in defending it?

There is no conflict of laws in this case. The Virginia statute of distribution is the English statute. Was the English *statute ever extended to any other country than England, but by express adoption? [*523
The statute of Virginia applies to different persons, and to a different state of things from that of Maryland; and therefore, there is no conflict. Fonbl. Eq. 444; Huberus, lib. 1, tit. 3, § 9; 5 East 131; *Willison* v. *Watkins*, 3 Pet. 43; 2 Har. & Johns. 224; 4 Mass. 318; 11 Ibid. 256, 264; 6 Binn. 361; 2 Kent's Com. 344; 3 Caines 154; 1 Har. & McHen. 236; Beawes' Lex Merc. 499; Insolvent Law of Maryland of 1798, ch. 101, § 2, 3; 4 Johns. Ch. 460; 1 Ibid. 118.

JOHNSON, Justice, delivered the opinion of the court.—The judgment below is rendered upon an agreed case, on which the following state of facts is exhibited. The defendant's testator was domiciled at Norfolk, in Virginia, at which place he contracted a debt on bond to one Thompson. He was also indebted to the Union Bank, the defendant in error, on simple contract. He died at Bedford, in Pennsylvania, and the defendant Smith administered on his estate in the county of Washington, in this district. Robertson, at the time of his death, was possessed of personal assets in the county of Washington; and the administrator, having reduced these assets into possession, now holds them subject to his debts.

By the laws of Maryland, which govern the county of Washington, all debts are of equal dignity in administration; but by the laws of Virginia, the country of Robertson's domicil, bond debts have preference, and the assets are insufficient to satisfy both. The question then is whether the bond debt shall take precedence, or come in average with the simple-contract debts?

On the bearing of the *lex loci contractûs*, on this question, nothing need be added to the doctrine of the chief justice of this court in the case of *Harrison* v. *Sterry*, to wit: "the law of the place where the contract is made is, generally speaking, the law of the contract; that is, the law by which the contract is expounded. But the right of priority forms no part of the contract itself." The passage which follows these words in the same opinion will present, in as succinct a form as they need be stated, the pro-
*524] positions on the correctness of which the decision of this *cause must, mainly, depend. It is in these terms: "It (the right of priority) is intrinsic, and rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits, which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his power."

The argument urged against this doctrine is, that personal property has no *situs;* that it follows the law of the person; and that there is no other rule that can give uniformity and consistency to its administration. In support of this argument, great industry has been exhibited in collecting and collating the cases which relate to the distribution of intestates' effects, and the execution of the British bankrupt law; and analogy, it is insisted, requires the application of the rule of those cases to that of the payment of debts.

With regard to the first class of cases, we expect to be understood as not intending to dispose of them, directly or incidentally. Whenever a case arises upon the distribution of an intestate's effects, exhibiting a conflict between the laws of the domicil and those of the *situs*, it will be time enough to give the views of this court on the law of that case. And as the cases in which the British courts have asserted a power over the effects of a bankrupt, the *situs* of which placed them beyond the action of their bankrupt laws, we are not aware of any instance in which they have gone further than to treat that power as an incident to the jurisdiction of these laws over their own subjects. As, in the instance in which a British subject had, by process of law, in this country, possessed himself of the effects

of a British bankrupt, to the prejudice of the other creditors. That there is no violation of principle in doing this, is fully affirmed in the same case of *Harrison* v. *Sterry;* in which this government, and this court, availed themselves of jurisdiction in fact over the effects of a foreign bankrupt, so as to subject them to the priority given by our laws to the debts due our government. Each government thus asserting the power of its own laws over the subject-matter, when within its control.

*That personal property has no *situs*, seems rather a metaphysical position than a practical and legal truth. We are now considering the subject with regard to subjecting such property to the payment of debts, through the medium of letters of administration. And here there is much reason for maintaining, that even the common law has given it a *situs*, by reference to any circumstances which mark it locally with discrimination and precision. Thus, in the case of *Byron* v. *Byron* (Hil. 38 Eliz.),Cro. Eliz. 472, ANDERSON, Chief Justice, says, "the debt is where the bond is, being upon a specialty, but debt upon contract follows the person of the debtor; and this difference has been oftentimes agreed." So, Godolphin lays down the same distinction, as established law. (Orphan's Legacy 70.) And Swinburn lays down the same rule with still greater precision, as well against the effect of domicil as of the place of contract. For he says, "debt shall be accounted goods, as to the granting of administration, where the bond was at his (creditor's) death, not where it was made." And again, "debts due the testator will make *bona notabilia* as well as goods in possession; but there is a difference between bonds and specialties, and debts due on simple contracts: for bond debts make *bona notabilia*, where the bonds or other specialties are at the time of the death of him whose they are, and not where he dwelt or died; but debts on simple contracts are *bona notabilia* in that country where the debtor dwells." (Part 6, ch. 11.) And so of judgments, locality is given them by the *situs* of the court where they are entered. Carth. 149; 3 Mod. 324; 1 Salk. 40; Dyer 305; 1 Roll. Abr. 908; 1 Plowd. 25; Carth. 373; Comb. 392, are cited for these distinctions. [*525

It is not unworthy of remark, that in almost every treaty between civilized nations, we find an article stipulating for permission to remove the goods of a deceased subject to the country of his domicil. And from the generality of the stipulation, it would seem to be intended, for the purpose of subjecting the goods to the law of the deceased's country or domicil, even as to their application to the payment of debts. There is the more reason to believe this, with regard to our own treaties, since there are two instances in which the generality of that provision is deviated from; the one in favor of the payment of debts due where the goods are, *and the other subjecting the right of property to the law of the *situs*. I mean, the French consular convention of 1788, by the 5th article of which it is expressly stipulated, that goods shall be subjected to the payment of debts due in the foreign country. And both our treaties with Prussia contain a stipulation, in the 10th article, "that if questions shall arise among several complainants to which of them the said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are." It would seem, that such a provision would be wholly unnecessary, if there existed any established rule of international law, by [*526

which the law of the domicil could be enforced in this regard, in the country of the *situs*. Or, if the fact of locality did not subject the goods to the laws of the government under which they were found at the party's death.

In point of fact, it cannot be questioned, that goods thus found within the limits of a sovereign's jurisdiction, are subject to his laws; it would be an absurdity, in terms, to affirm the contrary. Even the person of an ambassador is exempted from jurisdiction, only by an established exception from the general principle. And the *onus* lies certainly upon those who argue here for the precedence of the law of the domicil, to establish a similar exception in favor of foreign debts. But if we look into books, we do not find it there; for it is an acknowledged doctrine, that in conflicts of rights, those arising under our own laws, if not superseded in point of time, shall take precedence, "*majus jus nostrum quam jus alienum servemus.*" The obligation of the sovereign to enforce his own laws, and protect his own subjects, is acknowledged to be paramount

If we look into facts, we find no evidence there, to sustain such an exception; for every sovereign has his own code of administration, varying to infinity as to the order of paying debts; and almost without an exception, asserting the right to be himself first paid out of the assets. And the obligation on the administrator to conform to such laws, is very generally enforced, not only by a bond, but an oath; both of which must rest for their efficacy on the laws of the state which requires them. On what principle, then, shall we insert into all those laws an amendment in favor of foreign creditors, nowhere to *be found in their provisions; and in many instances, operating as a repeal of or proviso to their enactments? *527]

Nor will the search after the exception under consideration, be attended with any greater success, if extended to the reason and policy of laws. Property, palpably and visibly possessed, is calculated rather more certainly to give credit, than actual residence. The inhabitant of a northern or eastern state may be largely interested as a planter in the south, or in Cuba; his agent may there, with or without express instruction, have obtained extensive credits for subsistence or improvements, expended upon the very property itself; when, upon the death of the proprietor, his estate may turn out insolvent; and insolvent from debts or speculations at the place of his domicil. What greater reason can, in such a state of things, be urged, in favor of the debts of his domicil, than what applies to those of the *situs* of his property? But the reason of the thing may be followed out a little further. Contracts *contrà bonos mores*, or against the policy or laws of a state, will not be enforced in the courts of that state, though lawful in the state in which they are entered into. Suppose, then, a bond given for the purchase of a slave were postponed or held void under the laws of the deceased's domicil, though otherwise in the country of the *situs* of his property, what reason would there be in referring the creditor to the law of the domicil? Or, rather, what iniquity in confining him to it?

The actual course of legislative action in every civilized country, upon the effects of deceased persons, seems wisely calculated to guard against the embarrassments arising out of such conflicts, and to preserve in their own hands the means of administering justice, according to their own laws and institutions. It has been solemnly adjudged in this court, and is the general

principle in, perhaps, every state in the Union, that one administering in one state cannot bring suit in the courts of another state. This necessity of administering, where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if, in any instance, the rule is deviated from, it forms, *pro hâc*, an exception; a voluntary relinquishment of a right, countenanced by universal practice; and is of the *character of the treaty stipulations already remarked upon, by which foreign nations surrender [*528 virtually a right, which locality certainly puts in their power.

Whether it would or would not be politic, to establish a different rule by a convention of the states, under constitutional sanction, is not a question for our consideration. But such an arrangement could only be carried into effect, by a reciprocal relinquishment of the right of granting administration to the country of the domicil of the deceased, exclusively, and the mutual concession of the right to the administrator, so constituted, to prosecute suits everywhere, in virtue of the power so locally granted him; both of which concessions would most materially interfere with the exercise of sovereign right, as at present generally asserted and exercised.

There is no error, therefore, in the judgment below, and the same is affirmed, with costs.

Baldwin, Justice, dissented from the opinion and judgment of the court.[1]

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*John Winship and others, Plaintiffs in error, *v.* The Bank of [*529 the United States, Defendant in error.

Partnership.

If the particular terms of articles of partnership are unknown to the public, they have a right to deal with the firm, in respect to its business, upon the general principles and presumptions of limited partnerships of a like nature and any special restrictions in the articles, do not affect them. In such partnerships, it is within the general authority of the partners, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such were the general usage of trade, that authority must be presumed to exist; but not to extend to transactions beyond the scope and objects of the copartnership.[2]

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[1] See the dissenting opinion of Judge Baldwin, in Harrison *v.* Nixon, 9 Pet. 505, in which he affects to consider this case as overruled; this, however, is not the case; there is a clear distinction between the cases; in the one case, domestic creditors intervened; the other was a mere question of construction, as to the person designated as heir-at-law.

[2] To constitute one a dormant partner, it is not essential, that he should wholly abstain from any actual participation in the business of the firm, or be universally unknown as having a connection with it, nor that there should be a studied concealment of the fact; it is sufficient, that he is not an ostensible member. North *v.* Bliss, 30 N. Y. 374. When a partnership is formed for the transaction of a special business only, a dormant partner in such firm is not liable for its contracts, outside such limited transactions. Bank of Pennsylvania *v.* Hadfeg, 3 Yeates 560; s. p. Ex parte Munn, 3 Biss. 442. Where, however, a general partnership business is transacted in the name of an active partner, it has been held, that a promissory note given in his name, is *primâ facie*, a partnership debt. Mifflin *v.* Smith, 17 S. & R. 165. This case has never been overruled, though strong doubts are expressed of its soundness, in Burrough's Appeal, 26 Penn. St. 264. But it was there ruled, that it requires but very slight evidence, to impose upon the holder, especially, if a party to the original transaction, the burden of showing that it was intended and understood as a partnership act, and was within the partnership business. See Jones *v.* Fegely, 4 Phila. 1. Where the intention of the contracting parties is, that

Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public; which subserve the purposes of justice; and which society is concerned in sustaining. One of them is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts; another is, that a partner, certainly, the acting partner, has power to transact the whole business of the firm, whatever that may be; and, consequently, to bind his partners in such transactions, as entirely as himself; this is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership.

When a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way; if that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades in the way of his business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm; this is a general authority held out to the world, and to which the world has a right to trust.

The trading world, with whom the company is in perpetual intercourse, cannot individually examine the articles of partnership; but must trust to the general powers contained in all partnerships. The acting partners are identified with the company; and have power to conduct its usual business, in the usual way; this power is conferred by entering into the partnership, and is perhaps never to be found in the articles; if it is to be restrained, fair-dealing requires, that the restriction should be made known; these stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law.

The responsibility of dormant partners depends on the general principle of commercial law, not on the particular stipulations of the articles.

If promissory notes are offered for discount at a bank, in the usual course of the business of a *530] partnership, by the partner intrusted to conduct the business *of the firm, and are discounted by the bank, and such discount was within the firm business, a subsequent misapplication of the money (the indorsees not being parties or privy thereto, or of the intention to misapply the money), will not deprive the holders of their right of action against the dormant partners in such a copartnership.

United States Bank *v.* Binney, 5 Mason 176, affirmed.

Error to the Circuit Court of Massachusetts. This was an action of *assumpsit*, brought by the defendants in error against John Winship, Amos Binney and John Binney, the present plaintiffs in error, as copartners, under the name of John Winship.

The declaration contained seven counts, six of which set forth six different promissory notes, describing them. The notes were of different dates and amounts, made by Samuel Jacques, jr., and payable to, and indorsed by John Winship, jr.: the declaration alleging the notes to be payable to Amos Binney, John Binney and John Winship, jr., by the name and description of John Winship, and so indorsed to the Bank of the United States. Demand and notice were alleged to have been duly made. The seventh count was for $14,000, money lent. The defendants pleaded the general issue.

The plaintiffs below offered the testimony of Samuel Jacques, jr., the maker of the notes, which evidence was objected to, on the following facts: On the 28th day of August 1825, Samuel Jacques, jr., having failed in busi-

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the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm, in whatever form it may be made. Ex parte Warren, 2 Ware 325; Bigelow *v.* Elliott, 1 Cliff. 28. If a firm carry on business in the name of an active partner, and the latter give a note to the silent partner, for the amount of his capital, this is the separate debt of the former. Ex parte Waite, 1 Lowell 207.

ness, made an assigment of his property to Samuel Etheridge and Henry Jacques, in trust for the payment of his debts, and among them of the claims which John Winship might have upon him on the promissory notes stated in this declaration. These notes are thus described: "And among the creditors in this schedule, are also to be included banks and individuals, who are or may become holders of any of the notes in the following list, which have either been made by Samuel Jacques, jr., as promisor, and John Winship, as indorser, or by said Winship, as promisor, and said Jacques, as indorser; but such banks or holders are to be considered creditors for the purposes of this instrument, only for such part of the contents of such notes as came to such Jacques's use and possession, but for no more; and the assignees are to that extent, to indemnify said Winship for said proportion of said notes *pro rata* with other creditors of this class, *and said Winship may execute this instrument as representing his interest in said notes, when paid. And accounts between said Samuel Jacques, jr., and said Winship, touching former transactions, are to be adjusted; and the balance, if in favor of said Jacques, is to go towards the indemnity above provided for said Winship, and if in favor of said Winship, is to be a debt in this second class of debts, as above stated." Then followed a schedule of the notes drawn by Samuel Jacques, jr., in favor of John Winship, amounting to $14,250, and of three notes made by John Winship in favor of Samuel Jacques, jr., amounting to $4200. [*531

John Winship was, with other creditors of Jacques, a party to this assignment, and released the assignor in these terms: "The creditors of the said Samuel Jacques, jr., do hereby consent to and accept this assignment, and in consideration of the same, and of the covenants of the said Samuel Etheridge and Henry Jacques herein contained, for themselves, respectively, and their respective heirs, executors, administrators and assigns, have hereby demised, released, and for ever quit-claim to the said Samuel Jacques, jr., his executors and administrators, all claims, demands and causes of action which they have, or may hereafter have, for or on account of the several debts and sums of money set opposite to their respective names on schedule, and do hereby acquit and discharge him and them therefrom."

The court overruled the objection to the admission of Jacques; and he testified, "that he knew of the existence of a copartnership between the defendants, by general reputation, but had never seen any articles of agreement between them; he considered that the Binneys were concerned with Winship in the soap and candle business, and he knew that it was generally so understood; that Winship did no other business to his knowledge; that he and Winship both lived in Charlestown, and saw each other every day; that he had dealings with Winship soon after the commencement of the partnership, and supplied him with rosin—perhaps to the amount of $400 or $500 per year, sometimes more and sometimes less. And that he sometimes gave a note for the balance, signed John Winship; that witness always took such notes on the credit of the *Binneys, with full confidence that they were interested and were men of property. [*532

"And at some time in the year 1823, and perhaps a little previously, and until 1825, witness and Winship were in the habit of exchanging notes, which were discounted at the different banks; they began at the Manufacturers' Bank; there were none at the Branch Bank till 1824. They began

with small notes, and finally exchanged notes for $2000 and $2500, sometimes signed by one and indorsed by the other, and *vice versâ*. These notes were discounted at the different banks, but that he believed that none were discounted at the United States Bank, until at later periods; and that Winship usually applied for the discounts. That he, Jacques, indorsed these notes, on the credit of the firm. That Winship always represented them to be for the partnership account, and that witness never understood that they were on his private account.

"The notes in suit were generally presented by Winship for discount, but witness might have presented some of them. There were some notes for his private account, but he believed those in suit to have been for the firm. He could not state what portion of the money obtained on these notes he had received; but as he and Winship exchanged notes, he could not say, that he never received any of it. Some of those notes were given for renewals at this bank, and some to take up notes at other banks. It was his impression, that some of the money thus obtained went to pay for rosin; and that one of them for $1500 was originally made to take up a note which had been previously given at the Manufacturers' & Mechanics' Bank for rosin, being a material used in defendant's factory. He knew no particulars concerning the appropriation of the moneys obtained upon these notes, and knows of no other which Winship has made, but for the use of the firm. The business of the firm required a great capital, and Winship often spoke of buying barilla and tallow for the factory; but witness does not know that he alluded to these particular notes, nor that the proceeds of them were applied to any other business. This business of exchanging notes continued until 1825, *when he and Winship stopped payment. Winship kept a little note-book, but witness, having great confidence in him, kept no accurate accounts.

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"The particular occasion of witness stopping payment was the non-payment of his acceptance on a draft drawn on him by Winship for barilla, an article such as is used in the factory. He told Mr. A. Binney of it, who said, he would do nothing about it. He furnished the factory of defendants with rosin, from 1822 to 1825; he sometimes might have received payment in cash, but it was generally in notes. He has endeavored to trace the origin of the notes in suit, but can trace only two; that of $800 and one of $806, originally given for rosin, were eventually included in the notes in suit, for $1900, by means of successive renewals. Winship sometimes came to witness, and stated, that he wanted his name instead of Amos Binney, because he was absent; and got his name accordingly. He has a memorandum in his note-book, of August 15th, 1825, stating that Winship applied to him to take up a note of Amos Binney, of that date, for $1500, stating that he was out of town. This note originated 9th of October 1824, and was at first $2000, and renewed successively, till the 15th of August 1825, when it was reduced to $1500; the original note was Amos Binney's, not the last one."

Upon cross-examination, he testified, "that he had known John Winship about twenty or twenty-five years; that he was in partnership with Messrs. Hydes, and that their names were in good credit, before his connection with Binney, and not in extensive business. There are accommodation notes of this kind, now outstanding, amounting to about $21,000. No particular

agreement ever subsisted between him and Winship, concerning the proceeds of these accommodation notes ; they sometimes divided the money and each took a portion. And sometimes, he lent his name to Winship, and Winship lent his name to him. And at the conclusion of the whole matter, they bundled up all the notes that had been taken up, and agreed to consider them as settled and discharged. *And as to the outstanding $21,000, [*534
he applied to adjust it with Winship, but he said, that the papers were all in Binney's hands. He never applied to him to adjust them. When he went to Winship, the notes and checks were in a mass, and they agreed to consider them cancelled, to bundle them up and to pass receipts ; and as to the residue, which were outstanding, that they should be adjusted as well as they could. He has checks of Winship's, amounting to about $1700, or $2000, and some notes ; and Messrs. Binneys hold notes and checks signed by him, and given to them by Winship.

"He was engaged in an extensive speculation in hops ; was indebted and mortgaged his estates, in 1824, to Messrs. Thompson, for about $10,000. He never knew any actual use, for the benefit of the firm, for money obtained on the accommodation notes, unless the taking up of the rosin notes, as stated in his testimony, be so considered. He understood, that Winship was engaged in some shipments of the manufactures of the firm, and also of some other articles, but always supposed them to be on account of the firm ; and Winship always told him so. He was called upon to take up one of these accommodation notes signed by him, and borrowed money of Amos Binney upon collateral security, by a mortgage of land for that purpose ; and nothing was said to Binney about his being liable to pay the note, according to his recollection."

The plaintiffs also introduced the testimony of other witnesses, who, among other things, stated, that they learned the existence of a copartnership between Winship and the Binneys, in the soap and candle business, by report, and the declaration of Winship ; but none of them ever learned it from either of the Binneys. One witness stated, that Winship offered to exhibit to him the articles of copartnership ; and Parker stated, that the Binneys were engaged in large business as merchants, and he did not know that any one ever supposed, that they and Winship were connected, except in the soap and candle business.

The defendants gave in evidence the articles of agreement entered into by the defendants, at the formation of the *copartnership. The [*535
agreement was executed on the 25th of September 1817, and was between Amos Binney and John Binney of Boston, and John Winship, of Charlestown, Massachusetts, "for the manufacture of soap and candles." Amos and John Binney agreed to furnish for that purpose a capital stock of $10,000, at such times as the same should be required, to purchase stock and materials for carrying on the manufacture, and Winship agreed to conduct and superintend the same "under the name and firm of John Winship ;" to keep books open to the inspection of the parties ; exhibit an annual statement of the capital or business, interest to be paid on the capital ; and the profits to be divided, one-half to Winship, and the other half to A. and J. Binney, and losses to be apportioned in the same manner. The agreement was to continue in force for two years, and for a further term if the parties agreed thereto. The capital was afterwards increased to

$20,000, Amos Binney and John Binney advancing the same, in equal proportions. This was acknowledged by John Winship on the back of the agreement.

They also gave in evidence a bond given by John Winship to Amos Binney, on the 25th day of September 1817, in the penal sum of $10,000, with the condition following: "The conditions of this obligation are such, that whereas, the above-bounden John Winship has this day made an agreement with Amos Binney and John Binney, both of Boston aforesaid, for the purpose of carrying on a manufactory of soap and candles in joint account of the parties aforesaid; and whereas, the said A. Binney hath engaged to indorse the notes given by the said John Winship, for the purchase of stock and raw materials for manufacturing, when necessary to purchase on a credit, and in consideration of which, the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Amos Binney, for the term of two years from the first day of October 1817. Now, therefore, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person, to any amount, other than *the same Amos Binney, for the aforesaid term of two years from the first day of October 1817, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue."

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A witness, the clerk of Amos Binney, testified on the part of the defendants below, that having all the books and papers of Winship in his hands, after the failure of Winship, he examined them, and could find no entry of any of the notes in suit, and none of which are stated to be renewals, except two, one for $800, the other for $806; which in the note-book are marked paid. That regular business notes appear to have been entered in the books, and the payment of them entered in the cash book; but no entries of these accommodation notes appear. There are entries of notes signed by Winship and indorsed by the defendant to a large amount. Amos Binney advanced very large sums to pay the debts of the concern, amounting in all to about $46,828; and the whole amount sunk and lost to Amos and John Binney was about $70,000.

William Permenter said, that he was clerk to Amos and John Binney from 1813 to 1824, and never heard of any of the accommodation notes of Winship. Mr. Gould stated, that he was foreman in the factory, and kept the books of the concern, in a counting-room; that he never saw John Binney there; nor Amos Binney, more than once or twice, for the whole time, until about the time of the failure. That he had carried on the business, since Winship's failure, and it had been profitable. And several other witnesses stated, among other things, that Amos and John Binney were severally engaged in other extensive business, and in good credit as merchants; Amos Binney being esteemed wealthy.

The plaintiffs also introduced William Gordon, who testified, that he had always understood, that there was a copartnership in the manufacture of soap and candles. That Winship bought real estate, and that it was commonly reported, that he bought and shipped other articles than those used in the manufactory. Also, Thomas R. Thompson, Solomon Harvy, Samuel *Raymond and Thomas Pike; who testified, that it was generally understood, that the defendants were copartners, and that Winship

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shipped articles other than soap and candles, or factory goods. It was not stated, that any of the witnesses ever learned the existence of the partnership from either of the Binneys.

The first exception taken on the trial in the circuit court, as stated in the bill of exceptions, was, that the counsel for the defendants insisted, that the copartnership was, in contemplation of law, a secret copartnership, and did not authorize the giving of credit to any other name than that of the said Winship; but to this the counsel for the plaintiffs did then and there insist before the said court, that this was an open or avowed, and not a secret copartnership. And the presiding justice of the said court did state his opinion to the jury on this point, as follows: "That according to his understanding of the common meaning of 'secret partnership;' those were deemed secret, where the existence of certain persons as partners was not avowed, or made known to the public, by any of the partners. That where the partners were all publicly known, whether this was done by all the parties, or by one only, it was no longer a secret partnership; for secret partnership was generally used in contradistinction to notorious and open partnership; that whether the business was carried on in the name and firm of one partner only, or of him and company, would, in this respect, make no difference; that if it was the intention of the Binneys, that their names should be concealed, and the business of the firm was to be carried on in the name of Winship only, and yet that Winship, against their wishes, in the course of the business of the firm, publicly did avow and make known the partnership, so that it became notorious who were the partners; such partnership could not, in the common sense of the terms, be deemed any longer a secret partnership; that if 'secret' in any sense, it was under such circumstances, using the terms in a peculiar sense. That, however, nothing important in this case turned upon the meaning or definition of the terms 'secret partnership;' since the case must be decided upon the principles of law, applicable to such a partnership, as this was in fact proved to be. That there was no stipulation for secrecy as to the Binneys being partners on the face of the original articles of copartnership; and when those articles, by their own limitation, expired, the question what the partnership was, and how it was carried on for the future; whether upon the same terms as were contained in the original articles, or otherwise, was matter of fact from the whole evidence; that if the evidence was believed, Winship constantly avowed the partnership, and that the Binneys were his partners in the soap and candle manufactory business, and obtained credit thereby." But he left the jury to judge for themselves as to the evidence. [*538

Second exception. And the counsel of the defendants did then and there further insist, that the jury had a right to infer from the evidence aforesaid, notwithstanding the entries of shipments in the invoice-book kept by Winship, that the said Amos Binney and John Binney had no knowledge thereof; and therefore, could not be presumed to have adopted or ratified the conduct of said Winship, making said shipments. But the presiding judge did then and there instruct the jury as follows: "That whether the said Amos and John Binney, or either of them, knew of the said entries or not, was matter of fact for the consideration of the jury, upon all the circumstances of the case. That, ordinarily, the presumption was, that all the parties had access to the partnership books, and might know the contents

thereof. But this was a mere presumption from the ordinary course of business, and might be rebutted by any circumstances whatsoever, which, either positively or presumptively, repelled any inference of access; such, for instance, as the distance of place in the course of business of the particular partnership, or any other circumstances raising a presumption of non-access." And he left the jury to draw their own conclusion as to the knowledge of the Binneys of the entries in the partnership books, from the whole evidence in the case.

Third exception. And the counsel of the defendants did then and there further insist, that by the tenor of the said recited articles of agreement and bond, the said Winship had no right or authority to raise money on the credit of the said firm; or to bind the firm by his signature, for the pur-
*539] pose of *borrowing money. But the presiding judge did then and there instruct the jury as follows: "That if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm, in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature; and that any secret and special restrictions contained in such articles of copartnership, varying the general rights and authorities of partners in such limited partnerships, and of which they are ignorant, did not affect them. That the case of *Livingston* v. *Roosevelt*, 4 Johns. 251, had been cited by the defendants' counsel, as containing the true principles of law on this subject; and this court agreed to the law, as to limited partnership, as therein held by the court. That it was not denied by the defendants' counsel, and was asserted in that case, that it was within the scope and authority of partners generally, in limited partnerships, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such was, in fact, the ordinary course and usage of trade, the authority must be presumed to exist. The court knew of no rule established to the contrary. That the authority of one partner in limited partnerships, did not extend to bind the other partners in transactions, or for purposes, beyond the scope and object of such partnerships. That in the present articles of copartnership, Winship was in effect constituted the active partner, and had general authority given him to transact the business of the firm. That he had, so far as respects third persons, dealing with and trusting the said firm, and ignorant of any of the restrictions of such articles, authority to bind the firm, to the same extent, and in the same manner, as partners in limited partnerships of a like nature usually possess, for the objects within the general scope of such a firm. That the articles limited the partnership to a particular period, after which, it expired, unless the parties chose to give it a future existence. That no new written articles were proved in the case: and the terms and circumstances under which it was subsequently carried on, were matters to be decided upon the whole
*540] evidence. The fair presumption was, that it was *subsequently carried on on the same terms as before, unless other facts repelled that presumption. That the bond, executed at the time of the execution of the articles, ought to be considered as a part of the same transaction and contract."

And the said counsel of the defendants did, then and there, further request

the court to instruct the said jury, as follows, to wit: 1. That if, upon the whole evidence, they are satisfied, that the copartnership, proved to have existed between the defendants, under the name of John Winship, was known or understood by the plaintiffs to be limited to the manufacturing of soap and candles, they must find a verdict for the defendants; unless they were also satisfied, that these notes were given in the ordinary course of the copartnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they were satisfied, that any part of these moneys did go to the use of the firm, with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue. And 2. That if they are also satisfied, that the Messrs. Binneys furnished Winship with sufficient capital and credit for carrying on the business of the firm, no such consent can be implied from the mere fact that Winship applied these moneys, or any part of them, to the payment of partnership debts.

But the presiding judge refused to give the instruction first prayed for, unless with the following limitations, explanations and qualifications, viz: "That the defendants, as copartners, are not bound to pay the notes sued on, or money borrowed or advanced, unless the indorsements of the same notes, and the borrowing of such money, was in the ordinary course of the business of the firm, for the use and on account of the firm. But if the said Winship offered the notes for discount, as notes of the firm, and for their account, and he was intrusted by the partnership, as the active partner, to conduct the ordinary business of the firm, and the discount of such indorsed notes was within such business; then, if the plaintiffs discounted the notes upon the faith of such notes being so offered by the said Winship, and as binding on the firm, the plaintiffs were entitled to recover; although Winship should have subsequently misapplied the funds *received from the discount [*541
of said notes, if the plaintiffs were not parties or privy thereto, or of any such intention. And if Winship borrowed money or procured any advances on the credit and for the use of the firm, and for purposes connected with the business of the firm, in like manner, and under like circumstances, and the money was lent or advanced on the faith and credit of the partnership; the money so borrowed and advanced bound the partnership, and they were liable to pay therefor; although the same had been subsequently misapplied by Winship, the lender not being party or privy thereto, or of any such intention. And with these limitations, explanations and qualifications, he gave the instructions so first prayed for. And the presiding judge gave the instructions secondly prayed for, according to the tenor thereof.

The defendants in the circuit court excepted to these opinions and decisions of the court; and a verdict and judgment having been rendered for the plaintiffs, the defendants prosecuted this writ of error.

The case was argued by *Sprague*, for the plaintiffs in error; and by *Sergeant* and *Webster*, for the defendants.

Sprague contended, that Jacques was interested in the event of the suit, and ought not to have been permitted to testify in the cause. Such was his situation, that if the plaintiffs below did not obtain payment from the defendants, they could call upon him for the whole amount of the debt, he being the maker of the notes in suit. But if the defendants were compelled

to pay the same, they could have no remedy over against him, having discharged him from all liability by a release, executed after the date and before the maturity of either note. It was competent for the parties to enter into such contract; and to make an effectual release as between themselves; whether Winship was the holder of the notes at the time, or had previously transferred them with his own liability as indorser. Jacques was in failing circumstances; and by a species of conventional bankruptcy, transferred his property to assignees, to be appropriated, *pro rata*, to those debts from
*542] which his *creditors should discharge him by executing the indenture. That indenture expressly names and identifies the notes in suit; and declares, 1. That those who are, or may be, holders thereof may participate in the fund; 2. That the assignees are to indemnify Winship against his liability as indorser; 3. That if on a settlement of accounts, a balance shall be due Winship, he is to hold it towards this indemnity; and it contains a release, duly and legally executed by Winship, of all claims or demands which he had, or in any event might have, on account of these notes. *Gibbs* v. *Bryant*, 1 Pick. 118; *Le Roy* v. *Johnson*, 2 Pet. 195; 1 Camp. 408; *Ludlow* v. *Union Insurance Company*, 2 Serg. & Rawle 119; 2 Condy's Marsh. 202; 2 Ld. Raym. 1007; 1 Holt 390, 392; 16 Johns. 70; *Riddle* v. *Moss*, 7 Cranch 206; 4 Taunt. 464; 5 Moore 508; 4 Stark. Evid. 751; 4 Day 55; Peake's Cas. 84–5; 4 Mass. 653.

The instructions to the jury, as contained in the first and third exceptions, when brought together and compared, and applied to the same case, will be found to be inconsistent with each other; and one of them, therefore, must be erroneous. In the first instruction, it appears, that it having been contended by the counsel for the defendants, that this was a secret partnership, and did not authorize the giving credit to any other name than that of Winship; the court instructed the jury, "that nothing important in this case turned upon the meaning of the terms secret partnership, since the case must be decided upon the principles of law applicable to such a partnership as this was in fact proved to be," &c. In the third exception, it appears, that the counsel for the defendant having contended, that by the tenor of the articles of agreement and bond, Winship had no right or authority to raise money on the credit of the firm; the judge instructed the jury, "that if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature; and that any secret and special restric-
*543] tions contained in such articles of copartnership, varying *the general rights and authorities of partners in such limited partnerships, and of which they are ignorant, do not affect them.

In the first place, the jury were informed, that it was of no importance for them to determine, whether this partnership was secret as to the business or not; because their liabilities were to arise from the terms of the partnership, such as they should in fact be proved to be. But in the last, they were instructed that the liabilities of the Binneys are not to be limited or restricted to the terms of the partnership, as proved in this case, but to arise from certain "general principles and presumptions." The latter ruling is correct only in cases of open and avowed partnerships; and it was

most important, therefore, for the jury to determine, whether this was secret as to the Binneys, so as to limit their liabilities to the special terms of their agreement; or open, so as to subject them to the operation of the presumptions referred to by the court. And then it becomes of importance to determine, whether another part of the first instructions be correct: that the avowal of the partnership by Winship, when intended to be kept secret, and against the will of the Binneys, could extend their liability.

The legal responsibility of partnership is not to be determined by any classification into limited and unlimited. We must search deeper, and look to the real nature of the subject. In strictness, there are no unlimited parnerships; all have their boundaries. They vary in extent, from a single joint adventure, to the most enlarged business of general merchants. But each has its sphere more or less comprehensive; and to that sphere it is confined. The general principles of liability are the same in all; it may flow from two sources: one, that credit was given on the faith of the name of the partner; the other, that he participated in the consideration of the contract, by its going to the benefit of the firm. In the first, if he has authorized his name and credit to be pledged, he is bound; although the goods purchased or the money obtained are squandered by his copartner, and never came to the use of the firm. In the other, if he be a secret *or a [*544
dormant partner, and has never authorized his name or credit to be pledged; still, if the goods or money have gone to the partnership funds, they have come to his use; and he is bound, not on the ground of previous authority given, but subsequent reception and use.

No man's credit can be pledged, except by himself. If it be by the intervention of another, that other must have authority from him. When the ground of liability is, that credit was given to the name, then the liability is co-extensive with the authority which the partner had to pledge the name. This power is usually conferred by the avowal of the copartnership; and is known, limited and defined, by its nature and extent. But it is not always so; a person may avow or profess himself a general partner, when he is in fact a special partner, or no partner at all; or, on the other hand, the authority to use his name may be more restricted than his interest, or withheld altogether. In these cases, the question is, was the credit obtained on his name, authorized by him in any manner; if so, he is a surety from the beginning? In this case, was Winship authorized to pledge the credit of the Binneys? If he was so, the authority must be derived either from the written agreement, or from acts and declarations of the Binneys. It is not derived from the written contract. By that contract, the Binneys furnished the funds, but limited their liability: 1st, by its being secret in the name of Winship alone; 2d, by binding Winship not to become responsible for any other person; 3d, by Amos Binney agreeing to indorse Winship's notes for stock and raw materials, when necessary. The court declared, these were restrictions on Winship, binding as to those who knew them.

2. "Acts and declarations." There were none by the Binneys: if they had avowed the partnership, they would have been liable according to the import of the avowal, and could not avail themselves of restrictions which the business did not import. Winship's declarations were no proof: those who trusted him did so on his credit; and if they required a further responsibility, they should have demanded the articles, or have called upon

the Binneys. Not only were Winship's declarations no evidence, but he could not prove them his *copartners, by reason of his interest in making such proof. *545] *Brown* v. *Brown*, 4 Taunt. 752; 2 Moore 94; 4 M. & S. 475, 484; *Field* v. *Holland*, 6 Cranch 8, 24; 16 Johns. 89; 2 Desauss. 4–5.

This judgment has been rendered against the Binneys, wholly upon the ground, that they were liable, as avowed copartners, for debts contracted upon their credit. It is contended, then, 1st. That it was important to determine, whether they were avowed copartners or not. 2d. That Winship's avowal, when intended by all to be kept secret, cannot extend the liability of the Binneys. 3d. At all events, Winship could avow only such a partnership as actually existed; he could not, by misrepresenting it, extend the liabilities of others beyond what they would be if he had stated only the truth. 4th. Winship's authority was derived wholly from the written instrument, which gave him no power to pledge the credit of the Binneys to any persons; whether such persons knew the articles of the firm or not. 5th. No one has any right or claim against the Binneys, except by virtue of the writings; and, of course, subject to all their restrictions.

The court were requested to instruct the jury, that unless these notes were given in the ordinary course of the partnership business, or the money obtained from them went to the use of the firm, with the consent of Amos and John Binney, they are not responsible for their payment. The consent contemplated might be either direct or indirect, express or implied. The instructions prayed for show that it was not intended to be confined to direct or express assent, but might be implied from the fact of partnership, or the nature of the connection, or any other circumstance from which the law would raise the implication, or the jury deduce it. This instruction, thus prayed for, the court refused to give, except with certain limitations, explanations and qualifications; but the law being absolutely as set forth in the request, it was the right of the defendants below to have it so laid down to the jury, without limitation or qualification.

Sergeant and *Webster*, for the defendants in error.

I. The first question in this case is, as to the competency of Jacques as a witness. To the objection to his admission, *there are several answers. *546] 1st. The interest of the witness, if any, was created by the act of the defendants, after the plaintiff had become entitled to his testimony. It is not in the power of one party, by any management, to deprive the other party of the benefit of testimony to which he would have been otherwise entitled. If this exception is admitted, it will be the first case in which a witness is declared disqualified by a release given by one party, when he is called by another. Cited, *Barlow* v. *Vowell*, Skinner 586; 2 Starkie 750; *Rex* v. *Forrester*, Strange 552; *Bent* v. *Baker*, 3 T. R. 27; *Simons* v. *Pagne*, 2 Root 406; *Jackson* v. *Ramsey*, 3 Johns. Cas. 234; *Baylor* v. *Smither*, 1 Litt. 117; *Tatum* v. *Lofton*, Cooke 115. Also *Long* v. *Baillie*, 4 S. & R. 222; *Forrester* v. *Pigeou*, 1 M. & S. 9. The principles sustained by these cases are very reasonable.

2d. It does not appear that Winship had any interest arising from the release. The bank could only come in as a creditor for so much of the proceeds of the notes as went to Jacques's use. The release was only co-extensive with this: and if this were not so, by the terms of the indenture,

it would be so from the nature of the case. The notes, therefore, did not constitute a debt by Jacques. It does not appear, that any part of the money raised by these notes went to his use; his being maker makes no difference. It does not, therefore, appear, that there was anything upon which the release operated.

3d. This is not such an interest as to disqualify the witness. The interest must be certain and immediate. The distinctions between competency and credibility are known and settled. The bias of a witness is an exception only to his credit. Winship and Jacques were both answerable to the bank for all the notes. The liability of Jacques remained, whether the bank recovered or not. His interest consisted in this; that if he brought in a better debtor, and the bank could get the debt of that person, the bank might not proceed against him. But this judgment is no bar to a claim upon him, until it shall be satisfied. His interest is, therefore, a mere hope that the bank would satisfy its judgment out of its claims upon the Binneys. This hope was founded upon the situation of the parties, not on their rights.

Reverse the situation of the parties: let Jacques be solvent, *would an objection be sustained to his evidence? It is the right of action [*547 which constitutes the interest. Will Jacques gain or lose by the event of this suit? or can the verdict be given in evidence for or against him? However minute the interest, it is equally fatal; and that is a reason for holding the rule strictly. Where two are bound in a joint obligation, and one is not sued, he may be a witness against the other. 5 Mass. 71; 3 Dow. & Ry. 142; 5 Barn. & Cres. 3, 35. There is no contribution in trespass; and a joint trespasser is a witness. 2 Stark. 749; 1 Pick. 118; 6 Mass. 653; Bailey on Bills 371. Expectation in the highest degree of benefit or loss, without a legal right, does not create incompetency; and where the interest is remote and uncertain, the witness is not excluded. 2 Stark. 301, 744, 749. *Page* v. *Weeks*, 13 Mass. 199. All the cases cited by the counsel for the plaintiff in error come within these principles. No one of them resembles the present. In all of them, there was an immediate interest.

II. The instructions given in the circuit court are correct; those instructions were not a dissertation or treatise on the law of partnership generally, but are to be considered in reference to the subject before the court and jury. It is contended—

1. That there is no inconsistency between the first and third exceptions. The distinction is obvious between a secret partnership, and a secret stipulation between partners, limiting the authority of each partner. They are essentially different. The substance of the instructions is resolved into this position; that the act of one partner, within the scope of the partnership business, and also within the general scope of the authority of partners, would by law bind the other partners. The law is here laid down carefully and correctly.

2. The whole matter rests upon two or three general well-established principles. That which constitutes a partnership is the agreement to participate in profit and loss. The liability of the partners, is a legal consequence of that agreement; it is a construction of law, not a matter of agreement: and this is equally true of general partnerships and of special ones; of open partners and of secret partners. Such is our law. *To ascertain the liability of partners therefore, we do not look to their agreements or [*548

their acts between themselves. It is not in their power to limit their liability. The intention to do so is inconsistent with law. The attempt to do so is unavailing. Their agreements are good between themselves; they are vain as to third persons.

3. The authority of a partner is derived from the law; is a construction of law. The only limitation is, that it must be within the scope of the partnership; the name is nothing. If within the scope of a general authority, strangers are not bound to distinguish. They may be affected by actual knowledge. The circuit court went as far in behalf of the defendants as the law would warrant. Taking the whole of the instructions together, there can be no doubt, if the facts were found correctly by the jury, that the defendants below were liable. With the facts, the court here have nothing now to do.

But it was most unequivocally proved: 1. That a partnership was established in 1817, and continued for eight years, under the agreement, and after the agreement expired. It was rather a general than a special partnership; the business was general and the establishment permanent. 2. It was an open, not a secret partnership; it was a matter of notoriety. 3. It gave the ordinary authority of a copartnership to give notes, &c. The agreement expressly contemplated this. 4. The credit was given to the firm. This is proved by the evidence of Harris, as well as that of Jacques. 5. Some of these notes are distinctly traced to the business of the partnership. All the notes were understood to be for the partnership concerns. Thus, then, the case is no more than an ordinary one of a partnership, carried on under the name of one partner; and the use of an individual name ought to operate against all the partners. It enables them to practise unduly upon third persons; to obtain loans, without the usual pledge of a double responsibility. In this very case, partnership notes were given in the ordinary business of the partnership, drawn by Winship, and indorsed by Amos Binney, and thus *the makers and indorser were the same persons. This species of partnership produces a confusion, uncertainty and disputes; and should receive no favor.

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Sprague, in reply:—In answer to the position, that the bank had a right to Jacques's testimony, of which they could not be deprived by the release of Winship, one of the defendants, he argued, 1st. That it does not appear, that any such right existed before the execution of the release by Winship, on the 28th of August 1825. None of the notes were then payable. 2d. Upon a critical examination of all the authorities, it will be found, that the rule contended for extends only to cases where one party created an interest in the witness, for the purpose of depriving his adversary of the testimony; which, being a fraud, shall not succeed. It does not apply to a *bonâ fide* contract made in the course of business, much less to a case like the present. Mr. Sprague then examined the case of *Barlow* v. *Dowell*, Skin. 586, and the other cases relied on by the counsel for the defendants in error.

It is said, that the interest was created by the act of the defendants. In the first place, it was by a fair and *bonâ fide* contract in the course of business, and without any design to exclude the witness. This is manifest from the facts stated in the record. In the next place, it was not the act of the defendants who are contesting this demand. The Binneys only have

interest to resist this action. The interest of Winship is adverse to theirs; as he seeks to render them equally liable with himself. If he can make them his partners, he thereby transfers one-half of this debt from himself, and throws it upon them. He alone made this release; the Binneys had no knowledge of it. It was not a partnership act; and it was an instrument under seal. So strong is Winship's interest against the Binneys, that it would exclude him from testifying against them to prove the partnership. To allow Winship then to create an interest in Jacques, which would induce him to testify that the Binneys were his partners; is to enable him to bribe the witness to accomplish his purpose.

It was said, that no interest is proved, because it does not *appear that the money obtained on the notes went to Jacques's use. He [*550 was the first witness, and then appeared to the court only as the real maker of the notes. The release created an interest which his testimony could not purge; and if it could, his testimony would only show that some of the notes were for Winship's use. If Jacques was, as is contended by the counsel for the defendants in error, an accommodation maker, he would have a direct interest in making the Binneys responsible. He would thus obtain their liability for his ultimate indemnity; but if he failed in proving them to be the partners of Winship, he must rely solely on the insolvent Winship. So that, whether a real or an accommodation maker, Jacques was so interested as to be incompetent.

It has been strongly urged, that as satisfaction is necessary to protect the witness from the plaintiffs below, he has no direct and certain interest in the event of this suit; and that the judgment would not be evidence for him. This is the first instance in which such a nice and hazardous distinction has been attempted. It is nowhere to be found in the books; no case has ever recognised it; but, on the contrary, decisions almost innumerable have been made, that an interest, depending not merely on the rendition of judgment, but on judgment and satisfaction, is such a direct and certain interest as to affect the competency. It is said, the plaintiffs may never enforce the judgment, and therefore, the interest is not certain. This uncertainty is only as to the acts of the party, not as to the operation of law; and it is always uncertain, whether a party will pursue his case to judgment and execution. But still the witness is excluded; because, if the plaintiff should follow up his legal rights, an interest would accrue. It is certain, that the law gives the power to the party, and it is to be presumed, that he will exercise it. In nearly all the cases cited in the opening, judgment alone would be inefficacious; but satisfaction was also necessary, to create the rights or liability of the witness.

It is insisted, that dormant partners are equally liable, when discovered, as if the debts had been originally contracted upon the credit of their names: that is, that there is no substantial *distinction between secret and [*551 avowed partnership. This is confounding things, widely different, and broadly distinguished by the authorities. It is true, as to one class of debts, the liability of dormant partners is equal to that of the avowed partners, where the property actually came to the use of the firm. There, the obligation to pay arises from participation in the consideration; but if the property never came to the use of the firm, secret partners are not liable,

although they would have been, if avowed ; because their credit would then have been pledged.

It is said, that the authority of each to bind the others is a conclusion of law. This is true, and so is that of every agent to bind his principal. But it is a conclusion of law from facts, and varies or ceases as they change. The written instruments did not authorize the pledging the credit of the Binneys to those who knew their terms. This is ruled by the court, and not controverted. If, then, Winship had exhibited the articles, he could not have bound his co-defendants to the payment of the notes in suit ; all his authority being derived from the articles. Could he, by suppressing them, enlarge his own powers? Could he, by a *suppressio veri*, clothe himself with an authority which no one had imparted? If he could suppress the limitations upon the special partnership, why might he not also the restrictions upon the general? Why not merely declare himself a partner generally, and bind his associates, upon the principles and presumptions arising from the general partnership thus avowed? Each member stands in the same relation to the firm as an agent to his principal, and the authority to bind rests upon the same foundation. Can an agent, then, having no other source of authority than a written letter of attorney, enlarge his power, by suppressing the instrument? Can a principal, who has merely signed a written power, and has neither said nor done anything, nor caused or suffered or acquiesced in any act or declaration by any other person, from which authority could be deduced, be bound beyond the extent of the power which he has subscribed, by the mere suppression of the truth by the agent? Where a person is responsible, merely and exclusively by *virtue of written articles, can he be rendered liable beyond the extent of those articles? *552]

Marshall, Ch. J., delivered the opinion of the court.—This was an action brought in the court for the first circuit and district for Massachusetts, against John Winship, Amos Binney and John Binney, merchants and partners, trading under the name and firm of John Winship, as indorser of several promissory notes, made by Samuel Jacques, jr. At the trial, the maker was called by the plaintiffs, and sworn. He was objected to by the defendants, as an interested witness, an instrument being produced purporting to be a release in the name of John Winship of all liability of the maker on the said notes. The operation of the said instrument, as a release of the notes in suit, was controverted by the plaintiffs. It is unnecessary to state the instrument, or to discuss the question arising on it, or on the competency of the witness ; because the court is divided on the effect of the instrument and on the competency of the witness.

The witness testified, that he knew from general reputation that the defendant, John Winship, was concerned with the other defendants, Amos and John Binney, in the soap and candle business ; that Winship avowed the partnership ; that he had dealings with Winship, soon after its commencement, and supplied him with rosin, for which he sometimes gave a note, signed John Winship, which the witness always took on the credit of the Binneys. Winship and the witness were in the habit of lending their names to each other, and Winship always represented that the notes made or indorsed by the witness for his accommodation were for the use of the firm. Several other witnesses were examined on the part of the plaintiff to

prove the partnership, whose testimony was rendered unimportant by the production of the articles themselves. The defendants exhibited them, and they are in the following words:

"The memorandum of an agreement made this twenty-fifth day of September 1817, between Amos Binney and John Binney, of Boston, county of Suffolk, and John Winship, of *Charlestown, county of Middlesex, all in the commonwealth of Massachusetts, for the manufacture of [*553 soap and candles, witnesseth: That the said Amos and John Binney agree to furnish for the above purpose, the sum or capital stock of $10,000, at such times as may be wanted, to purchase stock or materials for carrying on the aforesaid manufacture; and the said John Winship agrees on his part to conduct and superintend the manufactory, and to pay his whole and undivided attention to the business; to manufacture, or cause to be manufactured, every article, in the best possible manner, and to use his utmost skill and exertions to promote the interest of the establishment, under the name and firm of John Winship, and without any charge for his personal labors; and to keep a fair and regular set of books and accounts, open and subject at all times to the inspection of the parties interested in the concern, and annually, on the first day of October of each year, to make and exhibit a statement of the state of the business, the amount of purchases and sales, and the profits, if any, of the business, that have been made; the expenses of conducting the business, and the profits, to be divided in the following manner: to say, from the profits is to be paid interest for the capital stock of $10,000, at the rate of six per centum per annum, all expenses of rent, labor, transportation, fuel and utensils, that it may be necessary to purchase or have, and the remainder of the profits, if any, to be equally divided between the said Winship and Binneys, one-half thereof to the said John Winship, and the other half to A. and J. Binney; and in case no profit should be made, but a loss, then the loss is to be borne and sustained, one-half by the said A. and J. Binney, and the other half by the said John Winship. The agreement to continue in force for two years from the first day of October next ensuing, and then for a further term, provided all parties agree thereto. And to the true and faithful performance of the foregoing conditions, each party bind themselves to the other in the penal sum of $10,000."

On the back of which were receipts signed by said Winship, acknowledging that he had received of Amos Binney $1000, on the 6th of September 1817, and *$4000, on the 9th of October 1817; and on the 27th of December 1827, he had in his hands $10,000, as said Amos's proportion of the capital; and that he had received of John Binney $2500, on the 1st of October 1817, and $500, on the 3d of November 1817, and $500, on the 17th of November 1817, and $1500, on the 13th of June 1820, and on the 2d of June 1821, he had in his hands $10,000, as said John's proportion of the capital stock. [*554

They also gave in evidence a bond given by said Winship to said Amos, on the 25th of September 1817, in the penal sum of $10,000, with the condition following: "The conditions of this obligation are such, that whereas, the above-bounden John Winship has this day made an agreement with Amos Binney and John Binney, both of Boston aforesaid, for the purpose of carrying on a manufactory of soap and candles on joint

account of the parties aforesaid; and whereas, the said A. Binney hath engaged to indorse the notes given by the said John Winship, for the purchase of stock and raw materials for manufacturing, when necessary to purchase on a credit, and in consideration of which the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons other than the said Amos Binney, for the term of two years from the first day of October 1817. Now, therefore, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person to any amount other than the same Amos Binney for the aforesaid term of two years from the first day of October 1817, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue."

The defendants also produced witnesses whose testimony furnished some foundation for the presumption, that the money arising from the notes, on which the suits were brought, was not applied by Winship to the purposes of the firm. Other testimony led to the belief, that a part, if not the whole of the money was so applied. All the notes in suit were discounted by and applied to the credit of John Winship.

*555] *The testimony being closed, the counsel for the defendant insisted, 1st. "That the said copartnership between them was, in contemplation of law, a secret copartnership, and did not authorize the giving of credit to any other name than that of the said Winship;" but to this the counsel for the plaintiffs did then and there insist before the said court, that this was an open or avowed, and not a secret copartnership. And the presiding justice of the said court did state his opinion to the jury on this point, as follows: "That according to his understanding of the common meaning of 'secret partnership,' those were deemed secret, where the existence of certain persons as partners was not avowed or made known to the public, by any of the partners. That where the partners were all publicly known, whether this was done by all the partners, or by one only, it was no longer a secret partnership; for secret partnership was generally used in contradistinction to notorious and open partnership; that whether the business was carried on in the name and firm of one partner only, or of him and company, would, in this respect, make no difference; that if it was the intention of the Binneys that their names should be concealed, and the business of the firm was to be carried on in the name of Winship only; and yet that Winship, against their wishes, in the course of the business of the firm, publicly did avow and make known the partnership, so that it became notorious who were the partners; such partnership could not, in the common sense of the terms, be deemed any longer a secret partnership; that if 'secret,' in any sense, it was under such circumstances, using the terms in a peculiar sense. That, however, nothing important in this case turned upon the meaning or definition of the terms 'secret partnership,' since the case must be decided upon the principles of law, applicable to such a partnership, as this was in fact proved to be. That there was no stipulation for secrecy as to the Binneys being partners, on the face of the original articles of copartnership; and when those articles, by their own limitation, expired, the question what the partnership was, and how it was carried on for the future; whether upon the same terms as were contained in the original

articles or otherwise; was matter of fact from the whole evidence; that if the evidence was believed, Winship constantly avowed the partnership, and that the Binneys were *his partners in the soap and candle manu- [*556
factory business, and obtained credit thereby." But he left the jury to judge for themselves as to the evidence.

Second exception. And the said counsel of the defendants did then and there further insist, that the said jury had a right to infer from the evidence aforesaid, notwithstanding the entries of the shipments in the invoice-book kept by said Winship, that the said Amos Binney and John Binney had no knowledge thereof; and therefore, could not be presumed to have adopted or ratified the conduct of said Winship making said shipments. But the presiding judge did then and there instruct the jury as follows: "That whether the said Amos and John Binney, or either of them, knew of the said entries or not, was matter of fact for the consideration of the jury, upon all the circumstances of the case. That, ordinarily, the presumption was, that all the parties had access to the partnership books, and might know the contents thereof. But this was a mere presumption from the ordinary course of business, and might be rebutted by any circumstances whatsoever, which either positively or presumptively repelled any inference of access; such, for instance, as the distance of place in the course of business of the particular partnership, or any other circumstances raising a presumption of non-access." And he left the jury to draw their own conclusion as to the knowledge of the Binneys, of the entries in the partnership books, from the whole evidence in the case.

Third exception. And the said counsel of the defendants did then and there further insist, that by the tenor of the said recited articles of agreement and bond, the said Winship had no right or authority to raise money on the credit of the said firm, or to bind the firm by his signature, for the purpose of borrowing money. But the presiding judge did then and there instruct the jury as follows: "That if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm in respect to the business thereof, upon the general principles and presumptions of limited partnership of a like *nature; and that any [*557
secret and special restrictions contained in such articles of copartnership, varying the general rights and authorities of partners in such limited partnerships, and of which they are ignorant, did not affect them. That the case of *Livingston* v. *Roosevelt*, 4 Johns. 251, had been cited by the defendants' counsel, as containing the true principles of law on this subject; and this court agreed to the law, as to limited partnership, as therein held by the court. That it was not denied by the defendants' counsel, and was asserted in that case, that it was within the scope and authority of partners, generally, in limited partnership, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such was, in fact, the ordinary course and usage of trade, the authority must be presumed to exist. The court knew of no rule established to the contrary. That the authority of one partner in limited partnerships did not extend to bind the other partners in transactions, or for purposes, beyond the scope and object of such partnerships. That in the present articles of copartnership, Winship was in effect constituted the active partner, and had general

authority given him to transact the business of the firm. That he had, so far as respects third persons, dealing with and trusting the firm, and ignorant of any of the restrictions in such articles, authority to bind the firm, to the same extent and in the same manner as partners in limited partnerships of a like nature usually possess, in the business, or for the objects within the general scope of such a firm. That the articles limited the partnership to a particular period; after which it expired, unless the parties chose to give it a future existence. That no new written articles were proved in the case, and the terms and circumstances under which it was subsequently carried on, were matters to be decided upon the whole evidence. The fair presumption was, that it was subsequently carried on, on the same terms as before, unless other facts repelled that presumption. That the bond executed at the time of the execution of the articles ought to be considered as a part of the same transaction and contract."

And the said counsel of the defendants did then and there further request the said court to instruct the said jury as follows, to wit:

*558] *1. That if, upon the whole evidence, they are satisfied, that the copartnership proved to have existed between the defendants, under the name of John Winship, was known or understood by the plaintiffs, to be limited to the manufacturing of soap and candles, they must find a verdict for the defendants, unless they are also satisfied, that these notes were given in the ordinary course of the copartnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they are satisfied, that any part of these moneys did go to the use of the firm, with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue. And—

2. That if they are also satisfied, that the Messrs. Binneys furnished Winship with sufficient capital and credit for carrying on the business of the firm, no such consent can be implied, from the mere fact that Winship applied these moneys, or any part of them, to the payment of partnership debts.

But the presiding judge refused to give the instructions first prayed for, unless with the following limitations, explanations and qualifications, viz: That the defendants, as copartners, are not bound to pay the notes sued on, or money borrowed or advanced, unless the indorsements of the same notes and the borrowing of such money, was in the ordinary course of the business of the firm, for the use and on account of the firm. But if the said Winship offered the notes for discount, as notes of the firm, and for their account, and he was intrusted by the partnership, as the active partner, to conduct the ordinary business of the firm, and the discount of such indorsed notes was within such business; then, if the plaintiffs discounted the notes, upon the faith of such notes being so offered by the said Winship, and as binding on the firm, the plaintiffs were entitled to recover; although Winship should have subsequently misapplied the funds received from the discount of said notes; if the plaintiffs were not parties or privies thereto, or of any such intention. And if Winship borrowed money, or procured any advances, on the credit and for the use of the firm, and for purposes connected with the business of the firm, in like manner, and under like circumstances, and money

*559] was lent or advanced on the faith and credit of the partnership, the money so *borrowed and advanced bound the partnership; and they

were liable to pay therefor, although the same had been subsequently misapplied by Winship ; the lender not being party or privy thereto, or of any such intention. And with these limitations, explanations and qualifications, he gave the instructions so first prayed for. And the presiding judge gave the instruction secondly prayed for, according to the tenor thereof.

To these opinions and decisions of the court, the defendants excepted. A verdict was found for the plaintiffs, and judgment entered thereon ; which is brought before this court by writ of error.

The exceptions will now be considered. All must admit, that the opinion asked in the first instance by the counsel for the defendant in the circuit court, ought not to have been given. That court was required to decide on the fact as well as law of the case, and to say, on the whole testimony, that it did not warrant giving credit to any other name than that of John Winship. But, though this prayer is clearly not sustainable, the counsel for the plaintiff in error contends, that the instructions actually given were erroneous.

The first part of the charge turns chiefly upon the definition of a secret partnership, which is believed to be correct ; but the judge proceeds to say, that if incorrect, it would have no influence on the cause ; and adds, "that the case must be decided on the principles of law applicable to such a partnership as this was in fact proved to be ;" "that when the original articles expired by their own limitation, the question what the partnership was, and how it was carried on, for the future, whether upon the same terms as were contained in the original article, or otherwise, was matter of fact from the whole evidence." The error supposed to be committed in this opinion is in the declaration, that nothing important in this case turned on the meaning or definition of the terms "secret partnership." This is not laid down as an abstract proposition, universally true, but as being true in this particular case. The articles were produced, and the judge declared that the case must depend on the principles of law applicable to such a partnership as this was in fact. This instruction could not, we think, *injure the plaintiff in error. Its impropriety is supposed to be made apparent by [*560 considering it in connection with the third exception.

The second instruction appears to be unexceptionable, and the counsel for the plaintiff in error is understood not to object to it.

The third instruction asked in the circuit court, goes to the construction of the articles of copartnership. The plaintiff in error contends, that those articles gave Winship no authority to raise money on the credit of the firm, or to bind it by his signature, for the purpose of borrowing money. The instruction given was, that if the particular terms of the articles were unknown to the public, they had a right to deal with the firm, in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature ; and that any special restrictions did not affect them ; that in such partnerships, it was within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm ; and if such was the general usage of trade, the authority must be presumed to exist ; but that it did not extend to transactions beyond the scope and object of the copartnership. That in the present articles, Winship was in effect constituted the active partner, and has general authority to transact the business of the firm, and

a right to bind the firm in transacting its ordinary business, with persons ignorant of any private restriction, to the same extent that partners in such limited partnerships usually possess. The amount of the charge is, that if Winship and the two Binneys composed a joint company for carrying on the soap and candle business, of which Winship was the acting partner, he might borrow money for the business, on the credit of the company, in the manner usually practised in such partnerships; notwithstanding any secret restriction on his powers, in any agreement between the parties; provided such restriction was unknown to the lender.

The counsel for the plaintiff in error has objected to this instruction with great force of reasoning. He contends very truly, that in fact scarcely any unlimited partnerships *exist. They are more or less extensive; *561] they may extend to many or to few objects; but all are in some degree limited. That the liability of a partner arises from pledging his name, if his name is introduced into the firm, or from receiving profits, if he is a secret partner. No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others, so far only as he is the agent of the others.

If the truth of these propositions be admitted, yet their influence on the case may be questioned. Partnerships for commercial purposes; for trading with the world; for buying and selling from and to a great number of individuals; are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently, to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely, if ever, seen, except by the partners themselves. The *stipulations they *562] may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business, in the usual way. This power is conferred by entering into the part-

nership, and is perhaps never to be found in the articles. If it is to be restrained, fair-dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. 2 H. Bl. 235; 17 Ves. 412; Gow on Part. 17.

The counsel for the plaintiff in error supposes, that though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those who trade with a firm, on the credit of individuals whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea, that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles.

It has been supposed, that the principles laid down in the third instruction, respecting these secret restrictions, are inconsistent with the opinion declared in the first; that in this case, where the articles were before the court, the question whether this was in its origin a secret or an avowed *partnership, had become unimportant. If this inconsistency really existed, it would not affect the law of the case; unless the judge had [*563 laid down principles in the one or the other instruction which might affect the party injuriously. But it does not exist. The two instructions were given on different views of the subject, and apply to different objects. The first respected the parties to the firm, and their liability, whether they were or were not known as members of it; the last applies to secret restrictions on the partners, which change the power held out to the world, by the law of partnership. The meaning of the terms "secret partnership," or the question whether this did or did not come within the definition of a secret partnership, might be unimportant; and yet the question whether a private agreement between the partners, limiting their responsibility, was known to a person trusting the firm, might be very important.

The proposition of the defendants in the circuit court was, that Winship had no right or authority to raise money on the credit of the firm, or to bind the firm by his signature, for the purpose of borrowing money. This can scarcely be considered as a general question. In the actual state of the commercial world, it is perhaps impossible to conduct the business of any company, without credit. Large purchases are occasionally made on credit; and it is a question of convenience, to be adjusted by the parties, whether the credit shall be given by the vendor, or obtained at the bank. If the vendor receives a note, he may discount it at the bank. If, for example, the notes given by Winship to Jacques, for rosin, to carry on his manufacture, which have been mentioned by the witness, had been

discounted in bank, it would not have been distinguishable from money borrowed in any other form. The judge said, that if it was within the scope and authority of partners generally, in limited partnerships, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm, and if such was in fact the ordinary course and usage of trade, the authority must be presumed to exist. Whether this was the fact or not was left to the jury.

Does anything in the articles of agreement restrain this general authority? *The articles state the object of the company to be, the manufacture of soap and candles; the capital stock to be $10,000, which sum is to be paid in by Amos and John Binney; John Winship to conduct and superintend the manufactory; the name of the firm to be John Winship; the profit and loss to be divided. They are silent on the subject of borrowing money. If the fact that the Binneys advanced $10,000 for the stock in trade, implied a restriction on the power of the manager to carry on the business on credit, it would be implied in almost every case.

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But the bond given by Winship to Amos Binney, which is admitted by the judge to constitute a part of the partnership agreement, is supposed to contain this restriction. The condition of the bond recites, that "whereas Amos Binney had engaged to indorse the notes given by the said John Winship for the purchase of stock and raw materials for manufacturing, when necessary to purchase on credit, in consideration of which, the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Amos Binney." "Now, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person, to any amount, other than the said Amos Binney, then," &c.

The agreement recited, but not inserted in this condition, that Amos Binney would indorse the notes of Winship, when it should be necessary to purchase on credit; while it implies that the power was incident to the act of partnership; was not in itself a positive restriction on that power. The affirmative engagement on the part of Amos Binney, that he will indorse, is not a prohibition on Winship to obtain any other indorser. The exigencies of trade might require the negotiation of a note, in the absence of Mr. Binney, and this may have been a motive for leaving this subject to the discretion of the acting partner. If he has abused this confidence, the loss must fall where it always falls, when a partner, acting within his authority, injures his copartners. If, then, the agreement between Amos Binney and John Winship contains nothing more than is recited in the condition, it contains no inhibition on Winship to negotiate notes in the ordinary course of *business. The restriction on Winship is not in this recital, but in his engagement expressed in the condition of the bond.

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He engages not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Binney. The obvious import of this engagement is, that Winship will not make himself responsible for another. Had he made an accommodation note for Jacques, it would have been as much a violation of this agreement as if he had indorsed it. The undertaking is not to indorse notes for another. But this note is indorsed for himself. It is negotiated in bank, in the name of the firm, and the money is carried to the credit of the firm. Had not

Winship misapplied this money, no question would have arisen concerning the liability of his partners on this note. The stipulation in the bond, not to indorse or become security for another, would not have barred the action. But be this as it may, this stipulation between the parties is a secret restriction on a power given by commercial law and usage, generally known and understood; which is obligatory on the parties, but ought not to affect those from whom it is concealed.

The counsel for the defendants in the circuit court then prayed an instruction to the jury, that if they were satisfied, that the partnership was known to the plaintiffs to be limited to the soap and candle business, they must find for the defendants; unless they were also satisfied, that these notes were given in the ordinary course of the partnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they are satisfied, that any part of these moneys did go to the use of the firm with such consent, that then they must find a verdict for such part only; and not for the residue. This instruction was not given as asked; but was given with "limitations, explanations and qualifications." The judge instructed the jury, in substance, that the defendants were not bound to pay the notes sued on, unless the indorsements thereon were in the ordinary course of the business of the firm, for the use and on account of the firm; but if they were satisfied, that the notes were so offered and discounted, and that the said Winship was intrusted by the partnership, as the active partner, to conduct the ordinary business of *the firm, and the discount of such [*566
indorsed notes was within such business, then the plaintiffs were entitled to recover, although Winship should have subsequently misapplied the funds, received from the discount of said notes; if the plaintiffs were not parties or privies thereto, or of any such intention.

The plaintiffs in error contend, that the instruction ought to have been given, as prayed, without any qualification whatever. The instruction required is, that although the jury should be satisfied, that the money went to the use of the firm, they should find for the defendants; unless they should be also satisfied, that the consent of Amos and John Binney was given to its being so applied. That is, that a note discounted by the acting and ostensible partner of a firm, for the use of a firm, the money arising from which was applied to that use, could not be recovered from the firm, by the holder, unless the application was made with the consent of all the partners. The counsel for the plaintiffs in error is too intelligent to maintain this as a general proposition. He must confine it to this particular case. He is understood as contending, that under the secret restrictions contained in the bond given by Winship to Amos Binney, Winship was restrained from discounting these notes, even for the use of the firm; and that no application of the money to the purposes of the copartnership could cure this original want of authority, and create a liability which the note itself did not create; unless such application was made with the consent of all the partners. So understood, it is a repetition of the matter for which the third exception was taken, and is disposed of with that exception. The instruction, therefore, ought not to have been given as prayed. Still, if the court has erred in the instruction actually given, that error ought to be corrected. That instruction is, that if the notes were offered in the usual

course of business for the firm, by the partner intrusted to conduct its business, and were so discounted, and if such discount was within such business, then the subsequent misapplication of the money, the holders not being parties or privies thereto, or of such intention, would not deprive them of their right of action against the copartnership. We think this opinion entirely correct. It only affirms the common principle, that the misapplication of funds raised by *authority, cannot affect the person from whom those funds are obtained.

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We think there is no error in the opinions given by the judge to the jury. The court being divided, on the competency of Samuel Jacques as a witness, the judgment is affirmed, with costs and damages at the rate of six per centum per annum, by a divided court.

Baldwin, Justice. (*Dissenting.*)—The plaintiffs sue in this case as the indorsees of six promissory notes drawn by James Jacques, and indorsed by John Winship, which came to their hands, as the discounters thereof, being offered by John Winship, and the proceeds thereof placed to his credit in the bank. They were not notes indorsed to the plaintiffs in payment, or as collateral security for the payment of an antecedent debt, or the performance of any pre-existing contract. The bank are prohibited in their charter from dealing in goods, unless for the sale of such as are pledged for the payment of debts. (4 Laws U. S. 43 ; Ninth fundamental article of the charter of the bank.)

This was not then the case of goods sold by plaintiffs to defendants, as partners, on the faith of the partnership, in the course of their business. Neither is it a case of money previously lent, and a note or bill indorsed over in payment or security. The case finds, and the circuit court considered it, a case of discount, which is a purchase of the note on stipulated and well-known terms. The purchase or discount of a note is contract wholly unconnected with the objects, uses or application of the money paid. A party who sells a bill or note, incurs no liability to the discounter, by the mere contract of discount, where he does not indorse it ; nor does the discounter who pays for the discounted bill or note in other bills and notes, without indorsement, guaranty their payment. The contract is one of sale ; and in the absence of fraud or misrepresentation, the rights of the parties are tested exclusively by the only contract which the nature of the case imports; of sale and purchase as of any other article in market.

Where a purchase is made or money borrowed on partnership account, an immediate debt is created ; a note or bill given or indorsed, is for payment of the existing debt ; and if not *paid, the debt remains, unless the bill or note has been accepted as payment. So, if the bill or note is given as collateral security. And the law is the same, whether one or all the partners do the act ; there is an antecedent debt binding on all, or an indemnity to be provided ; the obligation is not impaired by giving or transferring an effectual security. But the present case is wholly different. The defendants owed no antecedent debt to the bank, for which these notes were transferred to them. They were neither offered nor accepted as payment or indemnity ; but sold by Winship, and purchased by the bank, at their value. That value is, in my opinion, to be ascertained with reference to the names on the bill, who are the parties to the contract; and in my view

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of the law, the only parties. The bank bought from John Winship, the promise of James Jacques, guarantied by Winship, on known conditions. This distinction between passing or pledging a note in payment, and discounting it, has been wholly overlooked in the opinion of the circuit court; and the case seems to have been considered throughout, as governed by the same rules which apply to purchases, loans, and other partnership engagements. The case before them was a pure case of discount, which is governed by its own principles; which, in my opinion, would have produced a different result in the cause, had they been laid down to the jury.

These principles are fully illustrated and established in their various bearings on cases which have been adjudicated, and laid down in terms too clear not to be understood. 15 East 10, 11; 2 Doug. 654, note; 3 Ves. jr. 368; 10 Ibid. 204; 3 T. R. 757; 1 Ld. Raym. 442; 1 Cranch 192; 6 Ibid. 264; 1 W. C. C. 156, 321, 328, 399; 3 Ibid. 266; 9 Johns. 310; Burke's Cases in Bankruptcy 114, 170; 3 Madd. 120; 1 Esp. N. P. 448. I do not refer to the latter case, because it ought to be any authority in this court; but because it shows that Lord KENYON, who dissented from the court of king's bench in 1790, in the case quoted from 3 T. R. 757, came to the same opinion in 1796. Neither do I rely on elementary writers who lay down the same positions; but on the adjudged cases, which seem to me to be the safest guides to the law. "*Satius est petere fontes, quam sectari rivulos.*" 10 Co. 118.

*Resting on these authorities, I shall consider the case on the evi- [*569
dence, as one of discount, not of loan, purchase or any other pre-existing liability. As the evidence of Jacques proves that these notes were accommodation, and not notes of business; as Mr. Harris, the discount clerk, testifies, that all the notes were discounted at Winship's request, and the proceeds passed to his credit; that it is easy to distinguish accommodation notes from others; and that he considered these in suit to be of that description; and that the bank had frequently discounted notes drawn by Winship, and indorsed by Amos Binney; and Mr. Parker, one of the directors of the bank, testified, that when the bank discounted these notes, it was understood that Amos and John Binney were bound by them. Witness understood, that they were bound as partners in the soap and candle business, not general partners. Did not know, as to John Binney, whether plaintiff considered him answerable, but that they did so consider Amos Binney; that a number of notes of this kind were discounted, while other notes indorsed by Amos Binney were in bank; that Amos and John Binney were engaged in large business as merchants, and witness does not know that any one ever supposed defendants to be partners, except in the manufacture of soap and candles.

I cannot do injustice to the plaintiffs, by founding my opinion on this testimony. Mr. Parker was present at the making of the contract of discount of these notes; he was one of the agents of the bank in making it, and a party to it, as a member of the corporation, directly interested. His evidence is the solemn admission, on oath, of a party to the contract, and ought to be taken as true. The defendants have a right to its full benefit, as explanatory of the nature, terms and circumstances under which it was made. Mr. Harris, the discount clerk, was the appropriate agent of the bank in consummating the contract of discount, by paying to Winship the

proceeds of the discounted notes; and I cannot err in saying, from the record, that these were the only witnesses examined at the trial touching the discount of these notes; the only contract, in my opinion, which the law raises between the plaintiffis and defendants. What, then, was the obligation which this contract of discount, as proved by Harris and Parker, imposed on Amos and John Binney, by the bank's purchasing these notes *570] *at the request of John Winship, and paying or passing the proceeds to his credit?

The notes were accommodation, so understood by the plaintiffs, and discounted as such. The bank, then, knew that they were not what they purported to be; they are set forth in the record, are all drawn for value received, and thus bear a falsehood on their face, known to the bank. Such notes, Mr. Harris says, are easily distinguishable from notes of business; and the bank did not discount them as representing a purchase, a loan, or any pre-existing obligation by Jacques to pay the amount to Winship, but as the lending of his name by Jacques to Winship, to enable him to raise money by the sale of the notes. There was in this respect no fraud on the bank. They knew they were not purchasing notes given and indorsed in the usual course of business. They did not come to their hands as innocent indorsers, taking them to be what they imported to be, for value received. The bank are purchasers, it is true, for a valuable consideration; but not innocent, or without notice. They took the notes, with a known taint on their very face, which can only be effaced by some subsequent indorsee or holder, who takes them in the course of business, without notice, and takes them as between the payer and payee, as having been given for value received. But the plaintiffs have become the indorsees by discount, knowing that by the acknowledged principles of commercial law, as between the original parties in all their relations, Winship was the maker and Jacques the indorser. As between them and the bank, their relations were the same, whether the notes were of business or accommodation; they were liable in the capacities they respectively assumed on the face of the notes. When the discounter, or the indorsee, of an accommodation note, known by him to be such, seeks to recover the amount from a person whose name does not appear on the note, he must prove that the person charged had made himself a party to the note; had authorized its negotiation or transfer, previously, or afterwards assented to, ratified or adopted the indorsement as his own. Had there been no previous connection between the Binneys and Winship, and the Binneys had procured the discount from the bank, without their indorsement, they would be no more answerable to the bank, than by *571] receiving payment of a check. *On the face of these notes, the Binneys are strangers to the bank. The contract of discount which they made with Winship, does not, *per se*, create one with the Binneys. Being accommodation notes, they were discounted as such; that is, as the notes of Winship, indorsed by Jacques; for such is the acknowledged character of such notes in the commercial world. The line separating business from accommodation paper, is clearly defined by law and usage. There is the same difference between the indorser of a note known not to be what it purports to be, and one which represents a real debt from the maker to the payee, as between the purchasers of real estate with or without notice of an incumbrance, or the defect of title; so far as respects their standing in

courts of justice, in relation to third persons, not parties to the contract. Those who purchase in good faith, without notice of fraud, and pay their money, confiding in the face of the transaction, ignorant of anything which can affect its legal or equitable character, are entitled to the protection of all courts as their most favored parties.

A peculiar sanctity is thrown round the obligation of negotiable paper, actually negotiated in the usual course of business, and in the hands of an innocent holder, for a valuable consideration, without notice. Every presumption which the law can raise, is in favor of such a holder, whether he receives the note in payment, or by discount. It becomes divested of this peculiar obligation, when the paper, in its original concoction or negotiation, becomes divested of these attributes, and remains in the hands of a holder who has a knowledge of all the circumstances attending both. I know of no decision of any court, no principle of law, nor usage of merchants, which confounds the distinction between these two kinds of paper in the hands of indorsees, with or without notice ; it is too well established to require support from argument or authority. The same distinction exists in paper negotiated after it is due, or partnership notes given for the private debt of a partner. Notice is the distinguishing criterion in all these cases, and settles the question as to the burden of proof. So I find the law laid down by the supreme court of Massachusetts, in the case of the *Manufacturers' & Mechanics' Bank* v. *John Winship*, 5 Pick. 11. The suit was brought on an *accommodation note drawn by John Winship, to Jacques or order, indorsed by him and discounted by the plaintiffs in the usual [*572 course of banking business. The chief justice charged the jury, that the burden of proof was on the plaintiffs ; and that if no proof was given by them that the money was raised for the business of the firm, at the manufactory, the jury should find the fact for the defendants. In giving judgment for the defendants, the court affirmed the charge of the chief justice as to the burden of proving the note to have been given on partnership account being on the bank ; that no recovery could be had against the partners, so long as it remained doubtful whether they have or have not made the contract declared upon ; that from the fact of the note being found to be an accommodation one between Winship and Jacques, it would seem more likely that it related to the private concerns of Winship than to those of the partners ; at any rate, the uncertainty resting on the face of the note would still continue. The plaintiffs knew, or might have known, that Winship was openly engaged in commercial speculations, which were wholly unconnected with the business of the manufactory ; and that his signature might relate to one concern as well as another. If, therefore, they meant that the note should be enforced against the partnership, they should have ascertained that the signature of Winship was intended for the signature of the firm. But they made no such inquiry, and it does not appear that Winship or Jacques ever made any representation to that effect. And although it appears, that the plaintiffs supposed the Binneys would be answerable, because they were partners with Winship in the manufactory, yet they gave no intimation whatever to the parties to the note to be discounted, that such was their understanding of the contract.

There are few courts whose opinions may be more safely confided in, as to the rules of the common law ; there is none whose authority I feel more

bound to respect, as to the common law of Massachusetts, than its highest judicial tribunal. The law of the state where a contract is made and carried into effect, seems to me to be the law which must control its obligation; and until evidence of the common law of that state more imposing than the
*573] solemn decision of its supreme court *is furnished me, I feel it my duty to respect and adopt it: believing that in doing so, I violate no principle which has ever been sanctioned by this court. In some particulars, the evidence in the cause referred to was more favorable to the bank than in this. The note was discounted at the bank, on the belief that the Binneys were liable as partners of the manufactory at Charlestown only. This was found by the jury; but it was not found, and there appears to have been no evidence, that the bank or its officers knew the note to be an accommodation one. The judgment of the court was on the fact being so found, not on its being known to the plaintiffs.

In this case, the notice is brought home to the plaintiffs, by the evidence of their discount clerk. Mr. Parker, the director, does not say the note was discounted, on the belief that the Binneys were liable as partners; all he says on that subject is, when the bank discounted these notes, it was understood, the Binneys were bound by them. He immediately corrects this, and says, he does not know, as to John Binney, whether plaintiffs considered him answerable; but they so considered Amos Binney. This is certainly very lame evidence of the notes being discounted on the credit of both Amos and John Binney; and much weaker than the fact found by the jury in the other case. The bank had notice of the course of business between Winship and Amos Binney, by his indorsing Winship's notes, and the bank discounting them. The Binneys were in good credit; and being reputed wealthy, it was not to be presumed, they would borrow credit from Jacques. These circumstances ought to have put the bank on inquiry, as Binney was a customer residing in the place. The court placed no reliance on these circumstances, or on the fact of the notes being discounted with the knowledge that they were notes of accommodation.

Nor did the court, in my opinion, correctly define the difference between a dormant and an open partnership. It seems to me to be this: where the names of the partners do or do not appear in their accounts, their advertisements or their paper; where the business is carried on in the name of all, it is open; but if any are kept back, it is dormant; that the knowledge which the public may have is not the test, when it is acquired from the acts or
*574] declarations of the acting *avowed partners: it may enable them to reach the dormant one, if the transaction is one in which he had an interest, but does not alter its nature. The partnership remains dormant as to all, whose names do not appear on its transactions. The dormant, the sleeping, inactive partner may be known by reputation, or the declaration of his copartner, but these do not make him an avowed or active one, without the avowal and pledge of his name or paper. If credit is given to the other names, on the faith of such reputation or representation, the persons so trusting must do it at the risk of suffering, if their information is not true. The declarations of one of a firm are not evidence of another person's being a partner, in any particular transaction, unless a previous connection is established, which gives him authority to bind by his acknowledgment, or proof given of subsequent assent: reputation is not, *per se*, evidence,

unless brought home to the party charged; then his silence may be deemed acquiescence or assent. 11 Serg. & Rawle 362; 2 W. C. C. 388, 390; 14 Johns. 215; 3 Caines 92; 10 East 264; 5 Pick. 415, 417; 1 Gallis. 635, 638, 640.

The language of some of the cases is, that it is rather on the ground of agency, than partnership resulting from the community of interest in the subject-matter of the contract. The principle which makes a dormant partner liable is this: having an interest in the profits which are a part of the fund to which a creditor looks for payment, he shall be bound. 2 W. Bl. 1000; 2 H. Bl. 247; 4 East 144; 16 Johns. 40; 2 Nott & McCord 427, 429; 1 H. Bl. 45, &c. As his name is not pledged, his liability arises only from his interest (16 East 174–5); and the burden of proving such interest is on the party suing. The language of the court, in 2 Nott & McCord 429, is very emphatic: "To charge defendant as partner, one of two things is necessary; either he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community; or he must have participated in the profits." As the Binneys never pledged their names on these notes, they were not discounted on their faith. There is then wanting in this case that fact on which the power of one partner to bind the firm by negotiable paper is created, the use of the names. *The plaintiff who seeks to make those parties to a note, whose names do not give it currency or credit, must make them parties, by [*575 affirmative proof of an interest in profits, previous authority, or subsequent recognition. It is true, that when a dormant partner is discovered, he is liable; but then he must be shown to be one, by an interest in the subject-matter of the note. Till this is brought home to him, he is no party to it. I know of no authority for saying, that the mere existence of a partnership, composed of names not avowed or pledged to the public, makes them, when discovered, liable for any other than contracts in which they have an interest; one who suffers his name to be used on paper, is liable as a partner, though there is in fact no existing partnership; but the man who does not suffer his name to be used or pledged, is bound only by virtue of his interest.

This furnishes, I apprehend, the true distinction between dormant and open partnerships, and that it does not depend on the knowledge which the public may have, or the representation made by the contracting partner, when he is giving or negotiating a note. The reason which makes a note drawn or indorsed by one partner, in the joint name, though for his own use, binding on the firm, in the hands of an innocent holder, is, because it has been taken on the faith of his name. 3 Kent's Com. 18. The case of *Van Reimsdyk* v. *Kane*, shows the importance attached to the names of the partners appearing on a bill. One partner was authorized by the others to take up money on the credit of the partnership concern, and draw bills therefor, on a house at A. He took up money, drew a bill directing it to be charged on the account of all the partners; but it was signed by himself alone: the court held, that the representative of a deceased partner was liable in equity to a payee, who trusted his money on the faith of the joint credit; but expressed themselves with great doubt and caution, as to the liability of the partners at law. 2 Gallis. 30.

It seems to me, that the circumstance which would excite a doubt in

that case would remove it in this. But when all the names are not used, the reason and the law cease together. Where the liability attaches to the name, proof of the signature is enough; where it depends on the mere participation of the *profits, that must be proved by the holder: as he *576] claims to hold persons bound whose names were not held out on the paper as inducements to take it, he must show that the law has placed their names upon it. In proving a partnership assignment, it must appear, that the party making it had a right to sign the name of the firm, and that his act is the act of all the partners. 5 Cranch 300. A party claiming the money due on a note, indorsed to him in the name of the firm, must show the indorsement to be made in the name of the firm, by a person duly authorized. 7 Wheat. 669. The case of *Leroy* v. *Johnson*, in this court, 2 Pet. 186, was this: Hoffman and Johnson were partners, under the firm of Hoffman & Johnson; so advertised in the papers, so publicly known, and so carried on, under articles of partnership. Hoffman drew a bill on London, in Alexandria, in his own name, which the plaintiff, residing in New York, purchased from Hoffman; the bill was drawn to raise money to pay a note of the firm, and sent to New York, by Johnson, for the purpose of selling it. Not succeeding, Hoffman went on, and, assisted by letters of recommendation from merchants of Baltimore, negotiated the bill, and with the proceeds paid a partnership note. The circuit court of the district were asked to instruct the jury: 1. That on the evidence of partnership and the application of the proceeds of the bill to partnership purposes; 2. That if the bill was drawn with reference to the business of the concern; 3. That if the name of Jacob Hoffman was sometimes used in relation to the business of the firm, that the bill was drawn in his name, and so negotiated for the firm, and to pay their debts: that the plaintiff was entitled to recover. These instructions were refused, and judgment rendered for the defendant, which was affirmed; this court holding it indispensable for the plaintiff to prove, that the name of Hoffman was used in the transaction, as the name of the firm, and that the parties so traded and carried on their business; that the jury would be well warranted from the facts of the case in believing, that Hoffman dealt in his individual name, and on his sole responsibility, without even an allusion to the partnership; though the bill was drawn for partnership purposes, with the knowledge of Johnson, and *577] by him sent to New York for sale, *and the proceeds applied in good faith. The attention of the court was not drawn to the distinction between notes discounted, and those received in payment; nor was the bill in question an accommodation one. There was no fraud in the transaction, as between the partners. It was drawn, negotiated, and the proceeds applied, with the consent of both, and the aid of letters of recommendation. It came to the hands of the holder, by fair purchase in market, in the usual and regular way of business; yet Johnson was not bound: his name was not on the bill; the plaintiff did not prove it to be the name of the firm, in the particular transaction, though Hoffman's name was sometimes used alone in partnership transactions.

If, in addition to these defects in the plaintiff's case, it had appeared, that the bill drawn in the name of Hoffman had been one of accommodation, known to Leroy to be so, and purchased as such, without the knowledge of Johnson of its having been drawn or negotiated, or the application of its proceeds to

partnership purposes, and with a knowledge by Mr. Leroy, derived from his having been in the frequent habit of discounting bills drawn by one and discounted by the other, understanding there was a special partnership between them; it is not presuming too much, to think, that this court would have deemed these circumstances strong presumptive proof and reasonable notice of their accustomed mode of raising money for partnership purposes, by discount; and that a known accommodation note, made by a stranger, and indorsed by Hoffman alone, was not a partnership note, when offered by him for discount, without the name of Johnson. It would seem to me, to furnish the very case which this court, in delivering their opinion in *Leroy* v. *Johnson*, make a proviso of the liability of the members of a firm, whose names appear on a bill negotiated, and in the hands of an indorsee. The court say, a bill drawn or accepted by a firm, by their usual name and style, is presumed to be on their joint account and authority, and that third persons are not bound to inquire whether it was so done or not, "unless the contrary be shown, and that the persons with whom the partner deals had notice, or reason to believe, that the former was acting on his separate account." This restriction to the liability of partners, whose names *appear on a joint note, in the hands of an indorsee, to whom the faith of a partnership is publicly pledged, seems to me conclusive in [*578 a case circumstanced like this; where the agents, who effect the discount of the note in question for the bank, prove distinctly their own knowledge of the nature, extent and objects of the partnership, the mode adopted to raise funds for the firm in the same bank, and of these notes being for the accommodation of Winship, and his receiving the proceeds.

Under the circumstances of this case, I cannot consider the plaintiffs as innocent indorsees of the negotiable paper of a firm, actually negotiated by them on its pledged credit, without notice or reason to believe that Winship was acting on his separate account. The testimony of Harris is conclusive on my mind, to prove, that the officers of the bank perfectly understood the nature of the transaction; that the notes were not discounted on any representation made by Winship, or on the belief that they were the notes of the firm. The bank may have thought the Binneys, or one of them, liable; but according to the testimony of Parker, could not have believed the indorsement to represent a regular and authorized partnership transaction. The statement of Mr. Parker was, at first, that they understood the Binneys were liable; but he afterwards corrected himself, and said, he did not know, as to John Binney, whether the plaintiffs considered him so answerable, but that they so considered Amos Binney. They evidently thought Amos liable, because he had been in the habit of indorsing Winship's notes, but could by no possibility have believed Amos and John liable as partners, under the signature of Winship, when one of the directors who made the discount could not say that the bank ever considered John Binney to be liable.

Finding, on a careful examination of the charge of the circuit court, that none of the restrictions and qualifications of the liability of a dormant partner, whose name does not appear in an indorsement of an accommodation note, discounted under known circumstances of suspicion, have been laid down or explained to the jury; I am constrained to say, that it is erroneous, and that the judgment ought to be reversed. I cannot, on a subject so important as this, silently dissent from the opinion of the court, when my

judgment has been made up on *what seems to me the best established principles of commercial law; nor can I consent to overrule a decision of the supreme court of the state where this contract was made, executed and enforced, without the highest possible evidence of their having been mistaken in their judicial exposition of the common law.

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

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*580] *Luke Tiernan, David Williamson, Jr., and Charles Tiernan, Plaintiffs in error, *v.* James Jackson, Defendant in error.

Construction of contract.—Equitable assignment.

Whatever may be the inaccuracy of expression, or the inaptness of the words, used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly.

A shipment of tobacco was made at New Orleans, by the agent of the owner, consigned to a house in Baltimore, the shipment being for the account and risk of the owner, he being at the time indebted to the consignees for a balance of account; the owner of the shipment drew two bills on the consignees, and on the same day, made an assignment on the back of a duplicate invoice of the tobacco, in the following words: "I assign to James Jackson (the drawee of the bills) so much of the proceeds of the tobacco alluded to in the within invoice, as will amount to $2400 (the amount of the two bills), to I. & L. $600, &c., and Messrs. Tiernan & Sons (the consignees), will hold the net proceeds of the within invoice subject to the order of the persons above named as directed above;" the bills were dishonored. This assignment, by its terms, was not intended to pass the legal title in the tobacco, or its proceeds, to the parties; but to create an equitable title or interest only in the proceeds of the sale, for the benefit of the assignees; and they cannot maintain an action against the consignees, in their own name, for the same; the receipt of the consignment, by the consignees, did not create a contract, express or implied, on the part of the consignees, with the assignees, to hold the proceeds for their use, so as to authorize them to sue for the same.[1]

The general principle of law is, that *choses in action* are not at law assignable; but if assigned, and the debtor promise to pay the debt to the assignee, the latter may maintain an action against the debtor, as money received to his use.

In Mandeville *v.* Welsh, 5 Wheat. 277, 286, it was said by this court, that in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and after notice to the drawee, it binds that fund in his hands; but where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee; unless he consent to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied, from the custom of trade, or the course of business between the parties, as a part of their contract. The court were there speaking in a case where the suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor; and it was, therefore, unnecessary to consider, whether the remedy, if any, for the assignee, was at law or in equity.

Until the parties receiving a consignment or a remittance, under such circumstances as those in this case, had done some act recognising the appropriation of it to the particular purposes

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[1] An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment, so long as the owner of the fund retains a control over it. Christmas *v.* Russell, 14 Wall. 69; s. p. McLoon *v.* Linquist, 2 Ben. 9; Randolph *v.* Canby, 11 Bank. Reg. 296.

specified, and the persons claiming *had signified their acceptance of it, so as to create a privity between them, the property and its proceeds remained at the risk, and on the account of the remitter or owner.

ERROR to the Circuit Court of Maryland. James Jackson, the defendant in error, on the 30th of April 1824, instituted in the circuit court, an action of *assumpsit*, against the plaintiffs in error, Luke Tiernan & Sons, merchants, of Baltimore. The declaration was for money had and received; the defendants pleaded *non assumpsit*, and issue being joined, the cause was tried in December 1828, and a verdict and judgment rendered for the plaintiff, for the whole amount of his claim, under instructions given to the jury by the court, to which instructions the defendants excepted, and thereupon, prosecuted this writ of error. The circumstances of the case were the following:

Luke Tiernan & Sons were, in 1819, the creditors of Thomas H. Fletcher, a merchant of Nashville, in the state of Tennessee, for a balance of account-current, admitted to amount to $4906.83. Fletcher was at the same time largely indebted to Luke Tiernan & Co., of which firm Luke Tiernan was the surviving partner, and of other merchants in Baltimore, Philadelphia and elsewhere. In consequence of the failure of a house in Nashville, and of other heavy losses in business, Fletcher became unable to meet his engagements; and on the 10th of April 1819, through Messrs. Tiernan & Sons, he made a statement of his affairs to his creditors in Baltimore; and proposed an arrangement for the satisfaction of their claims in these terms:

"I hold a very large amount of good paper, of the most unquestionable kind, the greater part of it now due. The drawers are merchants to whom I have sold goods. It is not payable at bank. I wish to give you paper of this description for your claims against me. This arrangement will at once free me from my present difficulties, and at the same time, enable you to get your money much sooner than I could possibly pay you. This plan will also save me from being *harassed, and also put my creditors to much less trouble. In the above proposition, I ask no abatement in amount; [*582 I offer unquestionable paper for my own. The only injury you sustain by the arrangement is, that you will not get your money quite as soon as was expected originally. I will also indorse the notes I transfer to you, thus making myself still liable. I, therefore, wish you to forward your claims against me to this place, without delay; that I may pay them in the way above pointed out. I wish you all to forward your claims to the same person, as I can settle much easier with one person than with a dozen. I propose, that you all forward your claims, by mail, immediately, to Mr. Ephraim H. Foster, attorney-at-law, of this place. He is a man of integrity and high standing, both as a man and as an attorney, and is withal a gentleman of large fortune, free from all embarrassment, and unconnected with trade, and bound for no person. In his hands, your money will be safe, and your business ably attended to."

These propositions were, on the 3d of May following, accepted by Messrs. Tiernan & Sons, and by Luke Tiernan for Luke Tiernan & Co.; and on the 21st of May 1819, Fletcher paid the whole amount of their claims on him in promissory notes, delivered to Mr. Foster as their agent, and took the receipts of Foster for the same. Soon after this adjustment, Charles

Tiernan, one of the plaintiffs in error, arrived in Nashville ; and on his arrival, was dissatisfied with it. But as it had been made by Foster in conformity with directions from his father, Luke Tiernan, before he left Nashville, he expressed his approbation of it.

In the letter of Fletcher to his creditors in Baltimore, dated Nashville, April 10th, 1819, containing the proposition for the adjustment of their claims, he informed them : "My cotton and tobacco at Orleans have all been sold or shipped, and advances had on it, and I have received the money arising from the sales and shipments ; but that money I am in honor bound to apply to the payment of my notes at bank here, with the view of preventing injury to my indorsers, as I cannot reconcile it to my feelings, to permit a friend to suffer, who indorses my paper from motives of friendship."

*583] *By the evidence of Mr. Fletcher, it appeared, that in April 1819, Jouett F. Fletcher, his agent in New Orleans, shipped *per* the schooner Mary, to Luke Tiernan & Sons, ninety-five hogsheads of tobacco for the account of T. H. Fletcher, and drew on them against this shipment, two bills, one for $2000, the other for $2600. These bills were indorsed by Bernard McKiernan, at the instance of Thomas H. Fletcher ; and fearing that this tobacco would be attached for his debts in Baltimore, Fletcher, on the same day he procured the indorsement, assigned the shipment, on the back of the invoice, in favor of McKiernan for the proceeds thereof. This assignment was not communicated to McKiernan, but was filed away by Fletcher.

Jouett F. Fletcher, as the agent of Thomas H. Fletcher, drew another bill for $2000 against the shipment of the tobacco *per* the Mary, in favor of Joseph Fowler, on Luke Tiernan & Sons. The bill was accepted and paid by the Messrs. Tiernan & Sons ; the two bills indorsed McKiernan were not paid. When the adjustment of the claims of Tiernan & Co., and Tiernan & Sons was made, through Mr. Foster, they were not informed of the particular shipment of tobacco by the Mary, or a shipment made to them by the brig Struggle. On being informed of the dishonor of the bills indorsed by McKiernan, Fletcher consulted counsel in Baltimore, on the effect of the assignment to McKiernan ; and then, for the first time, made the same public. After this, Tiernan & Sons wrote to Foster and to Thomas H. Fletcher, urging that the settlement and payment in notes should be cancelled, with a view to enable them to hold the proceeds of the tobacco ; and a conditional arrangement was entered into, subject to the rejection or acceptance of the defendants ; and the notes which Foster had received were placed in the hands of R. C. Foster, there to remain until they should make known their determination in relation to the arrangements ; this was on the 19th of July 1819 ; and under date of 4th of September 1819, they accepted of the new arrangement, and the receipts which Foster had given to Fletcher were returned to him, and he returned all the notes except one for $2000 on

*584] *Thomas D. Crabb, which he retained on behalf of Tiernan & Sons as was supposed, for their ultimate security.

On the 8th of May 1819, Jouett F. Fletcher, as the agent of Thomas H. Fletcher, shipped on board the brig Struggle, from New Orleans for Baltimore, eighty-one hogsheads of tobacco, amounting, *per* invoice, to $6065.67. The invoice stated the same to be "Shipped by McNeil, Fiske & Rutherford, on board the brig Struggle, Nathan Stone, master, bound for Baltimore, by

order of Thomas H. Fletcher, through his agent, Jouett F. Fletcher, consigned to Luke Tiernan & Sons." The bill of lading stated the shipment and consignment to be for the account of Thomas H. Fletcher, Esq., of Nashville.

Fletcher stated in his evidence, that upon this consignment on the 21st of May 1819, he drew two bills upon the consignees, one in favor of James Jackson, the defendant in error, for $2400, and another bill for $600, in favor of Ingram & Lloyd. On the 26th of May 1819, he made the following assignment on the back of a duplicate invoice, and on the same day acknowledged it before a notary, and delivered it to Jackson.

Nashville, May 21st, 1819.

I assign to James Jackson so much of the proceeds of the sale of the tobacco, alluded to in the within invoice, as will amount to $2400 ; to Ingram & Lloyd, as above, $600 ; and the balance, whatever it may be, to G. G. Washington & Co.; and Messrs. L. Tiernan & Sons will hold the net proceeds of the within invoice, subject to the order of the persons above named, as directed above. THOMAS H. FLETCHER.

In reference to his transactions with Jackson, to the bill for $2400 in favor of Jackson, and to this assignment, Fletcher also stated, that in the fall of 1818, he had sold to Jackson a bill of exchange for $5000, drawn by him on his agent in Philadelphia, which was protested for non-payment ; on its return, he liquidated it by his notes, which he paid. Jackson required no security against the bill for $2400, *as he showed him Foster's [*585
receipts that he owed Luke Tiernan & Sons nothing ; and he satisfied him, he had actually made the consignment. When he sold the bill for $2400 to Jackson, he was greatly embarrassed, but did not consider himself insolvent ; because he had made large shipments of tobacco to Europe, and hoped they would turn out well. He did not know what opinion Jackson entertained of his circumstances ; but in the month of May 1819, he voluntarily indorsed his, Fletcher's, note for $10,000, without having any interest in the transaction.

Messrs. Tiernan & Sons refused to accept or pay the bill for $2400, and it was regularly protested. The tobacco *per* brig Struggle arrived in Baltimore, on the 7th of June 1819, and was sold by the consignees ; the net sales amounting to $4335.35, for which sum they were in cash on the 11th of February 1820. Soon after the arrival of the tobacco by the brig Struggle, the plaintiffs in error, and Luke Tiernan, sued out a foreign attachment in the Baltimore county court, against Thomas H. Fletcher, and attached the tobacco in their own hands. In these suits, judgments were obtained, at March term 1821, for the debts due by him to Luke Tiernan & Sons, and to Luke Tiernan & Co.

At the trial in the circuit court, the defendants, by their counsel, prayed the court to instruct the jury—

1. That the assignment made by Thomas H. Fletcher, dated May 21st, 1819, and acknowledged and delivered, on the 26th of May 1819, and indorsed on the copy of the invoice, as stated in the evidence, did not pass such a legal title to any part of the proceeds of the tobacco shipped by the brig Struggle, as will enable the plaintiff to support this action in his own

name. Which instruction the court refused to give, but instructed the jury, that such an assignment, connected with the character of the consignment of the cargo of the Struggle to the defendants, was sufficient to enable the plaintiff to support this action in his own name.

*586] 2. *That the invoice, letter of advice, and bill of lading, taken together, do not constitute such a special appropriation of this cargo of the brig Struggle, or of the proceeds thereof, to the order of Thomas H. Fletcher, as will enable his assignee in this case to maintain this action in his own name, upon the assigment of May 21st, 1819: which instruction the court refused to give.

3. That unless the jury find from the evidence, that Jouett F. Fletcher ordered the said cargo, or the proceeds thereof, to be paid to the order of Thomas H. Fletcher, or in some other manner authorized the defendants to deliver the cargo, or the proceeds thereof to him, the said Thomas H. Fletcher; that then the assignment of the said Thomas H. Fletcher to the plaintiff, dated May 21st, 1819, does not pass such an interest to the plaintiff as will enable him to maintain the present action in his own name. Which instruction the court refused to give; as it appeared on the face of the documents accompanying the consignment, with the bill of lading, invoice, and letter of instructions, that the tobacco was the exclusive property of Thomas H. Fletcher, and that Jouett F. Fletcher was merely the agent of Thomas H. Fletcher.

The defendants, by their counsel, prayed the court to instruct the jury:

1. If the jury find from the evidence, that, by the terms of the settlement between Thomas H. Fletcher and Ephraim H. Foster, the agent of the defendants, the said Fletcher was to continue still liable to the defendants for the money due to them from the said Fletcher, that then the assignment of the notes and the receipts mentioned by the said Fletcher in his deposition, did not extinguish the original debt due from him to the defendants, on account of which the said notes were assigned. Which instruction the court accordingly gave.

2. That if the jury find, that at the time the cargo of the brig Struggle came to the possession of the defendants, in the manner stated in the evidence, Thomas H. Fletcher, on whose account the said shipment was made, upon a balance of accounts, was indebted to the defendants in a sum exceeding the value of the whole cargo, for advances made and liabilities incurred *by the defendants, as the factors and agents of the said

*587] Thomas H. Fletcher, that then the said defendants had a lien upon, and were entitled to retain the proceeds of the said cargo, for the balance due them as aforesaid; notwithstanding the assignment made by the said Fletcher to the plaintiff, on the 21st May 1819, as stated in the evidence. Which instruction the court refused to give.

3. That upon the whole evidence offered, the plaintiff is not entitled to recover in this suit. Which instruction the court refused to give.

The case was argued by *Scott* and *Taney*, for the plaintiffs in error; and by *Wirt*, for the defendant.

For the plaintiffs in error, it was contended: 1. That the assignment of Thomas H. Fletcher, dated May 21st, 1819, and indorsed on a copy of the invoice, did not convey to James Jackson the property in the tobacco men-

tioned in the invoice, nor to any part thereof. 2. That the tobacco being the property of the said Thomas H. Fletcher, when it came to the hands of Tiernan & Sons, by virtue of his consignment; they had a lien on it, and a right to retain, for the balance due from Thomas H. Fletcher. 3. But if Tiernan & Sons have not a right to retain for the balance of their account, still James Jackson cannot maintain this action, in his own name, for the portion of the proceeds of the tobacco assigned to him by said Fletcher.

Scott argued, that the principal question in the case arose upon the assignment by Mr. Fletcher on the 21st of May 1819, indorsed on a copy of the invoice of the tobacco shipped to the plaintiffs in error. If that assignment passed the property, the action for money had and received would lie; if it did not, the suit instituted in the circuit court could not be sustained. He contended, that the indorsement was nothing more than a direction as to the disposition of the proceeds of the shipment; the tobacco was then *in transitû*; and it did not take effect, even for that purpose, until the 26th of May 1819, when it was acknowledged by Fletcher, before the notary at Nashville. The bill of leading and the invoice plainly show this construction to be correct. The *shipment was for the account and risk of Thomas H. Fletcher; the property continued in him; no sale was [*588 intended, and no delivery was made. There must be an intention to assign, in order to give the instrument that may be executed the effect of a transfer. 2 Kent's Com. 387; 2 W. C. C. 294, 403; 5 Taunt. 73, 558; 1 Pet. 456–8; 1 Bos. & Pul. 563.

The plaintiffs in error were the factors of Thomas H. Fletcher; the sum due to them arose in the course of their tranactions with him as factors; and they had a right to retain for the balance due to them out of any property coming into their hands in the course of business. Comyn on Cont. 259; 5 Com. Dig. 54; 2 Kent's Com. 501–2; 6 T. R. 259, 262; 2 East 523; 2 Bos. & Pul. 485. The equity was equally in favor of the factors as well as of Mr. Jackson. The proposition of Fletcher was not that he should be released from the debt; his liability continued; and the receipt of the notes by their agent in Nashville was not an extinguishment of the debt. The net proceeds of the tobacco were not sufficient to satisfy the claims of Tiernan & Sons. 1 Wheat. 208, notes; 2 W. C. C. 294.

If there was not an assignment of the property of Fletcher in the tobacco on board the Struggle, so as to vest the same in the defendant in error, absolutely, to the extent of the bill of $2400, he could not maintain this action. 1 Selw. N. P. 6, 33; 1 T. R. 619, 621, 623; 12 Johns. 276, 280. The action could not be sustained in the name of Jackson, even if there had been no debt due to the plaintiffs in error; without some promise or contract on the part of the consignees to pay over the proceeds to him. There is a difference between the assignment of a thing, and an assignment of an interest in it. 1 Har. & Johns. 114; 1 Pet. 446; 11 Mass. 25; 1 Johns. 139; 2 Wheat. 66.

Wirt, for the defendant in error, stated, that this case required a particular reference to the facts on which it depended. Thomas H. Fletcher, a merchant at Nashville, became embarrassed, in the early part of 1819; made a candid disclosure *of his situation, and submitted, through the plain- [*589 tiffs in error, a proposition to his creditors, which was accepted by

Luke Tiernan & Sons; and the whole amount of the debts due to them was paid, according to the proposition, and a receipt given for the same by Foster, their agent. Having thus arranged with the plaintiffs for the satisfaction of their debts (owing them nothing), he made two shipments of tobacco to them, which, by the invoices, were for his account, and which they were to hold subject to his orders. Of part of the proceeds of one of the shipments, he made an assignment to Jackson, to secure the payment of a bill drawn in his favor, on the plaintiffs in error; and this bill was presented on the 9th of June 1819, and on the 15th of June, notice of the assignment to Jackson was given. Thus, the rights of Jackson became fixed; and it was not in the power of the consignees of the tobacco, to change or impair them. Notwithstanding this position of the transaction, the plaintiffs in error refuse to accept the bill, attach the property, and proceed to obtain a dissolution of the settlement under which their demands on Thomas H. Fletcher had been adjusted and satisfied. On the attachments, judgments were afterwards obtained, but these judgments do not establish a debt due by Fletcher. 1 W. C. C. 424; 5 Taunt. 558; Cro. Eliz. 598.

The agreement of Mr. Tiernan to settle his claims, and the receipt in full which was given to Fletcher, were shown to Jackson, when the property was assigned. This was equivalent to a letter of credit, making the plaintiffs in error the debtors of the holder of the assignment. The bill drawn in favor of the defendant in error, connected with the assignment, is not to be considered as drawn on a general fund, and for a part of it; in which light, the bill would be considered, if it stood alone; but it is a sale and transfer of a portion of a specific property, unmixed, and standing in the hands of the consignees, separate and apart. The transfer was made of a part of this specific fund belonging to Fletcher, in their hands as trustees, and with which the plaintiffs in error had nothing to do, but to pay the amount to his vendees. It is in the nature of a sale of part of the proceeds, in the hands of the consignees, who were mere factors; and on the authority of the case of *Conard* v. **Atlantic Insurance Company*, 1 Pet. 444, it is considered, that the circuit court were right in rejecting the first prayer of the defendants in that court.

*590]

There is another and a distinct ground, on which it is held, that the instructions of the circuit court were right; and on which the action is sustainable. Luke Tiernan & Sons received the consignment, under a letter of instructions, which directed them to hold it subject to the orders of the shipper. In accepting the cargo, under this letter, they assent to the terms, and agree to conform to them. It was a special trust which they were bound to execute. Had they been unwilling to assume this trust, and to perform its conditions, they should have refused it. In taking the fund, therefore, under the condition, they agree, in advance, to pay it over according to the orders of the shipper. The case, thus established, belongs to a class of cases in which it is held that such an agreement beforehand will bind as effectually as a subsequent acceptance. *Neilson* v. *Blight*, 1 Johns. Cas. 205; *Weston* v. *Barker*, 12 Johns. 276.

As to the second bill of exceptions, which presents the right of the plaintiffs in error, as resting on the lien of factors for their balance, it was admitted, that this lien existed, in general, upon the goods of his principal, for a general balance. But even as to the goods of the principal, if the

factor receive them for sale, on a promise to pay the proceeds, when sold, to a particular individual, he has no lien on such goods for the balance of his account. 6 T. R. 262. The tobacco was received under an implied agreement to dispose of it under the orders of Fletcher; and this case is within the principle of that cited. But the conclusive answer to the prayer of the defendants in the circuit court is, that the tobacco, when it came into the hands of Luke Tiernan & Sons, was not the property of Fletcher. It had been previously assigned; and that assignment transferred the title, not only against Fletcher, but against all persons, his agents, factors, and even his creditors. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386; 5 Taunt. 558.

**Taney*, in reply, contended, that the case did not present an assignment or transfer of the property by Thomas H. Fletcher; it remained in him, until it was sold; and the proceeds only were disposed of by him under the arrangement with the drawer of the bill of exchange. Thus, no right of action in his own name existed in the defendant in error; and the plaintiffs having received the property, had a right to retain it. The equities were equal, and the possession was in the plaintiffs. They have no security for their debt, except the property retained by them; having returned the notes received by Foster, preserving only the responsibility of Fletcher, for their claims. The assignment of May 21st, 1819, did not convey the legal title of the property to the defendant in error, so that he would maintain his action. It remained in Fletcher, until the shipment was received, and then the lien of the plaintiffs in error attached. [*591

But the question is, whether the assignment transferred the legal right, so as to enable the assignee to sue in his own name, and not in that of Fletcher. This is denied. The shipment left this property subject to the control of Fletcher, and directed the proceeds to be subject to his order; when it was sold, it was sold as the property of Fletcher, and the proceeds held as such; a part only was assigned by Fletcher; and if a suit could be maintained, under the assignment, all the persons named in it should have united. The interests cannot be so split up and divided, and thus each become the subject of a separate suit. No notice of the assignment was received by the consignees, until some days after the property came into their hands. The proceeds follow the property; and if the legal title in the property did not pass, neither did the legal title in the proceeds.

The acceptance of property under specific orders, does not waive any lien. 6 T. R. 262. This would enable the principal, in all cases, to deprive the factor of his lien; which would be at war with the general rule of law, and the policy on which it is founded, for the security and indemnity of factors. 2 East 523. The general rule is, that suit must be brought in the name of the assignor, unless there is some promise or assent on the part of the factor to hold the property subject to some declared trust, or defined appropriation. No such exists in this case. 2 Kent's Com. 500. 12 Johns. 279, 281. [*592

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of Maryland, in which the defendant in error was the original plaintiff. The suit was an action for money had and received, brought under the following circumstances: The defend-

ants, Luke Tiernan & Sons, of Baltimore, were factors of Thomas H. Fletcher, of Nashville, in the state of Tennessee. In the course of their business transactions, Fletcher became indebted to them, and to another house, in which Luke Tiernan was surviving partner, in a sum of money exceeding $9000. On the 8th of May 1819, Fletcher, through his agent, Jouett F. Fletcher, shipped, at New Orleans, eighty-one hogsheads of tobacco, on board of the brig Struggle, bound for Baltimore, consigned to Tiernan & Sons. The invoice and bill of lading were inclosed in a letter of advice to Tiernan & Sons, by the Struggle. In the invoice, it was stated, that the shipment was made by order of Thomas H. Fletcher, through his agent, Jouett F. Fletcher; and in the bill of lading, that it was for the account and risk of Thomas H. Fletcher, and consigned to Tiernan & Sons. The letter of advice was as follows:

New Orleans, May 8th, 1819.

Messrs. Luke Tiernan & Sons:

Gentlemen:—Herewith we hand you invoice, bill of lading, eighty-one hogsheads of tobacco, for account of Thomas H. Fletcher, by order of Jouett F. Fletcher, which you will please receive and hold subject to the order of the latter. We are yours, &c., McNeill, Fisk & Rutherford,
per Jacob Knapp.

A short time before, there had been a like shipment of tobacco on account of Thomas H. Fletcher, to Tiernan & Sons, by the schooner Mary. The consignment by the Struggle arrived on the 7th of June 1819, sometime after that by the Mary had been received. Previous to the arrival of either
*593] of *these shipments, viz., on the 10th of April 1819, Thomas H. Fletcher, at Nashville, wrote a letter to Tiernan & Sons, inclosing another to his creditors at Baltimore, informing them of his embarrassments, in consequence of the failure of a house at Nashville, and offering a proposition for the liquidation of their debts. The letter, among other things, stated that his cotton and tobacco at New Orleans had all been shipped, and advances had on it, and that he had received the money arising from the sales and shipments; that he held a large amount of good paper, of the most unquestionable kind, the greater part of which was then due; that he offered to give paper of this description for their claims against him. He then proposed, that the creditors should appoint Mr. Ephraim H. Foster, of Nashville, their agent, to negotiate the business; and added, "in all cases such of you as hold my notes must forward them to Mr. Foster, as they must be taken up, when I give him other paper." Tiernan & Sons, on the same day they received the letter, accepted the proposition, and wrote a letter to that effect. In consequence of this arrangement, Thomas H. Fletcher, on the 21st of May 1819, paid to Foster, in promissory notes, the claims of the two houses of the Tiernans, and took receipts in full from Foster, as agent. At the time of this payment and settlement, Tiernan & Sons did not know of the consignment by the Struggle; but Charles Tiernan arrived at Nashville shortly afterwards, and expressed his satisfaction at the mode of payment. At a subsequent period, in July 1819, this payment and settlement were rescinded by the parties, and the receipts given up. But in our view of the case, it is unnecessary to trace these transactions further.

Tiernan v. Jackson.

On the 21st of May 1819, Thomas H. Fletcher, being indebted to James Jackson, of Nashville (the plaintiff), drew a bill of exchange in his favor upon Tiernan and Sons, as follows :

"Nashville, May 21st, 1819.

$2400. Sixty days after sight of this my first of exchange (second unpaid), pay to the order of James Jackson, twenty-four hundred dollars, value received. THOMAS H. FLETCHER.

To Messrs. LUKE TIERNAN & SONS, Baltimore."

This bill was presented, and protested for non-acceptance, on the 9th of June 1819 ; and was, at maturity, protested for non-payment. On the same day the bill *was drawn, Fletcher drew the following assignment on the back of a duplicate invoice of the shipment by the Struggle. [*594

"Nashville, 21st of May 1819.

I assign to James Jackson so much of the proceeds of the sale of the tobacco alluded to in the within invoice, as will amount to $2400 ; to Ingram & Lloyd, as above, $600 ; and the balance, whatever it may be, to G. G. Washington & Co.: and Messrs. Tiernan & Sons will hold the net proceeds of the within invoice subject to the order of the persons above named, as directed above. THOMAS H. FLETCHER."

This assignment was not delivered to Jackson until the 26th of the same month ; and all persons named therein were creditors of Fletcher. There are many other facts spread upon the record, but these appear to us all that are material to dispose of the questions argued at the bar.

The first question is, whether the assignment so made to Jackson, on the 19th of May, passed the legal title in the tobacco, so as to make the same, or the proceeds thereof, presently the property of Jackson and the other persons named. This is a question essentially depending upon the intention of the parties, to be gathered from the terms of the assignment ; for whatever may be the inaccuracy of expression, or the inaptness of the words used, in a legal view, if the intention to pass the legal title can be clearly discerned, the court will give effect to it, and construe the words accordingly. Thus, if a man grant the profits of his land, it is said, that the land itself passes. Co. Litt. 4 ; Com. Dig. Grant, E. 5. At the time when this assignment was made, the tobacco was *in transitû ;* and if there had been an absolute assignment of the proceeds, so that the tobacco was immediately put at the risk of the assignee, and the assignor was to have no further control over the management of it, we do not mean to say, that it would not pass the legal title and property in it to the assignee. But can such an intention be gathered from the words used in this instrument ? We think not. The words are, "I assign, &c., so much of the proceeds of the sale of the tobacco, &c., as will amount to $2400." The parties, then, contemplate a sale, and the assignment is to be, not of the tobacco itself presently, but of a portion of the funds arising from the sale of it, at a future period. Could the assignee or assignees have countermanded the consignment [*595 to Tiernan & Sons ? Or, putting aside the factor's claim of a lien, could they have demanded the property of the factors, before the sale ? We

think such was not the intention of the parties. The claim of Jackson was not to an undivided portion of the property, but to a specific amount of the proceeds arising from a sale. Suppose, before sale, the tobacco had been lost or destroyed, would the loss have been his or Fletcher's? We think, it would have been Fletcher's. The assignees were all creditors; and there is no evidence, that they took the assignment in satisfaction of their debts, or otherwise than as security therefor. And the fact, that, contemporaneously, Jackson took a bill of exchange on Tiernan & Sons for the same amount, demonstrates, that he did not understand the assignment as extinguishing his debt, or as operating more than as collateral security. Upon the dishonor of that bill, he had a right of recourse against the drawer. In this view of the transaction, Fletcher had an immediate interest in the sale. The larger the amount of the proceeds, the further they would go to extinguish his antecedent debts. It is perfectly consistent with the terms of the instrument, that he should retain the legal title in the tobacco, and that his factors would have a right to make sale thereof, in the best manner they could, for his benefit, giving the assignees an equitable title in the proceeds of the sale. Our opinion is, that upon the terms of the assignment, it was not intended by the parties to pass the legal title in the tobacco, or its proceeds; but to create an equitable title or interest only in the proceeds, after sale, for the benefit of the assignees.

Assuming, then, that an equitable title only to the proceeds of the sale, amounting to $2400, vested by the assignment in Jackson, still, if there has been any agreement on the part of Tiernan & Sons to hold so much of the proceeds, for the benefit of Jackson, he may maintain the present action; for under such circumstances, upon the receipt of the proceeds after the sale, so much thereof would be money had and received to the use of Jackson; and it will make no difference, under such circumstances, whether Tiernan & Sons have a lien for any balance of accounts or not; for such *an *596] agreement will bind them, and amount to a waiver of their lien *pro tanto* in favor of Jackson.

The question, then, is, whether there are any ingredients in this case furnishing sufficient proofs of such an agreement? Such an agreement may be express, or it may be implied, if the circumstances of the case, coupled with the acts of the parties, necessarily lead to such a conclusion. That there has been an express agreement on the part of Tiernan & Sons is not pretended. On the contrary, having received the shipment on the 7th of June 1819, they attached the property by a writ of garnishment, on the 8th of the same month, on their own account, as the property of Fletcher; and they dishonored the bill drawn in favor of Jackson, on the succeeding day; nor did they, after the notice of the assignment, on the 15th of the same month, ever give any express assent to hold the proceeds according to the terms of it.

But it has been argued, that the receipt of the consignment, with the bill of lading, invoice, and letter of advice, amounted to an implied engagement to conform to the terms of the latter, and "to receive and hold the tobacco subject to the order of" Jouett F. Fletcher, the agent of Thomas H. Fletcher; and that it being the case of a mere agency, it is, in contemplation of law, subject to the direct order of the latter, without the intervention of his agent. Now, assuming that a factor, upon receiving a consignment,

is bound, as between himself and his principal, to conform to the orders of the latter, which cannot well be denied in point of law, the question still recurs, whether that implied obligation can inure to the benefit of a third person, so as to entitle the latter, upon obtaining an order at a future period, to maintain an action against the factor, as upon an agreement in his favor? And, *à fortiori*, whether, in case of a dissent or refusal, contemporaneous with the receipt of the consignment, such an implied obligation can supersede the legal effect of such dissent or refusal? If an assent is to be implied from the duty of the factor, in ordinary cases, may not his dissent be shown by acts rebutting the presumption? In the present case, the letter of advice contains no authority to sell, but only to receive and hold the tobacco subject to the order of the party. If a power to sell be implied, it must be *implied from the antecedent course of business and relation of the parties, as principal and factors. The implied obligation, then, from [*597 the receipt of the consignment, is no more than the terms of it express, viz., to receive and hold the tobacco subject to order; not to pay over the proceeds to order. But waiving this consideration, how stands the general proposition in point of principle and authority?

The general principle of law is, that *choses in action* are not at law assignable. But, if assigned, and the debtor promise to pay the debt to the assignee, the latter may maintain an action for the amount, against the debtor, as money received to his use. Independently of such promise, there is no pretence, that an action can be sustained. Have Tierman & Sons, since notice of the present assignment, made any such promise to Jackson? No express promise is shown; and the acts antecedently done by Tierman & Sons repudiate the notion of any intentional implied promise; for those acts appropriate the property to their own claims, and to meet their own lien.

But it is said, that if a party agrees to hold money or goods, subject to the order of the owner, it raises an implied promise to the holder of the order, upon which he may maintain an action at law. The case of *Weston* v. *Barker*, 12 Johns. 276, has been relied on for this purpose. But in that case, the party receiving the money under the assignment, made an express promise to hold the same, subject, in the first place, to the demands of certain specified creditors, and next, the balance, subject to the order of the assignor. The court held, that in such case, the holder of the order subsequently drawn had a right to the money, as money had and received to his use; notwithstanding, there was a counter-claim, or set-off, of the assignee, accruing before the assignment. The case of *Walker* v. *Birch*, 6 T. R. 258, is somewhat complicated in its circumstances, but it turned upon similar principles. There, the agreement was express, to hold the property for a particular purpose; and that, in the opinion of the court, excluded the right of the factor to assert a lien upon it, for any demand due to him, which was inconsistent with that purpose. Lord Kenyon there said, the parties may, if they please, introduce into their contract an article to prevent the application of a *general rule of law to it. In the note [*598 given by the factors in that case, they acknowledged, that they had received the goods for sale, and promised to pay the proceeds of them, when sold, to J. F. or his order. J. F. was the agent of the owners; and they having become bankrupt, their assignees brought an action, not for the proceeds (for the goods were not sold), but for the goods, and they

recovered, upon the footing of the original special contract. That case also differs from the present in one important fact, and that is, that the suit was brought by the assignees of the bankrupt owners, and not by a holder of the order. In the case of *Mandeville* v. *Welch*, 5 Wheat. 277, 286, it was said by this court, that in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. But where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, in the course of business between the parties, as a part of their contract. The court were there speaking in a case, where the suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor; and it was, therefore, unnecessary to consider, whether the remedy, if any, for the assignee, was at law, or in equity

The case of *Farmer* v. *Russell*, 1 Bos. & Pul. 295, so far as the point before us is concerned, asserts the principle, that if A. receives money from B., to pay to C., it is money had and received for the use of the latter. In such a case, it is immaterial, whether the promise to pay over be express or implied; for by the very act of receipt, the party holds it, not for A., but in trust for C. (See also *Schermerhorn* v. *Vanderheyden*, 1 Johns. 139; *Onion* v. *Paul*, 1 Har. & Johns. 114; *Pigott* v. *Thompson*, 3 Bos. & Pul 146, 149, note.) The case of *Neilson* v. *Blight*, 1 Johns. Cas. 295, resolved itself substantially into this: that the defendant, who was a sub-agent, had received the goods in question, upon condition of paying to the plaintiff out of the first proceeds, a certain sum due to him, according to a written contract with *the agent, of which he had notice, and to which, in a letter addressed to the plaintiff, he admitted his obligation to comply; and the court held the plaintiff entitled to recover the amount, in an action for money had and received. This was, a case then, either of an express promise, by the sub agent, or at least of an implied promise, irresistibly established, and creating a privity between the parties, in a manner clear and unequivocal.

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All these cases are distinguishable from the present. They are either cases, where there was an express promise to hold the money subject to the order of the principal; or there was an implied promise to pay it over, as it was received, to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defence on account of want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person. In the case at bar, no such irresistible presumptions exist. There was, as we have seen, no express promise to hold the proceeds of the sale subject to order; and no implied promise, positively and necessarily, flowed from the circumstances. On the contrary, the acts of Tiernan & Sons, contemporaneous with the receipt of the consignment, negatived it; and the actual assignment was subsequent to those acts.

The question is certainly a nice one; and confessedly new in the circumstances of its actual presentation. On this account, we were desirous of

making some further researches into the authorities; and we have found two cases not cited at the bar, which seem to us fully in point. The first is *Williams* v. *Everett*, 14 East 582. There, K., abroad, remitted certain bills to his bankers, in London, directing them to pay certain sums out of the proceeds, when paid, to certain specified creditors. The bankers received the bills, and before they were paid, the plaintiff (one of the specified creditors) called on the bankers, and stated, that he had received a letter from K., directing 300*l.* to be paid to him, out of the bills sent, and proposing to the bankers to indemnify them, if they would deliver to him one of the bills to the amount; but the bankers refused so to do, or to act upon the letter; *although they admitted the receipt of it, and that the plaintiff was the person to whom the sum of 300*l.* was directed to be appropriated. [*600 The bankers afterwards received the money on the bills, and the plaintiff brought an action for money had and received, to recover the amount of the money so appropriated to him. The court held, that the action was not maintainable. Lord Ellenborough, in delivering the opinion of the court, said: "The question which has been argued before us is, whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by K., and bind themselves so to apply it; and whether, therefore, the amount of such bill, paid to them, when due, did not instantly become, by operation of law, money had and received to the use of the several persons mentioned in K.'s letter, as the creditors in satisfaction of whose bills it was to be applied; and of course, as to 300*l.* of it, money had and received to the use of the plaintiff. It will be observed, that there is no assent on the part of the defendants, to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal of the creditor so to do. If, in order to constitute a privity between the plaintiffs and defendants, as to the subject of this demand, an assent, express or implied, be necessary, the assent can, in this case, be only an implied one, and that too, implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it, until paid; and its contents, when paid, to the use of the remitter. It is competent to the remitter to give, and countermand, his own directions respecting the bill, as often as he pleases; and the persons to whom the bill is remitted may still hold the bill, till received, and its amount, when received, for the use of the remitter himself; until by some engagement entered into between themselves with the person, who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given; but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff, under the orders, which accompanied the remittance, it occurs, as fit to be asked, when *did it become so? It could not be so, before the money was received on the bill becoming due. And at that instant, suppose, the defendants had been robbed of the cash or notes, in which the bill in question had been paid, or they had been burnt or lost by accident; who would have borne the loss thus occasioned? Surely, the remitter, K., and not the plaintiff and his other creditors, in whose favor he had directed the application of the money, according to their several proportions, to be made. This appears to us to decide the question." [*601

This language has been quoted at large, from its direct application to all the circumstances of the case at bar. Here, Tiernan & Sons, before the sale and receipt of the proceeds of the tobacco, refused to hold the same for the use of Jackson; and how then could the money, when afterwards received, be money had and received to his use. If this case be law, it is in all its governing principles like the present. The case of *Grant* v. *Austin*, 3 Price 58, is still later, and recognises in the fullest manner the decision in 14 East 582. That was the case of a remittance to bankers, with a request, that they would pay certain amounts to persons specified in the letter. No dissent on the part of the bankers was shown. But the court held, that in order to constitute an appropriation of the money, or any portion of it, in favor of the persons specified, some assent on the part of the bankers must be shown: and that the circumstances of the case did not establish it. The remitter was, at the time, largely indebted to the bankers; and the account between the parties was soon after broken up. It seems to us, that these authorities are founded in good sense and convenience. Until the parties receiving the consignment or remittance, had done some act recognising the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a priority between them, the property and proceeds remained at the risk and on the account of the remitter or owner.

In this view of the case, it is wholly immaterial to decide, whether Tiernan & Sons had a lien on the proceeds, or not, for the balance due them; or whether the negotiations, stated in the record, created a dis-
*602] ability on their part to assert it. *For, even supposing that they have no available lien, that is a matter which cannot be litigated in a suit at law, where the only question is, whether the plaintiff has a good right to maintain his action; whatever might be the case, in a suit in equity, brought by the plaintiff to enforce his equitable claims under his assignment.

The instructions given by the court decided, that the assignment made to the plaintiff did, in effect, pass the legal property in the proceeds to the plaintiff, so as to entitle him to maintain the present action; or, that at all events, it constituted such a special appropriation of them, as would enable the plaintiff, as assignee, to maintain it. We are of opinion, that the court erred upon both grounds; and that, therefore, the judgment ought to be reversed, and the cause be remanded to the circuit court, with directions to award a *venire facias de novo*. In the mandate, the errors in the bill of exceptions will be specially pointed out; but as the principles involved in them are resolved into the points before stated, they need not here be particularly commented on.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is considered by the court here, that there was error in the circuit court in refusing to instruct the jury upon the prayer of the defendant's counsel, that the assignment made by Thomas H. Fletcher, dated the 21st May 1819, and acknowledged and delivered on the 26th May 1819, and indorsed on the copy of the invoice, as stated in the evidence, did not pass such a legal title to any part of the pro-

ceeds of the tobacco shipped by the brig Struggle, as will enable the plaintiff to support this action in his own name; and in instructing the jury that such an assignment, connected with the character of the consignment of the cargo of the Struggle to the defendants, was sufficient to enable the plaintiff to support this action in his own name. And there was error also in the circuit court, in refusing to instruct the jury, that the invoice, letter of advice, and bill of leading, taken together, do *not constitute such a special appropriation of the cargo of the brig Struggle, or of the proceeds thereof, to the order of Thomas H. Fletcher, as will enable his assignee in this case to maintain this action in his own name upon the assignment on May 21st, 1819. It is, therefore, considered by the court here, that for the errors aforesaid, the judgment of the circuit court be and the same is hereby reversed; and that the cause be and the same is hereby remanded to the circuit court, with directions to award a *venire facias de novo*. [*603

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*Patapsco Insurance Company, Plaintiffs in error, *v.* John Southgate and Wright Southgate, Defendants in error. [*604

Depositions de bene esse.—Subpœna.—Marine insurance.—Total loss. Sale by master.—Abandonment.

In the caption of a deposition, taken before the mayor of Norfolk, to be used in a cause depending, and afterwards tried, in the circuit court of the United States, held in Baltimore, the mayor stated the witness "to be a resident in Norfolk;" and in his certificate, he stated, that the reason for taking the deposition was, "that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, in the borough of Norfolk." It was sufficiently shown by the certificate, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial.[1]

The provisions of the 13th section of the act of congress, entitled, "an act to establish the judicial courts of the United States," which relate to the taking of depositions of witnesses, whose testimony shall be necessary in any civil cause depending in any district in the courts of the United States, who reside at a greater distance than one hundred miles from the place of trial, are not confined to depositions taken within the district where the court is held.

In all cases where, under the authority of the act of congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to a compulsory attendance. The act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted, or used on the trial; this inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered beyond a compulsory attendance.

The deposition of a witness living beyond one hundred miles from the place of trial, may not always be absolute; for the party against whom it is to be used, may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus probandi* thus would rest upon the party opposing the admission of the deposition in evidence; for a witness whose deposition is taken under such circumstances, it is not necessary to issue a *subpœna;* it would be a useless act; the witness could not be compelled to attend personally.[2]

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[1] Rules for taking a deposition *de bene esse*, and when it may be read in evidence. Harris *v.* Wall, 7 How. 693. The magistrate must state in his certificate the reason for taking the deposition; that the witness is about to "depart the state," is not sufficient. Id.

[2] This overrules Brown *v.* Galloway, Pet. C. C. 291; Penn *v.* Ingraham, 2 W. C. C. 487; Banert *v.* Day, 3 Id. 243; Pettibone *v.* Derringer, 4 Id. 215.

By the act of 2d March 1793, *subpœnas* for witnesses may run into districts other than where the court is sitting; provided, the witness does not live at a greater distance than one hundred miles from the place of holding the court.

Damages to a vessel, by any of the perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money to an amount exceeding half the value of the vessel at that port, after such repairs, constitute a total loss.[1]

The rule laid down in the books is general, that the value of the vessel, at the time of the accident, is the true basis of calculation; and if so, it necessarily follows, that it must be the value at the *605] place where the accident occurs. The *sale is not conclusive with respect to such value the question is open for other evidence, if any suspicion of fraud or misconduct rest upon the transaction.[2]

As a general proposition, there can be no doubt, that the injury to the vessel may be so great as to justify a sale by the master; there must be this implied authority in the master, from the nature of the case; he, from necessity, becomes the agent of both parties, and is bound in good faith to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity.

There must be a necessity for a sale of the vessel, and good faith in the master in making it and the necessity is not to be inferred, from the fact of the sale in good faith; but must be determined from the circumstances. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale to all concerned, would not justify it; unless the circumstances under which the vessel was placed, rendered the sale necessary, in the opinion of the jury.[3]

There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment; it seems, however, agreed, that no particular form is necessary; nor is it indispensable that it should be in writing. But in whatever form it is made, it ought to be explicit; and not left open as matter of inference, from some equivocal acts; the assured must yield up to the underwriter all his right, title and interest in the subject insured; for the abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy.

The consul of the United States, at the port where a vessel was sold, in consequence of her having, in the opinion of the master, sustained damages, the repairs of which would have cost more than half her value at that port, declared in the protest of the master, made at his request, that the master abandoned the vessel, &c., to the underwriters; this protest, as soon as it was received by the assured, the owners of the vessel, was sent to the underwriters; and the owners wrote, at the same time, that they would forward a statement of the loss, with the necessary vouchers, and they soon afterwards did forward the further proofs, and a statement of the loss to them; this constituted a valid abandonment.

Error to the Circuit Court of Maryland. The defendants in error instituted an action against the Patapsco Insurance Company, in the circuit court of Maryland, on a policy of insurance on the schooner Frances, Seaward, master, from Curaçoa or a port of departure in the West Indies, or on the main, to a port in the United States.

On her voyage from Carthagena to Norfolk, the Frances encountered a severe gale, and sustained such injuries as made it necessary for her, after two days, to put back to Carthagena; on entering that port, she struck several times on a sand bar; and on examination, it was found that she required considerable repairs in her hull and rigging. She was placed, by

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[1] It is the state of facts existing at the time of the abandonment for a total loss, which constitutes the criterion of its validity; if valid, when made, the rights of the parties are definitively fixed, and cannot be changed by subsequent events. Bradlie *v.* Maryland Ins. Co., 12 Pet. 398.

[2] See The Star of Hope, 9 Wall. 203, 235.

[3] S. P. The Amelie, 6 Wall. 18.

the *master under the care of the American consul, at Carthagena; and was sold by him, at private sale, to Evans, for $140, with the consent of the master. Evans afterwards sold the Frances to Palmer for $200. She was repaired by Palmer, and returned to the United States. The plaintiffs claimed a total loss from the underwriters.

On the trial in the circuit court, the defendants took exceptions to the opinions of the court, on points submitted by the plaintiffs and by the defendants, for instructions to the jury; which, with the facts of the case, are fully stated in the opinion of the court.

The deposition of Thomas Evans was offered in evidence by the plaintiffs below; and after exceptions to its legality by the defendants, was admitted by the court. The deposition was taken, *ex parte*, at Norfolk, before the mayor of that place. In the caption, the mayor stated the witness to be a resident in Norfolk; and in his certificate, declared the reason for taking it to be, that the witness "lives at a greater distance than one hundred miles from the place of trial, to wit, at the borough Norfolk." No *subpœna* was issued for Evans, and no other evidence was offered of the place of his residence, than the caption of the deposition, in the handwriting of the mayor of Norfolk.

The jury having found a verdict for the plaintiff in the circuit court, the defendants prosecuted this writ of error.

The case was argued by *Mayer* and *Wirt*, for the plaintiffs in error; and by *Stewart* and *Taney*, for the defendants.

For the *plaintiffs* in error, it was contended:—The deposition, *ex parte*, of Evans, ought not to have been admitted in evidence; because the act of congress allowing depositions of this kind is not to be construed to extend to depositions taken at a place, to which a *subpœna* from the court of trial will not reach. Only depositions *de bene esse* may be taken under the act; and *de bene esse*, *ex vi termini*, imports a power, by ordinary common-law process, to obtain the evidence; and a *subpœna* is that ordinary means. 3 W. C. C. 415, 529. At least, no such deposition can be read, unless due diligence be first used to obtain the attendance of the *witness at the [*607 trial, or his evidence under commission, according to the rules of the court. 2 W. C. C. 487; 4 Ibid. 215; Pet. C. C. 291. Nothing to this effect was in proof at the trial.

No evidence was offered to show that the vessel was injured by any of the accidents insured against injury, beyond one-half of her value. The underwriters do not insure the goodness of the ship; and the deficiencies which form the ground of the claim, must be traced to the disaster which has befallen the vessel, within the perils of the policy, and must be proved and measured by regular details and estimates. *Cazalet* v. *St. Barbe*, 1 T. R. 190; 1 Johns. 336; *Fontaine* v. *Phœnix Insurance Company*, 11 Ibid. 295.

It may also be questioned, whether, in the estimating of the injury to be beyond one-half, the customary rule must not be observed, of deducting from the repairs one-third on account of the new work. 3 Mason 75; 2 Caines Cas. 157. It is true, the insurer, if the abandonment be valid, will have the vessel, and consequently, the benefit of the new work; but the very inquiry here is, whether the abandonment be well grounded; and that is to be learnt only by seeing what injury is really sustained. That necessarily

refers us to the value of the old work, in its competent condition, at the commencement of the risk; nothing more being incumbent on the insurer, by his contract, than to replace the insured property in its original state, either specifically or by a pecuniary equivalent.

It is not settled, to what place the estimate of the vessel's worth, when supposed to be repaired, is to be referred; when the ascertainment is making, whether she will be worth repairing. It is to be presumed, her value, in her improved condition at her home port, is most just; because, there the vessel is to be available to the owners, for sale or enterprise; and the natural occupation of a vessel, to carry merchandise, will be supposed to be the object of the owners in having her at a foreign port, and not the sale of the vessel. 11 Johns. 295; 2 Caines Cas. 157; 2 Mason 71. All analogy from the settlement of the contribution, in general averages, authorizes the present construction. Marsh. Ins. 621, 628.

But an abandonment was necessary, for sustaining a claim of total loss admitting the vessel to have been deteriorated by *the disasters, *608] beyond one-half of her value. Phil. Ins. 383; 1 T. R. 611. There was neither an actual nor constructive abandonment here. An abandonment must be explicit and absolute, and must use terms of cession, that, by clear intent, transfer the property in the thing insured. A mere claim for total loss will not avail as an abandonment. *Parmeter* v. *Toddhunter*, 1 Camp. 541; *Turner* v. *Edwards*, 12 East 488; Phil. Ins. 447; Marsh. Ins. 600. The protest does not amount to an abandonment in this case, though transmitted by the assured, and containing words of abandonment in the close of it; because not made by the persons having the property in the thing insured, and because the assured transmitted it to the underwriters only as a protest, or detail of the circumstances of the loss. If there be evidence of abandonment, it is, nevertheless, necessary, under the policy in this cause, to show notice of an intention to abandon. The abandonment and the notice, it has been decided in the *Columbian Insurance Company* v. *Catlett*, 12 Wheat. 393, may operate by one instrument. But the instrument should contain words of a prospective import. That is not the case in any of the written acts of the parties here.

If there was an abandonment, yet the state of the vessel must be regarded, as the vessel was at the time of the abandonment. She had then been repaired, at a trivial expense; and, the sale being a nullity, she was in the hands of the insurers, in point of law. Though supposed once to be irretrievably injured, she was not so then; and her repairs having proved to be practicable, at so small a sum, demonstrated that she never was actually thus injured. In reference to this point, on the time of abandoning, the case must be treated in analogy to that of a capture and re-capture.

Only extreme necessity will justify a sale by the master; and that necessity must be found by the jury to have existed; and the jury, and not the master, is the arbiter on that issue of necessity, upon a view of all the circumstances of the case. The honest discretion of the master is not the sanction here; however that discretion may be conclusive as to all proceedings within the sphere of his ordinary business as master. A sale is, however, without those limits; and must be justified by a *superadded *609] agency, which only the force of circumstances can confer upon him. It is not enough, therefore, that the master shall appear to the jury to have

had an honest view to his owner's interest, in a sale of the ship; but the jury must find, that, according to the aspect and state of things, the sale was, in fact, for the owner's interest, because of the necessity to resort to that measure. It must be an interest created by the exigency, and not produced by any collateral circumstances beyond those connected with the restoration of the vessel. All the authorities may, in this view, be easily explained and reconciled, where on this head they use the terms, "for the best of all concerned;" "for the benefit of the concerned;" "as a prudent man, uninsured, would do;" as applied to the master's discretionary sale of the vessel. All these rules come round to the principle of the necessity, within which, strictly, the question of the owner's interest on the emergency lies. What is a case of necessity depends on the circumstances and many varieties of accident; but a necessity, in reference to a sale, may be said to be the state of things which, from actual ascertainment, where practicable, or from appearances, where they can alone be consulted, requires instant action; and where there is a choice only between the certain or probable loss of the vessel, and the saving of so much of her as the proceeds of a sale may yield.

Every case of necessity must exhibit a prospective destruction, or an injury already sustained, to a degree irreparable, or demonstrating, in connection with the expense, that repairs would be an idle waste of money. The first instance is an example of mere jeopardy; the latter is the case that should now be before the court to entitle the assured to succeed. The case of jeopardy is to be found by the jury, from the threatening perils of the ship; the case of sustained injury, from the fact of her actual condition, and the well-ascertained expense of repairs, and the value of the vessel, after repairs, determined upon some sure *data*. *Hayman* v. *Molton*, 5 Esp. 67; *Reid* v. *Darby*, 19 East 343; *Milles* v. *Fletcher*, 1 Doug. 231; *Read* v. *Bonham*, 3 Brod. & Bing. 147; *Scull* v. *Briddle*, 2 W. C. C. 150; *Queen* v. *Union Insurance Company*, 2 Ibid. 331; *Church* v. *Marine Insurance Company*, 1 Mason 341; *Roberson* v. *Clarke*, 1 Bing. 445; *Ludlow* v. *Columbian Insurance Company*, 1 *Johns. 336; Phil. Ins. 395, 408, 409, 412; Marsh. Ins. 580; *Fontaine* v. *Phœnix Insurance Company*, [*610 11 Johns. 295; *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115, and note of this case in 7 Eng. C. L. 386; *Green* v. *Royal Exch. Ass. Company*, 6 Taunt. 71; 3 Kent's Com. 134; *Plantamour* v. *Staples*, 1 T. R. 611, note; as to which case, J. BULLER'S words are misquoted in Marsh. Ins 582, and in *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115.

After an abandonment once effectually made, the master becomes the agent of the insurers. For the purposes of this case, it may be admitted, that in that event he is exclusively their agent. And the books must be understood to refer to their master's agency, after a valid abandonment, where sometimes they speak of his discretion as agent. Phil. Ins. 468, 471; Marsh. Ins. 615, a; 2 W. C. C. 61; 6 Cranch 272. And the clause in the policies which authorized the insurer and his agents to "labor, travail, &c., without prejudice to the insurance," refers only to the conduct of the master, after a complete ground for abandonment has occurred. 1 T. R. 613; Marsh. Ins. 334, 615; 2 W. C. C. 61. No necessity for a sale is shown here. 1 T. R. 190.

Well settled principles of insurance law are opposed to making the sale

of the master the measure, or ground, of the claim. It is settled, that an insurer is never to be involved by the fluctuation of the market. Marsh. Ins. 628. So, the adventure of the ship is never considered as insured in connection with the ship. An insurance on the ship is upon the ship for the voyage, not on the ship and voyage; showing that the thing itself, and not its speculative or fluctuating value, is always regarded in the determination of the insurer's liability. Phil. Ins. 283; 4 Cranch 370, 373. So, it is settled, that the goodness of the ship is not insured; but the contract only is, that she shall not be rendered defective by certain accidents: a principle that would be overthrown, if the insurer were to be made liable according to the state of the market for ships, at any casual port of distress. 1 T. R. 190. So, it is said to be repugnant to the contract of indemnity, which a policy of insurance is, that one shall recover for a total loss, where the event shows *there was, in fact and intrinsically, only a partial loss. Marsh. Ins. 575; *Hamilton* v. *Mendes*, 2 Burr. 1198; Phil. Ins. 395, 326.

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The insurer ought not to pay less, nor the assured to receive more, than the amount of actual loss; that is, an amount commensurate with the physical injury, and required to repair that injury. Marsh. Ins. 577; *Fontaine* v. *Phœnix Insurance Company*, 11 Johns. 295. There is no right to abandon, on the supposition of events which turn out to have been misconceived. *Bainbridge* v. *Neilson*, 10 East 343.

The sale in this case was void; the mate and the master being interested in the purchase, having no right to make the purchase at the first sale: nor Palmer, at the final disposition of her, because Palmer was one of the surveyors: by the survey, he promoted the sale, and stood, therefore, in a fiduciary relation with the owners of the vessel, which disabled him from being a purchaser. The assured had a right to vacate the sale, and the sale being, in point of law, null at the election of the assured, will be regarded as absolutely so, as to the insurers, whether the assured actually make an election or not. 5 Esp. 67; *Church* v. *Marine Insurance Company*, 1 Mason 341; *Baker* v. *Marine Insurance Company*, 2 Ibid. 370; 6 Pick. 198; 1 Esp. 237; 4 Binn. 386; Phil. Ins. 423.

This being then a case where there has been no abandonment, and the act of the master, by a sale, not being, in law, competent to make the loss actually total, and the ship, in consequence of the absolute nullity of the sale, being deemed to be specifically in the hands of the assured; the claim here can only be for a partial loss, to the extent of the sum required to repair, at Carthagena, the real injury sustained by the vessel.

Stewart and *Taney*, for the defendants, contended:—The deposition of Evans, taken before the mayor of Norfolk, was admissible in evidence. It was objected to, on the grounds, "that no *subpœna* had been issued for him, and no evidence, out of the deposition, produced, as to his residence, or any inability on his part to attend the trial." It was not denied, that the provisions of the act of congress had been strictly pursued. The officer, by whom the deposition was taken, had the power, and he was under no *disqualification to exercise it; the oath was administered in due form, and a due return made of the deposition, with a certificate of the reasons for taking it. But it was said, that the deposition was only *de bene esse*, and that until, by the return of a *subpœna*, or by some other mode of

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proof, to the court, it was shown, that his attendance could not be had, the deposition could not be read. It was insisted, that the act of September 24th, 1789, was passed to facilitate the administration of justice, to render it more convenient and less expensive, and that every caution and check had been employed, in the requisitions of that act, to prevent the dangers likely to attend *ex parte* examinations. That the ceremony of issuing a *subpœna* was not in the contemplation of that act, because, where the place of trial was in one of the United States, and the residence of the witness in another state, at a greater distance than one hundred miles from the place of trial, the *subpœna* would be unavailing. The act intended to reach all cases, where the witness resided at a greater distance than one hundred miles from the place of the trial; the whole object of that law being the procurement of testimony, under suitable sanctions, and in the manner least burdensome to the suitors and witnesses. Depositions taken at that distance were *de bene esse*, only in case the witness was within the reach of the process of the court at the time of the trial, with the knowledge of the party seeking to use the deposition.

In providing for this contingent arrival of the witness within the process of the court, the depositions were styled *de bene esse*. Under the opposite construction, a commission would be the only mode to take the testimony of witnesses residing out of the district, at a greater distance than one hundred miles: upon what principle can we so limit the operation of a law, whose words are general and comprehensive? In all the cases in the enacting clause, the depositions are absolute, unless the witnesses are afterwards shown to be within the reach of the process of the court. In the case of the *Lessee of Banert et ux.* v. *Day*, 3 W. C. C. 244, a *subpœna* was dispensed with, because the witness was shown to be so advanced in age as to be unable to attend. *In the case of *Beale* v. *Thompson and Maris*, reported in 8 Cranch 71, a deposition, taken under the act of congress, in New Hampshire, was offered in evidence in the circuit court for the district of Columbia, and rejected, because opened out of court. No objection was there made upon the ground taken in the case in 3 W. C. C. 414. The counsel for the defendant in error referred to the case of *Bell* v. *Morrison et al.*, 1 Pet. 356, to show, that the certificate of the magistrate taking the deposition is good evidence of the facts therein stated. [*613

If the damage done to the vessel by the peril of the sea, on the voyage insured, could not be repaired, without an expenditure of money, to an amount exceeding half her value at the port of Carthagena, after such repairs, the plaintiffs had a right to abandon and recover for a total loss. It was contended, that this rule was a positive one, originating in the convenience of having a precise test in all cases. *Smith* v. *Bell*, 2 Caines Cas. 153; *Centre* v. *American Insurance Company*, 7 Cow. 564; *Peele* v. *Merchants' Insurance Company*, 3 Mason 28, 69, 72; 3 Kent's Com. 276.

If, upon the information obtained, and the circumstances known to the master, at the time of the sale in question, after due and diligent inquiry, it was absolutely necessary, and for the interest of the concerned, that the vessel should be sold; and if a prudent and discreet owner, placed in the like circumstance, would have come to the same conclusion, and sold the vessel in like manner; then the sale made by the master was justifiable, and the plaintiffs had a right to abandon: whether such a necessity existed at the

time of the sale, was a question proper for the jury to decide, according to the rule stated in the opinion of the court.

It was contended, that the master of a vessel has a right to sell the vessel, in a case of extreme necessity; that upon the happening of any unforeseen emergency, which requires prompt and decisive action by the master, he becomes the agent of all parties, and is competent to bind them by acts done within the scope of the agency, and done with good faith, and for the benefit of all concerned; that the sale described in the testimony
*614] was so made in the prosecution of such *an agency, arising from a condition of extreme necessity; was made honestly, without knowledge of the insurance, and for the advantage of all concerned in the adventure. All the transactions at Carthagena, after the return of the schooner Frances to port, in a most disabled and unseaworthy condition, took place under the auspices and sanction of the United States consul, whose official station invited confidence, and was to be deemed a sure guarantee of the diligence and fidelity of the master, in the absence of all proof to the contrary. *Hayman* v. *Molton*, 5 Esp. 65; *Mills* v. *Fletcher*, 1 Doug. 231; *Plantamour* v. *Staples*, 1 T. R. 611, note; *Robertson* v. *Caruthers*, 2 Stark. 571; *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115; *Read* v. *Bonham*, 3 Br. & Bing. 147; *Robertson* v. *Clarke*, 1 Bing. 445; *Scull* v. *Briddle*, 2 W. C. C. 151; *Fontaine* v. *Phœnix Insurance Company*, 11 Johns. 293; *Centre* v. *American Insurance Company*, 7 Cow. 564, 582; *Gordon* v. *Mass. Fire and Mar. Ins. Comp.*, 2 Pick. 249; Phillips on Ins. 408.

The letters of the plaintiffs, dated May 1st and May 5th, 1824, together with the documents and accounts transmitted with them, were a sufficient abandonment. It was contended, that there is no prescribed form in which an abandonment is to be made: that any act manifesting the intention of the assured to look to the insurer for the stipulated indemnity, constitutes a sufficient abandonment, upon which to base a claim for a total loss; and that the correspondence between the parties demonstrated, that they treated the claim as a claim for a total loss, in connection with an implied surrender of all the property to the insurers. 8 T. R. 273; 3 Yeates 378; Condy's Marshall, 599 b.; 1 Binn. 47; 7 Eng. C. L. 384; 4 Ibid. 272. It was also contended, that inasmuch as the protest (one of the transmitted documents) contained a formal abandonment, in terms of cession, and claimed for a total loss, it became, by the transmission of it, the abandonment of the assured. It was the act of an agent, adopted, as soon as it was known, by the principal; and was, therefore, a valid and formal cession of the plaintiff's property.

The sale by the master being justified by the circumstances of necessity
*615] under which it was made, divested the defendants *in error of their legal title to the vessel, and therefore, left nothing to abandon. *Storer* v. *Gray*, 2 Mass. 565; *Gordon* v. *Mass. Fire and Marine Insurance Company*, 2 Pick. 249. It was further insisted, that in such a case an abandonment would be an idle ceremony. The object of an abandonment is, to subrogate the insurer to all the rights and property of the assured; but if these rights and property were divested by a legal and justifiable sale, an abandonment was useless as well as inoperative.

THOMPSON, Justice, delivered the opinion of the court.—This case is brought here on a writ of error to the circuit court of the United States for the Maryland district. The action is on a policy of insurance, dated the 20th March 1824, upon the schooner Frances, Seaward, master, valued at $2500, lost or not lost, on a voyage from Curaçoa, or a port of departure in the West Indies, or on the main, to a port in the United States. The schooner sailed from Norfolk, on the outward voyage, in January 1824, and arrived and remained at Curraçoa six or seven days, and proceeded thence to Carthagena, where she arrived on the 15th of February following; and having taken in a return-cargo, proceeded on her return-voyage to Norfolk; and after being at sea about twenty hours, she encountered a very heavy gale of wind, and received such injury that it was deemed necessary to return to Carthagena. The master reported the vessel to the American consul, who ordered a survey to be held upon her; and she was afterwards sold by the consul to Thomas Evans for $140, who purchased the schooner in his own name; but it was understood that Captain Seaward was to be concerned with him; and he furnished the money to buy her; and Seaward afterwards sold her to Palmer, for upwards of $200, who repaired her and returned with her to the United States.

Upon the trial, several bills of exception were taken on the part of the defendants in the court below, and who are the plaintiffs here; upon which bills of exception, are presented the questions brought into this court for review. The first question relates to the admissibility, as evidence, of the *deposition of Thomas Evans, taken, *ex parte*, before the mayor of Norfolk. In the caption of the deposition, the witness is stated to [*616 be a resident of the borough of Norfork. And the mayor, in his certificate, states, that the reason for taking his deposition is, that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, "in the said borough of Norfolk." It was admitted, that the borough of Norfolk is more than one hundred miles from the place of trial; but the objection was, that no *subpœna* for this witness had been issued, nor any evidence, out of the deposition, produced at the trial, to show his residence, or inability personally to attend the trial. These were the particular objections taken at the trial; but on the argument here, a broader ground has been assumed: that no *ex parte* deposition, taken out of the district where the trial is had, is admissible; but that the testimony should be taken on a commission issued for that purpose. We think neither of these exceptions sufficient to exclude the deposition. In support of the latter objection, the case of *Evans* v. *Hettick*, 3 Wash. C. C. 417, has been relied on, and which would seem to sustain the objection. Mr. Justice WASHINGTON does there say, that the act of congress must be so construed as to confine its operations to depositions taken within the district, when the witness lives more than one hundred miles from the place of trial; but when a witness lives out of the district, and more than one hundred miles from the place of trial, his deposition, if taken, must be under a commission.

We think, however, that this is not the true construction of the act of congress. (1 U. S. Stat. 89.)[1] It declares, that when the testimony of any

[1] See Allen *v.* Blunt, 2 W. & M. 136, where Judge WOODBURY says, the opinion of Judge WASHINGTON is founded on the soundest reasons, though the decision of the supreme court was the other way.

person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, &c., the deposition of such person may be taken *de bene esse*, &c. The language here used is general, and is not certainly, in terms, confined to depositions taken within the district where the court is held. And if the provision was intended for the convenience of parties, it applies equally to depositions of witnesses living without, as to those living within the district, at a greater distance that one hundred miles from the place of trial; and all the *dangers supposed *617] to arise from the taking of *ex parte* evidence, apply with equal force to the one case as to the other. It is said, however, that the act declares the deposition may be taken *de bene esse*, and if allowed in cases where the witness lives out of the district, it necessarily becomes absolute, as the law stood in the year 1789; because a *subpœna* could not be issued in a district other than where the court was sitting. But no such consequence is perceived by the court to follow. The permission to take the deposition of a witness, on account of his distant residence, is connected with a number of other cases where the deposition may be taken: as when the witness is bound on a voyage to sea; or about to go out of the United States; or out of such district; and to a greater distance from the place of trial than as aforesaid, before the time of trial; or is ancient or very infirm; the deposition may be taken *de bene esse*. In all these cases, except where the witness lives at a greater distance than one hundred miles, it will be incumbent on the party for whom the deposition is taken, to show at the trial, that the disability of the witness to attend personally continues; the disability being supposed temporary, and the only impediment to a compulsory attendance. The act declares, expressly, that unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered permanently beyond a compulsory attendance. The deposition is such case may not always be absolute for the party against whom it is to be used may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this would rest upon the party opposing the admission of the deposition in evidence. It is, therefore, a deposition taken *de bene esse*.

It was sufficiently shown, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. This was a fact proper for the inquiry by the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of *Bell* v. **Morrison*, 1 Pet. 356, it is decided, that the certificate of the *618] magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury. It was not necessary to issue a *subpœna*. It would have been a useless act. The witness could not have been compelled to attend personally. By the act of March 2d, 1793 (U. S. Stat. 335), *subpœnas* for witnesses may run into districts other than where the court is sitting, provided the witness does not live at a greater distance than one hundred miles from the place of holding the court.

The other exceptions arise upon the instructions given by the court, upon the prayers of the parties, respectively. After the testimony had been closed, each party submitted to the court several prayers, upon which the instruction of the court was requested, and the record then states as follows: "Upon which prayers of the plaintiffs and defendants, respectively, the court gave the opinions, and instructions and directions, to the jury, following:

"1. That if the jury find from the evidence, that the damage done to the schooner Frances, by any perils of the sea, on the voyage insured, could not be repaired, without an expenditure of money to an amount exceeding half her value at the port of Carthagena, after such repairs, then such damage constitutes a total loss, and the plaintiffs are entitled to recover.

"2. That if the jury find from the evidence, that Captain Seaward was a man of competent skill in his profession, and that before he sold the schooner Frances to Palmer, in the manner stated in the testimony, he used due and proper diligence to ascertain whether a sale was necessary, and for the interest of the concerned; and if upon the information so obtained, and the circumstances known to him at the time, after due and diligent inquiry, it was absolutely necessary, and for the interest of the concerned, that the vessel should be sold; and that a prudent and discreet owner, placed in like circumstances, would have come to the same conclusion, and sold the vessel in like manner; and if from all the circumstances of the case, the jury should be of the opinion, that the sale was justifiable; that then the plaintiffs are entitled to recover.

"On the prayers of the defendants, the court's directions were as follows: 1. *That the plaintiffs are not entitled to recover for a total loss, unless the sale at Carthagena was in consequence of urgent and inevi- [*619 table necessity; that no necessity will justify a sale by the master, unless it be urgent and inevitable; in other words, justifiable. 2. That in weighing this necessity, the fact of the sale having been made, as disclosed by the testimony, is not to be conclusive, but the necessity is to be tested by a consideration of all the circumstances. 3. That if the jury shall find from the evidence, that the damage which had been sustained by the vessel, at the time she put back to Cathagena, was of trivial amount; that this damage could have been repaired at Cathagena, for a small sum, and the vessel thus enabled, after a short delay, to proceed on the voyage insured, and that the master had the funds to make the necessary repairs; and if they shall be of opinion, that it was not such a case of urgent necessity as to justify the sale; then the plaintiffs are not entitled to recover for a total loss, but can recover only for a partial loss, according to the circumstances of the case. 4. The court are of opinion, that the abandonment was sufficiently made in this case."

In considering the exceptions taken to the opinion and direction of the court, we think, from the manner in which the prayers were presented, and the instructions given, they may well be considered together, as one entire direction to the jury, and not as a separate instruction upon each prayer; and this is the manner in which they have been treated on the argument at the bar.

The question arising upon the first instruction relates to the place where the value of the vessel was to be ascertained, in order to determine whether

there was a total loss. The court instructed the jury, that if the vessel could not have been repaired, without an expenditure exceeding half her value at the port of Cathagena, after such repairs, it constituted a total loss. This direction we think entirely correct. It was not denied, but that the cost of repairs must be ascertained at that place. But it is said, the value of the vessel, after such repairs, should be determined by the value in the home port, or in the general market; as the injury might occur in a place *620] *where the vessel would not be salable, and the property might be sacrificed. It is true, this may occur; but it is a circumstance incident to the risk assumed by the underwriter; and any other rule would be in many cases impracticable. The purpose for which the value is to be ascertained is, to determine the right to abandon; and a delay in doing this might be considered as waiving the abandonment; and the value at the time the injury happens must necessarily be the rule by which that right is to be decided. No case has been referred to, or has fallen under the notice of the court, intimating the distinction here set up; and we do not think it warranted by the general principles of insurance law. The rule laid down in the books is general, that the value of the vessel at the time of the accident, is the true basis of calculation. 3 Kent's Com. 277. And if so, it necessarily follows, that it must be the value at the place where the accident occurs. The sale is not conclusive with respect to such value. The question is open for other evidence, if any suspicion of fraud or misconduct rests upon the transaction.

The other questions arising upon the instructions relate to the sale of the vessel, and the sufficiency of the abandonment. As a general proposition, there can be no doubt, that the injury to the vessel may be so great, and the necessity so urgent, as to justify a sale. There must be this implied authority in the master, from the nature of the case. He, from necessity, becomes the agent of both parties; and is bound, in good faith, to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity. This was the doctrine in the case of *Mills* v. *Fletcher*, 1 Doug. 231; and which has been repeatedly sanctioned by the later decisions, both in England and in this country. It is a power, however, that is to be exercised with great caution, and only in extreme cases. It is liable to great abuse; and must, therefore, in the language of some of the cases, be carefully watched. The difficulty in all these cases consists principally in the application of a rule to a given case, and not in determining what the rule is. It was not denied by the counsel for the plaintiffs in error, that in cases of extreme and urgent necessity, the master has the power to sell, if he acts in good faith, and the circumstances *621] *are such that a jury will find the necessity existed. All the circumstances must be submitted to the jury, and they must find both the necessity and good faith of the master, in order to justify the sale. Necessity and good faith must concur; and the necessity is not to be inferred from the fact of sale in good faith, but must be determined from other circumstances. 4 Eng. C. L. 275; 7 Ibid. 386; 1 Ibid. 375; 2 Pick. 261; 5 Esp. 67.

The complaint on the part of the plaintiffs in this case is, that the court placed the right to sell upon the good faith of the master, and the existence of the necessity, according to his opinion. And the second instruction on

the prayer of the plaintiffs below, if standing alone, would be open to this interpretation; and if so, would be erroneous. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale, to all concerned, would not justify it; unless the circumstances under which the vessel was placed rendered the sale necessary, in the opinion of the jury.

But whatever ambiguity may appear in this instruction, standing by itself, it is entirely removed, when taken in connection with those given upon the defendant's prayers. The jury were explicitly told, that the plaintiffs were not entitled to recover for a total loss, unless the sale was in consequence of urgent and inevitable necessity, and that the fact of sale was not conclusive; but that the necessity must be tested by a consideration of all the facts, as they existed at the time; that if the damage sustained was of trivial amount, and could have been repaired at Carthagena for a small sum, and with little delay; and that if, in their opinion, it was not such a case of urgent necessity as to justify the sale; then the plaintiff was not entitled to recover for a total loss. This instruction is according to the defendant's prayer; except that the court was requested to instruct the jury, that the fact of sale was to have no influence, but that the necessity was to be tested solely by the facts, as they existed anterior to the sale. We think, the instruction, although not in the terms of the prayer, yet, when connected with the other instructions, is substantially according to the prayer. For the jury were told, in terms, that the plaintiffs were not entitled to recover for a total loss, unless the sale was the consequence of urgent and inevitable necessity. *Whether the evidence was sufficient to warrant the finding of the jury, is a question that cannot arise here, upon this bill of exceptions. [*622

The only remaining inquiry is, whether there was a sufficient abandonment proved? There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed, that no particular form is necessary, nor is it indispensable that it should be in writing. But in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title, and interest in the subject insured. For the abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, so far as it was covered by the policy. 3 Marsh. Ins. 599; Phil. Ins. 447, and cases there cited.

The evidence in this case to support the abandonment consists of the correspondence between the parties, and the documents accompanying the same. On the 1st of May 1824, the plaintiffs wrote to the defendants as follows: "We are sorry to have to forward to you protest and surveys of the schooner Frances, insured with her cargo in your office. Captain Seaward arrived yesterday in the schooner Enterprise. We had before seen, by an arrival at Charleston, from Carthagena, that the Frances had been condemned, but were ignorant, until now, of the cause. By the next steamboat, we shall forward you a statement of the loss, with the necessary vouchers." The protest inclosed to the underwriters contained the following clause: "I, the said consul, at the request of the said master, Joseph Sea-

ward, do hereby intimate, declare and make known to the underwriters of the said schooner Frances, and to the underwriters upon her cargo, that the said master, for himself, and in behalf of the owners of the said schooner Frances, and her cargo, doth abandon, cede and leave to them, the said underwriters, and to each and every of them, all his the said master's, and theirs, the said owners', right, title, interest, profit, property, claim, demand and produce of and in the said schooner Frances, and her cargo, and to the
*623] tackle, apparel and furniture of the said schooner; and *that the aforesaid master doth claim, on behalf as aforesaid, reimbursement for the same as a total loss, &c." The receipt of this was acknowledged by letter of the 4th of May; and saying, that the further proofs of loss, on arrival, should receive immediate attention. On the 5th of May, the further proofs, and a statement of the loss, were forwarded to the underwriters: the receipt of which was acknowledged by letter of the 7th of May; in which the underwriters say, they have resolved to take time to consider about the adjustment of the loss.

This correspondence, independent of the protest, leaves no doubt as to the intention and understanding of the parties with respect to the abandonment. This would, however, be matter of inference only. But the protest is direct and explicit, both in form and in substance. It is said, however, that this was an unauthorized act. It is true, no authority is shown from the assured to the master to make the abandonment; and had it been communicated direct from the master to the underwriters, the objection would apply with full force. But this protest, containing the abandonment, was communicated to the underwriters, by the plaintiffs. It became thereby their act, adopted and ratified by them, and must have the same legal effect and operation, as if it had originated with the assured themselves, and constituted a valid abandonment.

This renders it unnecessary for the court to express any opinion upon the question made at the bar, whether any abandonment was necessary in this case. It may not, however, be amiss, to observe, that there is very respectable authority, and that, too, founded upon pretty substantial reasons, for saying, that no abandonment is necessary, where the property has been legally transferred by a necessary and justifiable sale. 2 Pick. 261, 265. The judgment of the circuit court is affirmed, with six per cent. damages, and costs.

Judgment affirmed.

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*624] *Charles Edmondston, Plaintiff in error, *v.* Drake & Mitchel, Defendants in error.

Guarantee.

A letter of credit was written by Edmondston, of Charleston, South Carolina, to a commercial house at Havana, in favor of J. & T. Robson, for $50,000, "which sum they may invest, through you, in the produce of your island;" on the arrival of Thomas Robson in Havana, the house to whom the letter of Edmondston was addressed, was unable to undertake the business, and introduced Thomas Robson to Drake & Mitchel, merchants of that place; exhibiting to them the letter of credit from Edmondston; Drake & Mitchel, on the faith of the letter of credit, and at the request of Thomas Robson, made large shipments of coffee to Charleston, for which they were, by agreement with Thomas Robson, to draw upon Goodhue & Co. of New York, at sixty days, where insurance was to be made; of this agreement, Edmondston was informed, and he confirmed it in writing. For a part of the cost of the coffee so shipped, Drake &

Edmondston v. Drake.

Mitchel drew bills on New York, which were paid; and afterwards in consequence of a change in the rate of exchange, they drew for the balance of the shipments, on London; this was approved of by J. & T. Robson, but was not communicated to Edmondston; to provide for the payment of the bills drawn on London by Drake & Mitchel, the agents of J. & T. Robson remitted bills on London, which were protested for non-payment; and Drake & Mitchel claimed from Edmondston, under the letter of credit, payment of their bills on London: *Held*, that Edmondston was not liable for the same.[1]

It would be an extraordinary departure from that exactness and precision which is an important principle in the law and usage of merchants, if a merchant should act on a letter of credit, such as that in this case, and hold the writer responsible, without giving notice to him that he had acted on it.[2]

ERROR to the Circuit Court of South Carolina. The leading facts in this case, from the record, were:

Messrs. John & Thomas Robson, of Columbia, in the state of South Carolina, being desirous of making a speculation in coffee, and Thomas Robson, one of the firm, being about to proceed immediately to Havana, in execution of this purpose, procured from Charles Edmondston, of Charleston, the plaintiff in error, a letter of credit, dated the 16th of April 1825, to Castillo & Black, of Havana, in the island of Cuba, in these words:

Charleston, 16th April 1825.

Messrs. CASTILLO & BLACK:

Gentlemen:—The present is intended as a letter of credit in favor of my regarded friends, *Messrs. J. & T. Robson, to the amount of forty or fifty thousand dollars, which sum they may wish to invest, [*625 through you, in the purchase of your produce. Whatever engagements these gentlemen may enter into, will be punctually attended to. With my best wishes for the success of this undertaking, I am, &c.

C. EDMONDSTON.

With this letter, Thomas Robson sailed for Havana, the day after its date; upon his arrival, he presented his letter of credit to Castillo & Black, who were then engaged in the execution of a similar contract, and could not act on this. Mr. Black, one of the partners, introduced Robson to Messrs. Drake & Mitchel, the defendants in error, merchants residing in Havana; at the same, showing, but not delivering, to them, Edmondston's letter of credit. After this interview, an agreement was entered into between Drake & Mitchel and the Robsons, the particulars of which are exhibited in a letter dated the 28th April, from Thomas Robson to Drake & Mitchel.

Havana, 28th April 1825.

Messrs. DRAKE & MITCHEL:

Gentlemen:—I intend sailing to-morrow morning, in the schooner Felix, bound for Charleston, South Carolina, wind and weather permitting. I will thank you to execute the following order, at your earliest convenience; provided you feel yourselves warranted in so doing, from the letter of credit I produced; viz: two to three thousand bags of prime green Havana coffee, provided the same can be had at prices from eleven to thirteen dollars, and for extra prime, large lots, thirteen and a half. Bills on New York at sixty days, at two and a half to five per cent. premium; and to be governed in

[1] S. P. Birckhead *v.* Brown, 5 Hill 634; S. C. 2 Den. 375.

[2] Douglass *v.* Reynolds, 7 Pet. 113. See Lee *v.* Dick, 10 Id. 482; Adams *v.* Jones, 12 Id. 207.

said purchase by the rise or fall in foreign markets, exercising your better judgment thereon. Said coffee to be forwarded, by first good opportunity, to Charleston, South Carolina, on board of a good, sound and substantial vessel, addressed to the care of Boyce & Henry, Kunhart's wharf, Charleston. Bills of lading to be immediately forwarded to New York, and insurance ordered thereon to the full amount. Invoice of coffee, with duplicate bills of lading, to be made out in the name of J. & T. Robson, and forwarded, with advice of drafts, to the care of Boyce & Henry, Charleston.

*626] *Wishing you success in said purchase, and claiming your particular attention thereto; I am, gentlemen, your obedient servant,

THOMAS ROBSON.

Please inform me the name of the house to whom the bills of lading, &c., will be addressed.

Notice of this arrangement was communicated by Drake & Mitchel, to Charles Edmondston, in the following letter:

Havana, 29th April 1825.

CHARLES EDMONDSTON, Esq.

Dear Sir:—In virtue of your letter of credit to Messrs. Castillo & Black, in favor of Messrs. J. & T. Robson, and at their request, we have consented to purchase two thousand bags of coffee, to be consigned to Messrs. Boyce & Henry, of your city, the insurance to be effected by Messrs. Goodhue & Co., of New York, upon whom we are to draw for the amount, by reason of the facility of negotiations, Mr. Robson or his friends remitting the money to these gentlemen to meet our drafts. Mr. Robson, who carries this, will no doubt explain to you in person this negotiation, and we trust that there will be no demur in forwarding the necessary funds, with the cost of insurance. We are, &c.,

DRAKE & MITCHEL.

On the 25th of May, Charles Edmondston acknowledged the receipt of this letter in these words:

Charleston, 25th May 1825.

Messrs. DRAKE & MITCHEL:

Gentlemen:—In acknowledging the receipt of yours of the 29th of April, I cannot help expressing my grateful feelings at the manner you treated my letter of credit in Robson's favor. I am, &c.,

CHARLES EDMONDSTON.

The shipment of coffee for the Robsons was completed by the 17th of May; and in conformity with the agreement with the Robsons, Drake & Mitchel, on the 21st of May, drew bills on New York for nearly $15,000, which were all regularly paid. On that same day on which they drew their last bill on New York, they determined to alter the mode of reimbursement,

*627] as agreed on by the Robsons and themselves; and *instead of drawing on New York, to draw on London for 4000*l.* sterling. Their determination to do this, and their probable motive for doing it, appear by the following letter from them to Boyce & Henry, of Charleston:

21st May 1825.

Gentlemen:—We crave reference to our last respects *per* brig Catharine, which vessel we hope is safely arrived at this date. We have this day

received accounts from your city, and from New York, announcing to us the decline in the price of coffee; it is, therefore, well that we had not gone to the full extent of the instructions of Mr. Robson. We also note the decline of your exchange on London, and as ours is still maintained at fourteen per cent, it has occurred to us, to alter our plan of reimbursement, for the benefit of the interested in these coffee purchases, by drawing on London for the balance of our shipments—for some houses here are drawing on the United States, at par to one per cent., a rate which we cannot submit to—we are accordingly about to value on our friends Messrs. Campbell, Bowden & Co., to be covered by you, or Messrs. Goodhue & Co., as you may direct, to the amount of 4000*l.* sterling, which at $444, and fourteen per cent., amounts to $20,246.40. And we have already drawn upon Messrs. Goodhue & Co. $12,699.12, with premium three, and two and a half per cent., $337.03; and to complete this account, we have again drawn on the same, $2070.43, at two and a half per cent., $2123.12; making together $35,406.07; from which, deducting our commission for drawing and negotiating, two and a half per cent., the remainder $34,522 will then be equal to the amount of our three invoices *per* Eagle, Hannah and Catharine, as *per* inclosed statement. We trust that these dispositions will meet your approbation, and we pray you to make the necessary remittances to Messrs. Campbell, Bowden & Co., including their commission and any other incidental charges. Coffee is still maintained here at $13 and upwards; but second *qualities are plenty and cheaper in proportion; both this article and sugar [*628 are likely to decline a little, &c.

They executed this purpose, on the day of the date of this letter; the Robsons being credited, on that day, with the amount of their bills on Campbell, Bowden & Co., for 4000*l.* They drew, on the same day, according to their agreement, on New York, at two and a half per cent., which bill was duly honored. The Robsons, on the 4th June 1825, assented to this alteration in the mode of reimbursement, with relation to the draft for 4000*l.*; and their agents, Boyce & Henry, by their direction, and according to the request of Drake & Mitchel, remitted to Campbell, Bowden & Co., a bill of exchange of J. B. Clough, on his firm of Crowder, Clough & Co., of Liverpool, at sixty days sight, on account of Drake & Mitchel; which bills were protested for non-payment. During all these operations, Mr. Edmondston was wholly uninformed of the change which had been made in the mode of reimbursement, and which had been stated to him by Drake & Mitchel, in their letter of the 29th April.

On the 16th of September, Drake & Mitchel inclosed to Edmondston for collection, an order on Thomas Robson, in the following words.

Havana, 16 September 1825.

Thomas Robson, Esq., Charleston:—Please pay Charles Edmondston, Esq., or order, the sum of twenty six dollars, for balance of your account with, dear sir, your obedient servants, Drake & Mitchel.

After calling upon Edmondston, as their attorney in fact, to collect the amount of the protested bills on Liverpool, from the Robsons, or from Boyce & Henry, and he not succeeding, Drake & Mitchel instituted this suit in the circuit court.

On the trial, the counsel for the defendant requested the court to charge the jury, as stated in the bill of exceptions; which being refused, and a verdict and judgment being rendered for the plaintiff, this writ of error was prosecuted. The exceptions are stated in the opinion of the court.

*629] The case was argued by *Drayton* and *Wirt*, for the *plaintiff in error; and by *Hunt* and *Webster*, for the defendant.

As to the necessity of notice to Edmondston, of what was done under the letter of credit, the counsel for the plaintiff in error cited, 1 Mason 340; 7 Cranch 91–2; 1 Atk. 91; 2 Bro. C. C. 579; 2 Ves. jr. 540; 3 Meriv. 272; 2 Johns. Ch. 544. As to the construction and effect of the letter of credit: 2 Saund. 403, 411; 5 Bos & Pul. 175; 2 Maule & Selw. 363; 3 Ibid. 502; 5 Ibid. 166; 15 East 272; 8 Johns. 19; 3 Cranch 492; 4 Johns. 476; 10 Ibid. 188; 7 T. R. 254; 16 Johns. 100; 4 Taunt. 623; 3 Camp. 63; 4 Cranch 224; 1 Stark. 153; 5 Barn. & Cres. 269; 2 Caines Cas. 1; 1 Paine 377.

For the defendants in error, as to the liability of a gurantor, the counsel cited, Pothier on Obligations 11, ch. 5, § 1; Ibid. 371; Code Napoleon, liv. 3, tit. 14, art. 2011; Ersk. Institutes 326; *Merle* v. *Wells*, 2 Camp. 413; *Mason* v. *Pritchard*, Ibid. 436; 12 East 227; *Lanusse* v. *Barker*, 3 Wheat. 101; *Russell* v. *Clarke's Executors*, 7 Cranch 69; *Meade* v. *McDowell*, 5 Binn. 203; *Barclay* v. *Lucas*, 1 T. R. 291; 12 East 227; 1 Maule & Selw. 21; 12 Wheat. 516.

Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted by Drake & Mitchel, merchants of Havana, in Cuba, against Charles Edmondston, merchant, of Charleston, in the court of the United States for the sixth circuit and district of South Carolina; in order to recover the balance of an account due to Drake & Mitchel from J. & T. Robson, who were merchants and partners of Columbia, in South Carolina.

Thomas Robson, being about to proceed to the Havana, for the purpose of making a speculation in coffee, obtained from Edmonston the following letter of credit.

Charleston, April 16th, 1825.

Messrs. Castillo & Black:

*630] Gentlemen:—The present is *intended as a letter of credit in favor of my regarded friends, Messrs. J. & T. Robson, to the amount of forty or fifty thousand dollars, which sum they may wish to invest, through you, in the produce of your island. Whatever engagements these gentlemen may enter into will be punctually attended to. With my best wishes for the success of this undertaking, I am, gentlemen, yours respectfully, Charles Edmondston.

On his arrival in Havana, Mr. Robson presented his letter of credit to Messrs. Castillo & Black; who being unable to undertake the business, introduced him to Drake & Mitchel, and showed them the letter of Edmondston, but did not deliver it to them. At this interview, an agreement was entered into between Robson and Drake & Mitchel, the particulars of which are stated in the following letter:

Havana, April 28th, 1825.

Messrs. Drake & Mitchel :

Gentlemen :—I intend sailing to-morrow morning in the schooner Felix bound for Charleston, South Carolina, wind and weather permitting. I will thank you to execute the following order, at your earliest convenience, provided you feel yourselves warranted in so doing from the letter of credit I produced, viz., two to three thousand bags of prime green Havana coffee, provided the same can be had at prices from eleven to thirteen dollars, and for extra prime large lots, thirteen and a half. Bills on New York at sixty days at two and a half to five per cent. premium, and to be governed in said purchase by the rise and fall in foreign markets, exercising your better judgment thereon. Said coffee to be forwarded, by first good opportunity, to Charleston, South Carolina, on board of a good, sound and substantial vessel, addressed to the care of Boyce & Henry, Kunhart's wharf, Charleston. Bills of lading to be immediately forwarded to New York, and insurance ordered thereon to the full amount. Invoice of coffee, with duplicate bills of lading, to be made out in the name of J. & T. Robson, and forwarded, with advice of drafts, to the care of Boyce & Henry, Charleston. Wishing your success in said purchase ; and claiming your particular attention thereto ; I am, gentlemen, your obedient servant,

Tho. Robson.

Please inform me the name of the house to whom the bills of lading, &c., will be addressed.

*On the succeeding day, notice of this arrangement was communicated to Charles Edmondston in the following letter. [*631

Havana, April 29th, 1825.

Charles Edmondston, Esquire :

Dear Sir :—In virtue of your letter of credit to Messrs. Castillo & Black, in favor of Messrs. J. & T. Robson, and at their request, we have consented to purchase two thousand bags of coffee to be consigned to Messrs. Boyce & Henry, of your city ; the insurance to be effected by Messrs. Goodhue & Co., of New York, upon whom we are to draw for the amount, by reason of the facility of negotiations ; Mr. Robson, or his friends, remitting the money to these gentlemen to meet our drafts. Mr. Robson, who carries this, will no doubt explain to you in person this negotiation, and we trust that there will be no demur in forwarding the necessary funds, with the cost of insurance. We are, &c., Drake & Mitchel.

On the 25th of May, a short letter on business from Charles Edmonston to Drake & Mitchel concluded in these terms :

" In acknowledging the receipt of yours of the 29th of April, I cannot help expressing my grateful feelings at the manner you treated my letter of credit in Robson's favor ; I am, &c., Charles Edmondston."

The shipment of coffee for J. & T. Robson was completed by the 17th of May ; and on the 21st of that month, Drake & Mitchel had drawn bills on New York for nearly $15,000, which were regularly paid. On that day, they determined, of their own accord, to change the mode of reimbursement ; and on the 25th, drew bills on London for 4000*l.* sterling. This was commu-

nicated to Messrs. Boyce & Henry, the agents of J. & T. Robson, at Charleston, in the following letter:

21st May 1825.

Gentlemen:—We crave reference to our last respects *per* brig Catharine, which vessel we hope is safely arrived at this date. We have this day received accounts from your city and from New York, announcing to us the decline in the price of coffee; it is, therefore, well that we had not gone to the full extent of the instructions of Mr. Robson. We also *note the *632] decline of your exchange on London, and as ours is still maintained at fourteen per cent., it has occurred to us, to alter our plan of reimbursements, for the benefit of the interested in these coffee purchases, by drawing on London for the balance of our shipments—for some houses here are drawing on the United States at par, to one per cent.; a rate which we cannot submit to; we are accordingly about to value on our friends Messrs. Campbell, Bowden & Co., to be covered by you, or Messrs. Goodhue & Co., as you may direct, to the amount of 4000*l.* sterling, which at $444, at fourteen per cent., amounts to $20,246.40. And we have already drawn upon Messrs. Goodhue & Co., $12,699.12, with premium, three, and two and a half per cent.; $337.43, and to complete this account we have again drawn on the same $2071.34, at two and a half per cent., $2123.12; making together $35,406.07, from which deducting our commission for drawing and negotiating, two and a half per cent., the remainder, $34,522, will then be equal to the amount of our three invoices *per* Eagle, Hannah and Catharine, as per inclosed statement. We trust that these dispositions will meet your approbation, and we pray you to make the necessary remittances to Messrs. Campbell, Bowden & Co., including their commission and any other incidental charges.

On the same day, Drake & Mitchel drew their last bill on New York, which was duly honored. J. & T. Robson, afterwards, on the 4th of June, assented to this alteration in the mode of reimbursement; and directed their agents, Boyce & Henry, to conform to it. They remitted a bill drawn by J. B. Clough on his firm of Crowder, Clough & Co., of Liverpool, at sixty days sight, for 4000*l.* sterling, on account of Drake & Mitchel. No notice of this transaction appears to have been given to Edmondston. On the 16th September, Drake & Mitchel *inclosed to him for collection, *633] a small order on T. Robson, in the following words:

Havana, 16th September 1825.

Thomas Robson, Esq., Charleston.—Please pay Charles Edmondson, Esq., or order, the sum of twenty-six dollars, for balance of your account with, dear sir, your obedient servants,

Drake & Mitchel.

The bill on Crowder, Clough & Co. having been returned under dishonor, Drake & Mitchel, in a letter of the 15th of October, employed Mr. Edmondston as their agent, to obtain its amount from the Robsons, or from Boyce & Henry. In a letter of the 5th of November, Edmondston informed Drake & Mitchel of the ill success of his endeavours to procure payment. The Robsons, who were insolvent, considered themselves as discharged from the debt, by remitting the bill on London, in conformity with the directions of Drake & Mitchel; and Boyce & Henry, whose names were not on the bill, said they had acted only as agents of the Robsons, and of Drake & Mitchel.

After some correspondence between Edmondston, and Drake & Mitchel, on the liability of the former for the protested bill on Crowder, Clough & Co., in the course of which Edmondston transmitted to them a copy of his letter to Castillo & Black; this suit was instituted on the original letter of credit of the 16th of April 1825, and on the letter addressed by Edmondston to Drake & Mitchel, on the 25th of May following. At the trial of the cause, the following bills of exceptions were taken:

1. The counsel for the defendant insisted, that the letter of the defendant, of the 16th of April 1825, addressed to Castillo & Black, was not a general letter of credit, but an engagement only to guaranty the contracts of J. & T. Robson with Castillo & Black, and not with the plaintiffs; and that the said guarantee was not assignable; and that the defendant, on the said letter, was not accountable to the plaintiffs. But the court instructed the jury, that the said letter of the 16th of April 1825, was a general letter of credit, in favor of J. & T. Robson; that it authorized the said Castillo & Black, *not only to give, but to procure a credit for the said Robson; and if the jury believed, that under the said letter, the said Castillo [*634
& Black had procured such credit for them with Drake & Mitchel, that Drake & Mitchel, the plaintiffs, had, under this letter, the same right to call on the defendant to make good the contracts of J. & T. Robson with them, the plaintiffs, as Castillo & Black would have had, if they, Castillo & Black, had, on the faith of this letter, contracted with the said J. & T. Robson.

2. And the counsel for the defendant contended, and so moved the court to instruct the jury, that in order to make the defendant liable to the plaintiffs, under the said contract, they were bound, by the law-merchant, to give him due notice thereof; and as the defendant neither received notice of it, nor ever assented to the subsequent change as to the place or form of payment, he was fully discharged therefrom; on which the court, being divided in opinion, refused to give the instruction. It was, therefore, not given to the jury. And, on the contrary, his honor Judge Lee, one of the presiding judges, charged and instructed the jury, that they, the plaintiffs, were not bound to give the defendant notice of the original contract, and though they gave him notice of it, they were not bound to give him notice of the alteration made in it.

3. And the counsel for the defendant argued to the court, and requested the court so to instruct the jury, that if the defendant was bound at all to the plaintiffs, he was bound for the performance of the agreement made between the Robsons and the plaintiffs, as set forth in the letter of Thomas Robson to them, dated the 28th of April, and the plaintiffs' letter of the 29th of April 1825, to the defendant; and that the arrangement afterwards made between the plaintiffs and Robson, for payment in London, instead of New York, was an alteration of the contract; and the defendant not having consented thereto, was not bound for the performance of the agreement thus altered, but was discharged from his liability, if, in fact, he was at all liable: but, the court, being divided, refused to give such instruction.

4. And the counsel for the defendant further argued to the court, and requested the court so to charge and instruct the jury, that the guarantee of the defendant was not a *continuing guarantee, and could not be [*635
extended to any other engagements than those mentioned in the letter of the plaintiffs to him, of the 29th of April aforesaid, and set forth in

that of Thomas Robson to them, of the 28th of April aforesaid ; and that the change in the place of payment, from New York to London, made without due notice thereof given to the defendant, discharged him from the said guarantee : but the court, being divided in opinion, refused to give such instruction.

5. And the counsel for the defendant further argued to the court, and requested the court so to charge and instruct the jury, that the plaintiffs, in their letter of the 29th of April, having given notice to the defendant of the contract made by them with the Robsons, in virtue of his the defendant's letter of the 16th of April, were bound to give him notice of the change of the contract ; and as they did not give him any such notice, he is hereby discharged. But the court, being divided in opinion, refused to give the instruction : it was, therefore, not given to the jury ; and on the contrary, his honor Judge Lee, one of the presiding judges, charged and instructed the jury, that the plaintiffs were not bound to give the defendant notice of the original contract ; and though they gave him notice of it, they were not bound to give him notice of any alteration made in it.

The jury found a verdict for the plaintiffs ; the judgment on which is brought before this court by writ of error.

In the view which the court takes of the case, it is necessary to decide on the first instruction given by the circuit court. If the letter of the 16th of April 1825, was limited to Castillo & Black, that of the 25th of May, unquestionably, sanctioned the advances made by Drake & Mitchel on its authority ; and made Edmondston responsible for Robson's contract with them. It is, on his part, a collateral undertaking, which binds him as surety for the Robsons, that they will comply with their contract. No doubt exists respecting his original liability. The inquiry is, has the subsequent conduct of the parties released him from it ?

It is necessary to ascertain exactly what the contract really was. The evidence of it is to be found in the letter of T. Robson to Drake & Mitchel, of the 28th of April 1825, and in the letter written by Drake & Mitchel to Edmondston, on *the succeeding day. The first states the order to be executed by Drake & Mitchel. It is for "two or three thousand bags of prime green Havana coffee, provided the same can be had at prices from eleven to thirteen dollars, and for extra prime large lots, thirteen and a half. Bills on New York, at sixty days, at two and a half to five per cent. premium, and to be governed in said purchase by the rise or fall in foreign markets, exercising your better judgment thereon." The last states it to Edmondston in the following words : "We have consented to purchase two thousand bags of coffee, to be consigned to Messrs. Boyce & Henry, of your city, the insurance to be effected by Messrs. Goodhue & Co., of New York, upon whom we are to draw for the amount, by reason of the facility of negotiation ; Mr. Robson or his friends remitting the money to these gentlemen to meet our drafts."

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The contract consists of the quantity of coffee to be purchased, the house to which it was to be shipped, and the mode of payment. On the quantity to be purchased, Drake & Mitchel were to exercise their judgment. It was to be from two to three thousand bags, as the rise or fall of foreign markets might render advisable. The letter of Drake & Mitchel, giving notice of the contract to Edmondston, shows their determination to limit their pur-

chase to two thousand bags. On the other parts of the contract, if we are to judge from its language, they could exercise no discretion. The coffee was to be shipped to Boyce & Henry, of Charleston, and the mode of payment was settled definitely. It was to be by remittances to Messrs. Goodhue & Co., of New York, on whom Drake & Mitchel were to draw at a rate of exchange settled between the parties. This contract was obligatory in all its parts, and when communicated to Mr. Edmondston, gave him precise information of the extent of his liability. His letter of the 25th of May was written with a view to the particular contract, which had been thus communicated.

In estimating the influence of this notice on the cause, it has been supposed of some consequence to establish its necessity. The district judge, sitting in the circuit court, informed the jury that it was not necessary. The attempt has not been made to sustain this instruction in its terms, but to explain it so as to limit it to the necessity of giving Edmondston *notice of the mode in which Drake & Mitchel were to be reimbursed for the coffee. This was probably the intention of the judge. It [*637 would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on the letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it. The authorities quoted at the bar, on this point, unquestionably establish this principle.

If it were incumbent on Drake & Mitchel to give notice to Mr. Edmondston that they had acted on his letter of credit, did the nature of the transaction require a communication of that part of the contract which stipulated for the mode of payment? It cannot be alleged, that this part of it was of no importance, or that it did not concern Mr. Edmondston. It is an essential article in all contracts, and was of peculiar interest to Edmondston in this. The parties thought the particular mode of reimbursement of sufficient importance to stipulate for it, expressly, in their agreement. We cannot determine positively whether it was, or was not, a matter of indifference to them. They selected this; and when selected, it became a part of the contract. Each had consequently a right to insist upon it. We have said, that this part of the agreement was of peculiar interest to Edmondston. For any failure in it, he was responsible. Being informed of the place on which bills were to be drawn by Drake & Mitchel, and to which remittances to meet them were to be made, he was enabled to bestow that general attention on the course of the business, which he might think necessary for his own safety. He might observe, generally, the shipments made on account of the Robsons to New York, and be led to farther inquiry by any apparent remissness. Drake & Mitchel seem to have given him the information with this view. After saying they are to draw on Messrs. Goodhue & Co., of New York, they add, "Mr. Robson, or his friends, remitting the money to these gentlemen to meet our drafts." It was essential to Robson, or to the friends by whom the remittances might be made, *that the place and persons to whom they might be made should be fixed. We cannot consider this part of the agreement as immaterial. [*638 It was the part in which Edmondston was most deeply interested.

Being part of the contract, it is not pretended, that Drake & Mitchel

could alter it, without the consent of the Robsons. They could no more vary a contract made, than they could make one originally. The one, as much as the other, requires the consent of both parties. Drake & Mitchel, and the Robsons, being capable of binding themselves by an original contract, were equally capable of varying that contract at will. But though capable of binding themselves, they were not capable of binding Edmondston. To this his own consent was indispensable. Any new stipulation introduced into it, was so far a new contract, which could only affect themselves. Edmondston was a stranger to it, unless his letter to Castillo & Black of the 16th of April, 1825, in connection with his letter to Drake & Mitchel of the 25th of May, in the same year, made him a party to it.

The letter of the 16th of April, in its object and its language, is limited to a contract to be made by Robson, during his stay in the Havana. It was written for a special purpose, and its obligation could be extended no further when that purpose was accomplished. It was intended to pledge the credit of the writer to the amount of forty or fifty thousand dollars, to be invested by Robson in the purchase of the produce of the Island. The letter was directed to an operation for which Robson went to the Havana, and which was to be completed while there. It was addressed to merchants of that place, and relates to an operation to be performed in that place. If, instead of proceeding to the Havana, and purchasing the produce of the island, he had proceeded to Great Britain, and purchased a cargo of woollens; it would scarcely be pretended, that the vendor trusted to this letter. Still less could it be pretended, if, after actually making the contract in Havana, he had proceeded to Europe, and made purchases in that part of the world. The cases cited in argument show that, in law, and in the under-
*639] standing of *commercial men, the credit given by such a letter is confined to the particular operation and to the particular time. It extended to no contract made by Robson after returning to the United States. Still less can the letter of the 25th of May avail the defendants in error. That this is obviously confined to the contract stated in the letter of Drake & Mitchel, to which it is an answer.

The credit, then, given in the letter of Edmondston was exhausted by the contract made by Robson, while at Havana, and the extent of his responsibility under those letters is confined to that contract. Drake & Mitchel, and the Robsons, could no more affect him, by any change in its terms, than by an entirely new stipulation, or an entirely new contract.

It has been said, that this change was made for the advantage of the Robsons, and with their consent. It is immaterial, whether it was made for the benefit of the Robsons, or of Drake & Mitchel, or of both. They had no right to vary a contract for their own benefit, at the hazard of Edmondston. It has been urged, that the risk of remittances to New York was as great as the risk of bills on England. Were this true, it could not affect the case. Edmondston had a right to exercise his own judgment on the risk; and the persons who varied this contract had no right to judge for him. But is it true, that the risk was not increased? While payments were to be made in New York, the agents in the transaction were in some measure within the view of Edmondston. He could observe their situation, and act for his own safety. This power is essentially diminished, when a bill, without his knowledge, on a house of whose stability he may be igno-

rant, is remitted, at sixty days sight, to England. It is, on every reasonable calculation, at all events, a prolongation of the risk.

The contract at the Havana may be considered as one to be performed immediately. It does not appear, that any time was given for the shipment of the coffee; and the whole transaction has the appearance that the bills were to be drawn as soon as the coffee was shipped. The last bill on New York was drawn on the 21st of May, and notice of the bill on *London was given on the 26th of that month. It may be considered, [*640 then, as a transaction to be completed as soon as the nature of the business would permit. It might be reasonably supposed, that it would be completed before the condition of the parties would be essentially changed. Had the bill which was drawn on London been drawn at the same time on New York, there is reason to believe that it would have been paid. The change in the mode of payment, by substituting a bill on London, at long sight, necessarily prolonged the time at which payment should be made, and prolonged the risk of Edmondston. This they had no right to prolong, without his consent.

It is admitted, that Drake & Mitchel could not change the mode of payment, without the consent of the Robsons. Then, it is a part of the contract; of that contract, for which alone Edmondston became responsible.

It has been said, that the engagement respecting the place of payment was contingent, dependent on the facility of negotiations, and subject to any future arrangement to be made between the parties. We do not so understand the agreement. Its terms are positive, dependent upon no contingency. "The facility of negotiations" was the motive for the stipulation. No hint of a reserved power to change it, is given, either in the letter of T. Robson to Drake & Mitchel, or in theirs to Edmondston. It was not a contingent but an absolute arrangement, as absolute as any other part of the contract.

We think, the court erred in not giving the second, third, fourth and fifth instructions to the jury, and the judgment ought to be reversed, and the cause remanded with directions to award a *venire facias de novo.*

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of South Carolina, 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 award a *venire facias de novo.*

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*United States *v.* Robertson. [*641

Construction of bond.

Construction of a bond executed by the president and directors of the Bank of Somerset to the United States, for the performance of an agreement made by them with the United States, for the payment of a debt due to the United States, arising from deposits made in the bank, for account of the United States.

This case came before the court on a certificate of division from the judges of the Circuit Court for the district of Maryland. The facts, including those stated in the opinion of the court, were the following:

In the circuit court, at January term 1828, the United States instituted an action of debt, on a bond, executed on the 15th of July 1820, by Thomas Robertson, Levin Ballard, Arnold E. Jones, Mathias Deshiell, Charles Jones, Marcey Maddux, William Done, George W. Jackson and John H. Bell, of Somerset county, in the state of Maryland, in the penal sum of $100,000. The bond and the condition are stated in the opinion of the court.

The plaintiffs gave in evidence a statement of the condition of the Bank of Somerset, on the 11th of May 1820; by which it appeared, that the assets of the bank consisted of notes discounted, $106,995; real estate, $5000; debts due by the Bank of Columbia, and the Merchants' Bank of Alexandria, $1607; and that its debts were, capital unredeemed, $4250; notes in circulation, $15,000; deposits, including the United States, without interest, $115,426; making a deficit of $20,074. The plaintiffs also proved, that from the 15th of July 1820, to the 15th of July 1825, the president and directors of the Bank of Somerset received in good current money from the debtors of the bank, and from sales of their real estate, a large sum of money. That they received in payment of debts due to the bank, and as the proceeds of the real estate of their debtors, a large sum of money in
*642] the bank-notes of *the corporation, and in certificates of deposits of bank-notes of the same. A certificate of those receipts was exhibited and admitted in evidence; by which it appeared, that the receipts, in the period stated, were $11,000 in good money, in payment of debts due the bank, and for the proceeds of real estate; $15,500 in bank-notes of the corporation, in payment of debts due to the bank, or the proceeds of the real estate of the debtors to the bank; $15,000 in certificates of deposits of such notes: that the payments were, $10,000 for extinguishing prior liens on an estate conveyed to the bank by C. D. Teackle, a debtor to the bank; $1000, for clerk and sheriff's fees, in suits brought by the bank; $1000, attorney's fees and commissions; $1000 paid to William Done, as agent for the bank; $500 for taxes on real estate and small charges. This statement contained an allegation by the corporation, that the losses, by insolvencies of its debtors, amounted to $60,000.

It was further given in evidence by the plaintiffs, that Charles Jones, one of the obligors in the bond, was sheriff of Somerset county, from October 1821, to October 1824; and as such, received, under executions placed in his hands, in favor of the bank, $8255.77, in notes and certificates of the bank, and in good money; no part of which was proved to have been paid by him to the bank.

It was admitted, that before the 15th of July 1820, the notes of the Somerset Bank had largely depreciated, and were not current as paper, as a circulating medium; that they had continued to depreciate, and were then worth nothing. No part of the debt due to the United States had been paid.

The defendants gave evidence of the payments made by the bank for the extinguishment of the liens on the estate of L. D. Teackle; for clerk's and sheriff's fees on suits brought by the bank against the debtors to the bank; for attorney's fees and commissions, which were asserted to have been actually due and lawfully chargeable; for the lawful and reasonable commissions to William Done, as the agent of the bank; and for taxes on real estate; and for small charges. All these payments were in good money, and were paid between the 15th of July 1820, and the 15th of July 1825.

*The evidence given by the defendants, as to the taxes on the real estate of the debtors to the bank, and the lawfulness of the fees, costs and commissions, was opposed by evidence on the part of the United States. Evidence was also given which was intended to deny that the taxes, fees, &c., were due, or that they were reasonable.

The plaintiffs also gave in evidence, that attachment suits were issued against the same debtors of the Bank of Somerset, in the district court of the United States, in the years 1818 and 1819, against whom suits were instituted and prosecuted by the president and directors, in the county court of Somerset; some of which suits were instituted prior, and some subsequent, to the instituting of the attachment suits in the district court of the United States; all of which suits were actually proceeded in, after the attachment suits, and in the prosecution of which Somerset county suits, the principal fees, commissions and costs were incurred.

The defendant further offered evidence, that some time after the execution of the bond, upon which this suit was instituted, a contest arose between the Bank of Somerset and several of its debtors, in consequence of the bank having refused to receive its certificates of deposit, which the debtors tendered in payment of debts due by them to the bank; and that the right of a debtor to use such certificates in payment of a debt due by him to the bank was judicially brought before the Somerset county court, in an action instituted therein by the bank, for the recovery of a claim which the debtor had refused to pay, except in said certificates; that the county court, at its November term, in the year 1821, decided, that the tender of the certificates of deposit by the said debtors to the bank, in payment of the debt due by them to the bank, was a satisfaction of the claim; and that the bank-notes and certificates of the Bank of Somerset were a legal tender to the bank, and should be received in payments of judgments obtained in that court in favor of the bank, from the date of the act of assembly of the session of 1818, ch. 177; and that in conformity with the opinion, a verdict was entered for the debtor, with a judgment for his costs. And the defendant also proved, that the bank-notes and certificates, received by the president and directors of the said bank as stated, were received by them subsequently to the said decision.

*The defendant also gave in evidence, that among the judgments in favor of the bank were several against Littleton D. Teackle, upon [*644 whose property there were prior liens; and that all the money paid away by the corporation for liens, was in discharge of such liens; and that the bank, under their own executions, bought the property of said Teackle, subject to such liens, and that the property so taken was and is worth more than such liens; and that the property was delivered by the bank to the United States, and had been and was then in the hands and possession of the United States, or its authorized agents.

The plaintiffs then gave in evidence, that the property last referred to was never otherwise in the hands or possession of the United States, than as taken in execution under a writ of *fieri facias*, issued against the property of the bank, since the 15th July 1825; and further, that the property was not worth so much as the amount of the said prior liens.

The defendant offered, at the trial, to deliver to the plaintiffs the notes and

certificates of the bank, received in payment of debts due to the bank and for real estate, but the plaintiffs declined to receive them.

The defendant further offered in evidence, that the president and directors of the Bank of Somerset, during the five years from the 15th of July 1820, to the 15th July 1825, used due and reasonable diligence in recovering and securing the property and estate of the said bank, for the benefit of the United States; and that they, on the 15th July 1825, offered to deliver over to the United States all the property and estate which had been received by them (except what had been paid for liens, commissions, fees, cost and taxes, as therein-before set forth), which the United States refused to accept; and that the president and directors had continued to hold, and still held the same for the benefit of the United States, and always had been, and still were, ready to deliver the same to the United States.

The plaintiffs then offered in evidence, that the president and directors did not, during the five years, from the 15th July 1820, to the 15th July 1825, use due and reasonable diligence in recovering and securing the property and estate of the bank, for the benefit of the United States; and that they did not on the 15th July 1825, or at any time since, offer to deliver up any property or estate whatsoever; and that they did *not
*645] hold any part of such property or estate, by them received, for the benefit of the United States; and that they had theretofore neglected and refused to deliver up any property or proceeds of property of the bank to the United States.

The defendant further offered evidence, that the bank, from the 15th July 1820, to the 15th July 1825, sustained losses to the amount of $60,000 by insolvencies of its debtors, for which the said corporation was not responsible. And thereupon, the plaintiffs offered evidence, that the said supposed insolvencies, or the principal part thereof, happened by the negligence and misconduct of the said president and directors.

Certain proceedings of the corporation, relative to the management and transactions of its business, were given in evidence. At a meeting of the board of directors of the bank, on the 16th June 1818—Ordered, that all persons indebted to this bank may discharge the same, by transfers of its stock, at the rate of ninety *per centum*, for the amount of capital actually paid in.

By a resolution of the president and directors of the bank, passed June 13th, 1820, William Done, one of the directors, "is hereby appointed agent for the Bank of Somerset, to adjust and settle the claim of the United States, and he is requested immediately to repair to the seat of government, and there submit to the proper officer the propositions made by the former committee on the United States claim; and endeavor to procure the acceptance of either of them by the government in substance as the same now stands. And whereas, this board has been informed, that it has been represented at the seat of the general government, that the last election for directors was illegally conducted, and would be contested; the cashier is requested to furnish the said William Done with such extracts and statements from the proceedings of the board of directors of April 12th last, as he may think necessary and sufficient to satisfy the officers of government that the said election was conducted and closed according to all antecedent

usage in this bank; and, so far as we know, in every other similar institution."

*At a meeting of the president and directors of the bank, on the 15th of July 1820, the agent, appointed at the former meeting of the board to proceed to the seat of government for the purpose of effecting a compromise with the treasury department relative to the claim of the United States against the bank, reported, that he had waited accordingly on the secretary and comptroller of the treasury; and that he had entered into a compromise, upon the basis of the second proposition made by the committee on the United States claim, with a modification made by the treasury, as follows, viz., the directors will pledge to the government the whole estate of the corporation, as a security for the payment of the original principal of the claim, on or before the expiration of the term of five years from the date of the compromise; and for the fulfilment of this engagement, they will bind themselves individually to the United States, in a sum equal to the amount of the debt. The board then resolved, that the board accept the said proposition, as thus modified, provided the United States will agree to assign to those individuals who shall enter into the bond, the whole claim as it now stands, and all interest which have or shall accrue on the same. And for the better security of those who shall enter into said bond, and as an indemnification for any loss they might sustain, and a compensation for their extraordinary trouble and responsibility, it is hereby distinctly declared and understood by this board, that all advantages and privileges now held by the United States, shall be transferred to said individuals; and that they shall be entitled to all interest, profit and costs, which have or shall accumulate on the said claim, until the same shall be finally settled. [*646

On the 26th of June 1821, the board of directors ordered, "That William Done proceed, as soon as convenient, to the seat of government, for the purpose of finally settling the arrangement entered into with the treasury department; and he is also requested to ascertain the state of the suit or suits brought by the United States against the bank and its garnishees, in the district court of Maryland." "That Charles Jones shall attend all sales of property under execution, shall receive all moneys offered to him in payment of any execution or judgment, and shall pay over the same, at the expiration of each month, to the chairman." *Evidence was given that Charles Jones was solvent during the whole period of his shrievalty, and that he had since died, leaving his estate insolvent. [*647

And further testimony was given, that the stockholders, generally, availed themselves of the provision of the resolution of the 16th June 1818; that where the stockholders were debtors, the transfer of their stock was made to cancel their debts *pro tanto;* and other debtors purchased from other stockholders stock for the like purpose; that some of the persons who were directors on the 16th June 1818, and who acted under the said resolution, were obligors in the bond in question; and that other obligors therein subsequently availed themselves of the same resolution.

Upon the statements, admissions and evidence, the plaintiffs, by their counsel, prayed the court for their opinion and direction, as is stated in the opinion of this court. The defendant also submitted certain prayers to the court, which are also stated in the opinion of this court.

The case was argued by *Berrien*, Attorney-General, for the United States; and by *Martin*, for the defendant.

Marshall, Ch. J., delivered the opinion of the court.—This suit was brought in the court of the United States for the fourth circuit and district of Maryland, on the following bond:

Know all men by these presents, that we, Thomas Robertson, Levin Ballard, Arnold E. Jones, Mathias Dashiell, Charles Jones, Marcey Maddux, William Done, George W. Jackson and John H. Bell, all of Somerest county and state of Maryland, are held and firmly bound unto the United States of America, in the sum of one hundred thousand dollars, current money of the United States, to be paid to the said United States, their certain attorney or attorneys; to the which payment well and truly to be made and done, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, as witness our hands and seals this 15th day of July, in the year 1820. Whereas, on the first day of August 1817,
*648] the Bank of *Somerset became indebted to the United States for the sum of $69,079.62 deposited in said bank, by George Brown, collector, and others, for the final payment of which sum, and the better security of the United States, an agreement has this day been entered into between the United States on the one part, and the president and directors of the said Bank of Somerset, on the other part, in the words following, viz.:

"The directors agree to pledge to the government of the United States, the entire estate of the corporation, as a security for the payment of the original principal of the claim, on or before the expiration of the term of five years, from the date of the compromise; and for the fulfilment of this engagement, they will bind themselves individually to the United States, in a sum equal to the amount of the debt; and in order that no misunderstanding may hereafter arise respecting the true intent and meaning of the phrase, 'the entire estate of the corporation," and the nature and extent of the individual obligation, it is hereby declared to be distinctly understood by both parties, that the entire estate of the corporation means not only all the real estate of the said Bank of Somerset, but also all the debts of every description which are now due and owing unto the said bank, or to which the said bank may have any legal or equitable right whatever; and it is also understood by both parties, that the bond of individuals is not intended as a contract for the absolute payment of the said sum of money from their private estates, but as a guarantee that the said president and directors and their successors will fulfil their agreement to preserve entire the estate of the corporation, until the United States are paid and satisfied the said original principal of their claim, and to give a preference to the United States over any other creditor of the bank. The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland, against the bank, to the individuals who thus enter into bond; and at the expiration of the said term of five years, upon the payment of the sum of $69,079.62, on or before the day of payment, the United States will give a full and free acquittal to the said corporation for the whole claim."

*649] *Now, the condition of the foregoing obligation is such, that if the said president and directors, and their successors, shall on their

part well and faithfully perform the said contract, and shall, in preference to any other claim against the said bank, pay into the treasury of the United States the said sum of $69.079,62, on or before the 15th of July 1825, then the foregoing obligation to be void, otherwise to remain in full force and virtue in law. Signed and sealed by Thomas Robertson, Levin Ballard, Jun., Arnold E. Jones, Mathias Dashiell, Charles Jones, Marcey Maddux, William Done and George W. Jackson.—John H. Anderson, witness.

The issues joined on several special pleas filed by the defendant, were withdrawn by consent; and *nil debet* pleaded, under an agreement that the parties might give any matter in evidence which might have been given under any form of pleadings.

It will be perceived, from the condition of the bond, that the Bank of Somerset had become indebted to the United States in a large sum of money on account of deposits made by a collector, and that a suit had been instituted against the bank in the court of the United States for the district of Maryland. On the 15th of July 1820, an agreement was entered into between the United States and the president and directors of the Bank of Somerset, which is recited in the condition of the bond. The principal object of this agreement was, to secure the whole estate and property of the bank, of every description, for the payment of the principal debt, on or before the expiration of five years from the date of the agreement. For the performance of this engagement, the directors agree to bind themselves individually, in a sum equal to the amount of the debt; but this bond of individuals is not to be understood as a contract for the absolute payment of the said sum of money, but as a guarantee that the president and directors, and their successors, will fulfil their agreement to preserve the entire estate of the corporation, until the United States are satisfied with the principal, and to give a preference to the United States over any other creditor of the bank. The United States on *their part agree, on receiving this bond to assign the direction and management of the suit to the obligors. [*650

The construction of this bond has been discussed at the bar, as a preliminary question to the several points made in the cause. The United States contend, that the agreement recited in the condition of the bond, is made by the then president and directors of the Bank of Somerset, in their individual as well as corporate character, and that the defendant is bound individually, not merely to the extent of the obligation created by the bond, but also so far as he would have been bound had he signed the agreement in his private character. The defendant contends, that the agreement was made by the president and directors for the bank, as its legitimate agents, and is to be treated as an engagement made in their corporate character; and that the bond is an undertaking by the obligors, in pursuance of that agreement, by which they become sureties for the bank, that the president, directors and their successors will perform their engagements with good faith.

In pursuing this inquiry, the form of the instrument and the nature of the transaction must be considered. The agreement between the United States and the bank is not spread on the record, otherwise than as it is recited in the condition of the bond. It does not appear to have been signed by the president and directors individually. This could not have been omitted,

had they intended to bind themselves individually by that agreement. As an official act, it was sufficient, that it be entered on their journals; as an undertaking of individuals, it ought to be signed by them. It is referred to in the recital of the condition, in these words: "and whereas, an agreement has this day been entered into between the United States on the one part, and the president and directors of the said Bank of Somerset of the other part, in these words," &c. This language indicates, we think, an agreement by the president and directors, in the corporate character in which they are mentioned, rather than in their individual characters in which they are not mentioned. If the president and directors are bound in their private character, is every member of the board bound, whether he was present and assented to the agreement or not? The incorporating act declares, that the affairs of the bank shall be managed by a president and ten *directors. Are they all bound by this argeement? If not, who of them are? The paper itself, as recited, does not inform us. If we look out of the condition of the bond, to the journals of the corporation, for instruction, we are informed, that at a meeting of the board on the 15th of July 1820, the president and six directors attended. If it be contended, that this record fixes the members present, one of them, George Jones, who was a party to the agreement, did not sign the bond. Is he bound? If we are permitted to travel out of the bond, and search the journals of the bank for information on this subject, the same record informs us, that this whole business was transacted by the board, in their corporate character, as acting for the bank.

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The great object of the agreement was, to pledge the estate of the bank, to secure, so far as it would secure, the payment of the debt due to the United States. None could give this pledge, but those whose official duty it was to manage that property; and they could only give it in the character in which they were intrusted with its management. They alone, in their political character, and their successors, could redeem this pledge; for only those who retained the management of the affairs of the bank, during the five years given for the payment of the debt, could keep the estate together, and apply it exclusively to the use of the United States.

To what purpose should the United States require, that the directors should bind themselves individually, if they were already bound individually by the agreement itself? This stipulation, being for the benefit of the United States, must be considered as introduced at their instance; and if we may look at the proceedings of the board on the 15th of July 1820, we are informed, that the agent of the board, who carried propositions to the secretary of the treasury, reported, that he had made a compromise on the basis of the second proposition, with this modification made by the treasury. But without going out of the bond, this stipulation must be considered as being made on the part of the United States. For what purpose, we repeat, was it made? If the individual members of the board were bound by the agreement, why require a bond from the same persons, as sureties for themselves? They could be sued upon the original agreement as well as upon the bond. *Why this complex proceeding? Upon the hypothesis of individual obligation, under the agreement, it is inexplicable. Upon the hypothesis, that the original agreement was a mere corporate act, the whole transaction is accounted for. The agreement being

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a corporate act, could not affect the members of the board in their private characters; it was a mere pledge of the faith of the corporation, for the violation of which, the corporate funds would alone be responsible, and would add nothing to the security of the government; because the liability of those funds was already as complete as any corporate act could make it. The obligation of individuals, therefore, was required, who should be sureties that the corporate body would faithfully observe its contract. This is expressly declared to be the effect of the bond, and the purpose for which it was given. The words are, "and it is also understood by both parties, that the bond of individuals is not intended as a contract for the absolute payment of the said sum of money from their private estates, but as a guarantee that the said president and directors, and their successors (not their heirs and executors) will fulfil their agreement to preserve entire the estate of the corporation," &c.

The words which follow this recital of the condition, serve still further to show the understanding of the parties. They are, "now, the condition of the foregoing obligation is such, that if the said president and directors, and their successors, shall on their part well and faithfully perform the said contract," &c., then the foregoing obligation to be void, &c.; obviously referring to a contract made by the corporate body, and to be performed by the corporate body.

An argument against this construction of the instrument has been founded on the following clause: "The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland to the individuals who thus enter into bond; and at the expiration of the said term of five years, upon the payment of the sum of $69,079.62, on or before the day of payment, the United states will give a full and free acquittal to the said corporation for the whole claim." The court does not allow to this clause that influence over *the agreement for which the counsel for the United States contends. Being a stipulation to assign the management of the suit, not the judgment which should be obtained, the power might have been conferred on the president and directors and their successors, without releasing the debt. If, as we suppose, it was intended as an inducement to incur personal responsibility, by affording security to those who should incur it, the clause rather furnishes an argument in favor of that construction for which the defendant contends. [*653

We are of opinion, that the agreement recited in the condition of the bond on which this suit is instituted, is, in fact, made, and was understood by the parties to be made, by the United States, with the Bank of Somerset, acting by its lawful agents, the president and directors of that bank; and that the obligors bound themselvers, as sureties, that the bank would faithfully perform its engagements.

At the trial of the cause, the following points were made at the bar by the counsel for the United States, and the opinion of the court was asked upon them.

1. That, by the bond on which this suit is brought, the defendant has undertaken that the estate of the bank, including its debts, shall be applied, in the first instance, to extinguish the debt due to the United States, in five years, if that estate was sufficient to extinguish it; and if the jury shall be

of the opinion, that the estate, at the date of the bond, was sufficient, and might, by the use of proper means on the part of the defendant and his co-obligors, have been rendered available to that purpose, within the time limited by the bond, the defendant is answerable for any portion of the debt ascertained upon the face of the bond, which remained due to the United States, at the expiration of the five years given by that bond, and which still remains due.

2. That it being admitted the statement of the condition of the bank, on the 11th May 1820, which has been offered in evidence, proceeded from the obligors in the bond, and has been furnished by them, it is an admission on their part, that the estate of the bank was, at that time, sufficient to have paid the debt due to the United States, and throws the burden of proof on the defendant, to show how it afterwards became insufficient; and in the absence of satisfactory proof on this *point, the estate of the bank is
*654] to be held sufficient to have paid the debt due to the United States, within the five years given by the bond, and the defendant is answerable for any portion of that debt which remains unpaid to the United States.

3. That, among the duties imposed on the defendant by the bond, was that of calling in the debts due to the bank, in the most expeditious and effectual manner; and if the jury shall believe, that a resort to attachment against the bank debtors, in the name of the United States, on the judgment which had been obtained by the United States against the bank, was the most expeditious and effectual manner, and that the obligors in the bond have not resorted to this mode of proceeding, they have been guilty of a breach of their undertaking in the bond, and are answerable for the full value of any debt which might have been secured by that mode of proceeding.

4. That by the bond, on which this suit is brought, the obligors were bound to use diligence in enforcing the collection of the outstanding debts due to the Bank of Somerset, at the date of the bond; and that if they have failed to employ the best means which the law placed in their power, to enforce such collection, they are responsible for all losses proceeding from their neglect to use those means, &c.

5. That having been authorized to proceed against the debtors of the bank, on the judgment which had been obtained by the United States against the Bank of Somerset, and to enforce the proceedings against those debtors, as garnishees, which had already been instituted in that suit, as well as to take out new attachments against other debtors, in the name of the United States, the plaintiffs in that judgment; if, instead of resorting to these proceedings, they brought new actions against their debtors, in the state courts, and by the adoption of this latter course, debts have been lost which might have been saved by resorting to the process of attachment against those debtors, under the judgment before mentioned, the defendants are liable for all such losses.

6. That if the jury shall be satisfied, that the statement of the condition of the bank, on the 11th May 1820, was its true condition at that time, and that no proof has been offered by the defendants to show that this condition was variant at the date of the bond, the defendants can repel the inference of the *solvency of the bank, in no other way, than by showing to the
*655] satisfaction of the jury, that the debtors, whose debts compose the

aggregate of $106,995 presented on the statement, were wholly or partially insolvent; and that the defendant was unable to collect the debts, either by reason of such insolvency, or by some legal impediment which they could not control; and that, in the absence of such proof, the legal presumption will be, that such debtors were solvent, and that those debts might have been collected, by the use of due diligence; and if they have not been collected and paid over to the United States, that the defendant is liable for the amount of the debt acknowledged in the bond to be due to the United States, or for whatever balance of that amount remains unpaid to the United States.

7. That attachments, at the suit of the United States, which had been laid in the hands of the debtors to the Bank of Somerset, prior to the date of the bond, fixed the debts in the hands of such debtors; and that such debts could be discharged only by the payment of good and lawful money, equal in value to the amount of such debts; and that if the obligors in the bond on which this suit is brought, did afterwards receive such debts from the debtors, in depreciated notes of the Bank of Somerset, or any other depreciated paper, the defendant is liable to the United States, in good and lawful money, for the amount of debts so received in depreciated paper, if there be no proof that such debtors were in circumstances so insolvent, as that they could not have paid their debts in good and lawful money.

8. That by virtue of the agreement recited in the bond, on which this suit is brought, and of the bond itself, the debts due to the bank were so pledged to the United States, that the obligors in the bond had no right to receive these debts in the depreciated notes of the Bank of Somerset; and that if, after the date of the bond, they did so receive them, they are liable to the United States, in good and lawful money, for the amount so received, if there be no proof that the debtors from whom they were so received were in circumstances so insolvent, that they could not have paid these debts in good and lawful money.

9. That by virtue of the bond and the agreement therein *recited, [*656
the defendant was bound to see that the estate of the bank, as described in the agreement and bond, should be applied, in the first instance, to the payment of the debt due to the United States, before any payment made to any other creditor; and that if any portion of that estate has been paid to the holders of certificates of deposit, which were outstanding at the date of the bond, or if these certificates have been received in payment of debts due by the holders to the bank, the defendant is liable for all sums so paid to the holders of such certificates, and for the amount of all debts for which such certificates have been received in payment, if there be no proof that the debtors from whom they were so received were in circumstances so insolvent, that they could not have paid those debts in good and lawful money.

10. That in all cases where, after the date of the bond, moneys have been shown to have been paid under executions, at the suit of the bank, placed in the hands of Charles Jones, the sheriff of the county, who is admitted to have been one of the obligors in the bond, the defendant is liable for all such amounts so received by the said Charles Jones.

11. That the defendant had no authority to pay away any part of the estate of the bank, as described in the bond, to the purpose of relieving liens

on the estates of the debtors to the bank; but their duty was to have collected the debts due to the bank, out of the estate of such debtors, which they will be presumed to have been capable of doing, until the contrary is proved; and in the absence of such proof, they are liable to all sums paid away for such liens.

12. That it was in the power of the obligors to have proceeded by attachment against the debtors of the bank, under the judgment which had been obtained in the district court of the United States, the institution of new suits against such debtors in the county court of Somerset was unnecessary, until it shall be proved that they could not have so proceeded; and that the costs and expenses attending these suits were incurred by the obligors, in their own wrong, and must fall upon them; and the defendant is entitled to no credit on account of such costs and expenses, but must answer for the value of these debts, clear of any other costs and expenses, than would have arisen from his proceeding by attachment in the courts of the United States.

*657] *13. That the defendant was not authorized to diminish the amount of the estate of the bank, by the payment of a commission for collection, to William Done, one of the obligors.

14. That if the resolution of the board of directors, of date the 16th June 1818, authorizing the stockholders to assign their stock at ninety dollars, in discharge of their debts, was made for the purpose of shielding the stockholders from the judgment of the United States, and the process of attachment against the debtors of the bank which the United States were authorized to sue out against these debtors, such transfers of stock were fraudulent and void; and it was the duty of the obligors to have re-asserted these debts, as they stood prior to such transfer of stock, and to have proceeded to recover them by the legal process of attachment, in the name of the United States; and that if they failed to do so, such failure was a breach of their duty under the said bond and contract; and if such debts might have been so recovered, by the use of due diligence, the defendant is liable for the amount.

15. That if process of attachment, at the suit of the United States, had been served on these stockholders, prior to such transfer in payment of their debts, such debts became fixed thereby to the United States; and the subsequent transfer of stock in extinguishment of them was a void act, and these debts constituted a part of the estate of the bank, which the defendant was bound to apply to the payment of the debt of the United States; and not having done so, he is liable for those amounts.

And the counsel for the defendants made the following points:

1. That by the true construction of the bond, the obligors undertook for the acts of the corporation only, and not for their own conduct as individuals, or the conduct of any other individuals, not being the agents of the corporation.

2. That payment made to the sheriff, is no payment made to the bank, and that the defendant is not liable for any money received by the aforesaid Charles Jones, as sheriff, unless the same was paid over to the bank, or to the agents of the bank lawfully authorized to receive the same.

*658] 3. That the bank is not liable for any depreciation in the *money,

which the bank was compelled to receive by the judgment of the Maryland courts.

4. That the corporation had not the right to use the attachments which had issued from the district or circuit court; nor to order any process connected with the suit or judgment of the United States against the Bank of Somerset, and cannot, therefore, have been guilty of negligence or misconduct, by reason of not attempting to use the said attachments, or to issue process on said judgment.

5. That the defendant is not liable for any depreciation in the money, which the bank was compelled to receive by the judgment of the Maryland courts, unless the jury find that the bank was guilty of culpable negligence or misconduct, in prosecuting their claims in the courts of Maryland, instead of using the attachments issued from the district or circuit court of the United States.

6. That if the jury believe, that the property, from which the liens were removed, by payments of the Bank of Somerset, as stated in the evidence, has come to the hands and possession of the plaintiffs, and is worth more than such liens, and that the payment of such liens was made with an honest intention and view, for the benefit of the United States, then, the plaintiffs are not entitled to recover the amount so paid for such liens, as stated in the evidence.

7. That if the jury find from the evidence, that the taxes, officers' fees, counsel fees and commissions, paid by the bank, were actually due, and that the said taxes were lawfully chargeable on the said property, when in the hands of the bank, as the agent of the United States, and that the said officers' fees, and counsel fees and commissions, became due on account of suits instituted by the bank, as the agent of the United States, under the contract upon which this suit is brought, and that the said fees and commissions were lawful and reasonable; that then the plaintiffs are not entitled to recover the amount so paid by the banks, of taxes, officers' fees, counsel fees and commissions, unless the jury find that, in instituting the said suits, the said bank from negligence and misconduct violated its duty to the United States.

Upon these points too, the instructions of the court to the jury were requested. *The record states that the judges being opposed in opinion on each of these questions, ordered them, on motion of the counsel for the plaintiffs, to be certified to this court for its decision; and discharged the jury. [*659

Some general propositions have been stated in argument, which bear upon all the points; and which will be considered, before we proceed to apply them to the several specific questions which have been certified by the circuit court. The counsel for the United States insists, that by the act of 1818, the United States were empowered to enforce payment of the judgment they might obtain against the bank, in specie, by summoning the debtors of the corporation as garnishees, and obtaining judgments against them. The act provides, that in any suit thereafter instituted by the United States against any corporate body, for the recovery of money upon any bill, note or other security, it shall be lawful to summon as garnishees, the debtors of such corporation, who are required to state on oath the amount in which they stand indebted, at the time of serving the summons, for which amount judgment shall be entered in favor of the United States, in the same

manner as if it had been due and owing to the United States. This act operates a transfer from the bank to the United States of those debts which might be due from the persons who should be summoned as garnishees. They become, by the service of the summons, the debtors of the United States, and cease to be the debtors of the bank. But they owe to the United States precisely what they owed to the bank, and no more. On the 9th of February 1819, the legislature of Maryland passed an act declaring that in payment of any debt due to, or judgment obtained by, any bank within that state, the note of such bank should be received. This act, so far as respects debts on which judgments have not been obtained, embodies the general and just principles respecting off-sets which are of common application. Every debtor may pay his creditor with the notes of that creditor; they are an equitable and legal tender. So far as these notes were in possession of the debtor, at the time he was summoned as a garnishee, they form a counter-claim, which diminishes the debt due to the bank, to the extent of that counter-claim. But the residue becomes a *debt to the United States, for which judgment is to be rendered. May this judgment be discharged by the paper of the bank?

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On this question, the court are divided. Three judges are of opinion, that by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank; which original right remains in full force against the United States, who come in as assignees in law, not in fact; and who must therefore stand in the place of the bank. Three other judges are of opinion, that the right to pay the debt in the notes of the bank does not enter into the contract. A note given to pay money generally, is a note to pay in legal currency, and the right to discharge it with a particular paper, is an extrinsic circumstance depending on its being due to the person or body corporate responsible for that paper, which right is terminated by a transfer of the debt.

The counsel for the United States also contend, that the obligors are responsible in this suit for the act of any individual who has signed the bond, by which any portion of the estate of the bank may have been lost; and for the omission of the obligors to perform any act within their power, which might have enabled the corporate body to collect its debts in money of more value than its own notes. We do not think so. Whatever obligations a sense of right might have imposed upon them, as members of the corporation, the obligation imposed by the bond itself is measured by its terms. They do not undertake for their general conduct as individuals. They do not undertake for each other, as to any matter not expressed in the bond. They undertake that the bank shall perform the contract recited in the condition, and for nothing more. The bond does not stipulate that the obligors will do anything which may facilitate the operations of the bank in collecting its debts and performing its contract with the United States.

It has been urged, that they might have used the power to direct and manage the suit, so as to compel the debtors to the bank, by summoning them as garnishees, to discharge their debts in specie.

The United States have not required them to make *any use of the power to manage and direct the suit. Nothing is specified, nor is anything either demanded or undertaken on this subject. Were this court

*661]

to insert it, we should add a new term to the bond, and create an obligation which the parties have not imposed upon themselves. We should do something more than construe and enforce the contract.

In the state in which the record now appears, this question does not regularly arise. If the obligors were bound to use their power to direct and manage the suit, in the manner most advantageous to the United States; if we could suppose, that the power was given, not for the benefit of the obligors who obtained it, but for the benefit of the United States, who agreed to surrender it unconditionally, for something else stipulated in the bond; still this obligation, so to use the power, could not commence until the power was given. This we think is not shown by the record. The bond was executed to the United States, and this action is a proof that it was accepted. So far as respects the liability of the obligors, as sureties for the bank, the acceptance has relation to the date; but so far as respects the liability to be created by a subsequent act of the obligee, this relation cannot be sustained. The actual time of acceptance becomes a subject of inquiry.

The record furnishes reason for the opinion, that the bond was not accepted at its date, on the 15th of July 1830. The acceptance being a fact *in pais*, we may look out of the bond for proof of it. The directors agree to bind themselves individually for the performance of the contract recited in the condition. This was required by the treasury department, in terms implying that all the directors should so bind themselves. The act incorporating the Bank of Somerset makes the board to consist of a president and ten directors; the bond is executed by the president and seven directors. It remained some time for the signature of others, and was incomplete at its date. It might, without the slightest breach of faith, have been rejected by the secretary of the treasury; and, as it did not conform to its original proposition, remained as an escrow, until approved by him. The record furnishes some evidence that is was not immediately approved. On the 26th of June 1821, the board of directors ordered, * "that William Done proceed, as soon as convenient, to the seat of government, for the [*662 purpose of finally settling the arrangement entered into with the treasury department; and he is also requested to ascertain the state of the suit or suits brought by the United States against the bank and its garnishees, in the district court of Maryland."

If then the power claimed for the obligees, to direct and manage the suit of the United States, was conferred by the mere operation of the bond; it could not be conferred, until the bond was actually accepted, and the time of acceptance ought, for this particular purpose, to be shown. But this power is not conferred by the mere operation of the bond; it requires a distinct and independent act on the part of the government. "The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland against the bank, to the individuals who thus enter into bond." Till this authority was actually given, the attorney for the United States would have disregarded, and ought to have disregarded, any orders received from the obligors in the bond.

Suits were instituted by the bank against its debtors in the courts of the state; by whose judgment the bank was compelled to receive not only its own notes, but the certificates of deposit held by its debtors. The counsel

for the United States insists, that the bank is responsible for the sums so received, in violation of its agreement to give a preference to the United States over other creditors. So far as this act was voluntary on the part of the bank, it is a violation of the contract, for which its sureties are liable. But how far was it voluntary? The bank possessed no other means of collecting its debts than through the medium of the state courts. It might, therefore, be necessary to resort to those courts, in order to avoid a total loss. The act of limitations, independent of those casual insolvencies which might occur, would have formed a serious deduction from that estate; which it was their duty to preserve entire for the United States. The bank, perhaps, might have made, and sound morality required that they should have endeavored to make, new arrangements with the United States. It is
*663] not certain, that any arrangements which would remove *difficulties with which the whole transaction was embarrassed, were practicable. But, be this as it may, we perceive no other course which was prescribed by duty and by contract, with respect to their debts generally, than to sue in the state courts. With respect to those debts which were attached by the United States, the same division of opinion exists, as with respect to their payment in the notes of the bank.

We will now apply these principles to the particular points on which the judges of the circuit court were divided.

On the first question propounded by the counsel for the United States, and also on the first question propounded by the counsel for the defendant, this court is of opinion, that the obligors undertook for the faithful performance, by the president and directors, of the contract recited in the condition of the bond, on which the suit is instituted; and not for their own conduct as individuals; and that they are responsible for any failure on the part of the bank to perform that engagement.

On the second and sixth questions propounded by the plaintiffs, this court is of opinion, that the statement of the condition of the bank of the 11th of May 1820, which appears in the record, is evidence to be submitted to the jury, who are the judges, on the whole testimony, how far the estate of the bank was, at that time, sufficient to pay the debt due to the United States; and if any part of that estate has been wasted or misapplied by the corporate body, or their agents, or has been appropriated unnecessarily to any purpose other than towards the debt of the United States, or is otherwise unaccounted for; the defendant is responsible for such misapplication or waste, and for any sum not accounted for.

On the third and fourth questions propounded by the plaintiffs, this court is of opinion, that the obligors did not undertake by their bond, to call in the debts due to the bank. That duty was to be performed by the president and directors of the bank; for whose faithful performance of it, the obligors are responsible.

The court does not perceive the application of the fifth question on the part of the plaintiffs to the cause, unless the president and directors of the bank be considered as the obligors, which idea is negatived in the answer
*664] to the first question. *The obligors had no power to bring actions against the debtors of the bank, in the state courts.

On the seventh question propounded by the plaintiffs, this court is of opinion, that the attachments at the suit of the United States which had

been laid in the hands of the debtors to the Bank of Somerset, prior to the date of the bond, fixed the debts in the hands of such debtors, as to the sum remaining due, after deducting the legal off-sets against the bank, then in the hands of such debtors. This court gives no opinion as to the money or paper in which the sum so remaining due was demandable.

The eighth instruction required by the plaintiffs ought not to be given as asked. The ninth question is answered in the opinions given by this court on the preceding inquiries.

On the tenth question propounded by the plaintiffs, and the second propounded by the defendant, this court is of opinion, that the bank is liable for the money received by Charles Jones, as their collector; and the defendant is liable therefor, as their surety; but that the bank is not liable for the money which came to his hands, as sheriff, unless the president and directors were guilty of negligence in using the appropriate means to draw it out of his hands in reasonable time.

On the eleventh question propounded by the plaintiffs, and the sixth propounded by the defendant, this court is of opinion, that it was the duty of the president and directors, to collect the debts due to the bank. In the performance of this duty, it might be necessary to purchase property pledged to the bank, which was subject to prior liens, and to relieve such property from its prior incumbrances, in order to avoid a total loss of the debt. This may have been advantageous, or may have been disadvantageous, to the United States. We think the transaction, with all its circumstances, ought to be submitted to the jury; and that the liability of the defendant can, in no event, exceed the actual loss sustained by the United States, in consequence of the bank having taken the property, by discharging the prior incumbrances, instead of suing the debtor in the state court.

On the twelfth question propounded by the plaintiffs, and *the seventh propounded by the defendant, this court is of opinion, that [*665 the president and directors of the Bank of Somerset had no power over the judgment of the United States. They could, therefore, proceed only in the state courts; and were entitled to credit for such necessary expenses, as were incurred in such suits as it was prudent to bring.

On the thirteenth question propounded by the plaintiffs, this court is of opinion, that the propriety of allowing the commissions paid to William Done depends upon their reasonableness.

On the fourteenth and fifteenth questions, propounded by the counsel for the plaintiffs, this court is of opinion, that the instructions ought to have been given as asked; except so much of the fourteenth, as states it to have been the duty of the obligors, instead of the president and directors, to re-assert these debts; and so much as supposes a power to proceed by the legal process of attachment in the name of the United States; and except so much of the fifteenth as supposes a power in the defendant to apply the funds of the bank.

The court is of opinion, that the third, fourth, and fifth instructions moved by the counsel for the defendants, ought to be given as asked; except so much of the fifth as submits to the jury the question on the power of the bank to use the attachments issued from the district court of the United States.

All which is to be certified to the circuit court for the fourth circuit and district of Maryland.

BALDWIN, Justice. (*Dissenting.*)—I consider the directors of a bank, as its chartered agents; and the bank as bound by their acts, when they are within the powers, and are exercised on the subjects, and in the manner authorized by the charter. 12 Wheat. 52, 53, 58, 83, 87. *Shankland* v. *Corporation of Washington*, decided at this term. If a corporation is authorized to raise money by a lottery, their agents cannot sell it (12 Wheat. 55); if to raise a specific sum, they cannot raise a quarter. *Lee* v. *Manchester Canal*, 11 East 645, 654. Every act of fraud, departure from their duty, of any other illegal act, committed by the directors of a bank, or the cashier, by their connivance and permission, however *sanctioned by the uniform usage of the *666] board, is an excess of power and void from illegality. 1 Pet. 71, 72. The directors are liable individually; but the bank cannot be bound by their doing that which they had no lawful power to do, or which was a violation of some duty enjoined by the charter, or resulting from the nature and objects of the incorporation; for the directors are not then their agents. A corporation is strictly limited to the exercise of those powers which are specifically conferred on it. 4 Pet. 168; 2 Dow P. C. 521, &c. The directors own none of the property or funds of the bank. They are trustees for the stockholders and creditors. Their control over the effects is entirely fiduciary and confidential; deriving their power over them by the act of incorporation, they must execute it according to its provisions and directions; which are in their nature creative, and not merely restrictive, inherent powers. If the act of incorporation is their only authority, they must act within its precise terms. 2 Dow P. C. 253. By section 13th of the charter, they may manage the funds, in the common course of banking, for the use and benefit of the stockholders; but for any fraud, are liable to an indictment, a suit by the bank for the damages sustained, or forfeiture of their stock. If they manage them in any other way, they do it on their own individual responsibility, not on that of the bank, as its authorized agents; if misapplied funds of the corporation come to the hands of innocent third persons, they cannot be recovered back. But if the directors make a contract which contains stipulations exceeding their authority, it cannot be enforced against the bank, by the party contracting with them. By the act of contracting with the agents and trustees of a corporation, the party is presumed and bound to know the nature, extent and the legitimate objects of their authority, according to the terms of the charter; and necessarily contract subject to them.

The 12th section of the law of Maryland, ch. 32, December 1813, chartering the Bank of Somerset, enacts that, "no member of said company shall be answerable in his personal or individual property, for any contract or engagement of said bank, or for any losses, deficiencies or failures thereof, or the capital stock thereof; but all the capital stock, together *with *667] all its property, rights and credits of the said institution shall at all times be answerable for demands against said bank."

At, or as near the date of the bond as could be ascertained, according to the statement given in evidence by the plaintiffs, the bank owed the creditors $130,000; whereof there was due to the holders of notes, $15,000; to individual

depositors, $46,000 ; and to the United States, $69,000. The whole property and effects of the bank amounted to $113,000 ; of which $60,000 appear to be lost by insolvencies. The state of the bank, in May 1820, shows on its face, a deficit of $21,000, short of the debts. With this law and statement of the bank before them, the plaintiffs and the directors entered into the agreement of the 15th of July 1820 ; by which the entire estate of the corporation was pledged to the United States, for the payment of their debt of $69,000 ; and they were to have a preference over every other creditor of the bank. They were entitled to no such preference by law ; and unless the agreement of the directors gave it to them, under their authority as agents of the bank, they cannot enforce it. The power and right of an individual to prefer one creditor to another, is undoubted ; not because any law confers that right upon him, but being the owner, and having full power of disposing of it as he pleases among his creditors, or to sell it for money, the distribution or payment of it, at his pleasure, among them, results from his ownership ; and no law has prohibited or restrained him. But, to my mind, an agent or trustee of a banking corporation is in a different situation ; he has no rights of individual ownership ; his control over the effects is solely derived from the law ; regulated and controlled by it, in any application he may make of it. The moment he exceeds his chartered powers, or violates his duty as prescribed by law, all privity between him and the bank ceases ; he is no longer their agent ; and his acts are no longer theirs. Conceding the rule to be, that in a contest between creditors, at the counter of a bank, the note or check first presented, may be first paid by the cashier ; it cannot, in my opinion, apply to real estate, or unavailable effects ; which require time and legal process for their collection ; and which *the charter declares, [*668
shall be at all times answerable for demands against the bank. Directors have no inherent right in the property, or control over it, resulting from ownership, which gives them the power of individual debtors to give creditors a preference. The charter gives them none. Their authority must then be implied, either from the general scope and objects of the incorporation, or be incident to the agents and trustees of all moneyed and other corporations, in a case of known and ascertained deficiency to pay its corporate debts. If there is in the statute or common law of Maryland, or of any state in this Union, such a principle, it is wholly unknown to me. If, instead of delaring a pre-existing rule, a new one is adopted, from reasons of supposed analogy, justice or inconvenience, I cannot withhold my dissent to its adoption ; for I can perceive no reason which permits preferences by individuals, which do not, instead of authorizing, forbid the application of the rule to the trustees of the corporation ; nor can I perceive the justice of preferring one noteholder or one depositor to another. It would seem to me a justice unknown to the common law, to apply all the effects of an insolvent corporation to the debt of the government, and strip individuals. In such a case, the rule that equality is equity, would seem a very appropriate one. An equal distribution of all the effects among all the creditors, would certainly not operate unjustly. I can apply no other rule to this case, in the absence of any provision in the charter, or common-law authority, to the contrary.

An agreement like the present, made by an executor or trustee, under a deed or will, by an administrator or guardian, would be an excess or abuse of power. Creditors excluded by the agreement, would have their remedy

on the fund. Yet, in all these cases, the trustee has an interest in and control over the property intrusted to him, at least equal to that of the bank directors, in and over the effects of the corporation. If the giving a preference to one, and excluding all other creditors, would not be deemed a fair execution of the powers of the former classes of trustees, it is difficult to assign the reasons, which, on settled principles of law, would confer on the trustees of a corporation, an extent of authority unknown to any private
*669] trustees. A power given by will, deed or assignment, *to a trustee, to sell property to pay the debts of the party executing it, would not be well executed by such an agreement and bond as this; nor can it be a compliance with the clear direction of the twelfth section of the charter; the express words of it import a different meaning. The whole capital stock, property, rights and credits of the bank are answerable for demands upon it. They are thus pledged alike to all. While the demand is unsatisfied, the pledge is unredeemed, and directly violated, if the whole fund is appropriated to the demand of a favorite. It cannot be pretended, that the appropriation of the whole fund to the United States exonerates the bank from their obligation to pay the $60,000 due to individuals; their demands are not extinguished thereby, but remain in full force, after all the corporate effects are disposed of. And this becomes the situation of the parties: the private creditors have just and legal demands against the bank, arising from a deposit of their money; the United States have a demand of the same kind; the bank is bound to pay both, if its property and effects are sufficient; but its effective means fall short of either debt. The 13th section expressly releases the members of the company, exempts their persons and property from all liability for the contracts and engagements of the bank, or losses, deficiencies and failure of the capital stock; thus making the capital stock the only fund for payment. Two creditors, then, having debts contracted in the same way, have by law a pledge of the whole estate and effects for their security. The trustees of the fund apply the whole to one creditor; the other receives nothing. All the losses are thrown on him; he has a right to a judgment against the bank, as his debtor; but can take neither their property nor effects, and the law prohibits him from resorting to any individual member of the company. I cannot consider this as anything short of a palpable perversion of the corporate powers of the directors, by depriving innocent individuals of every possible remedy for the clearest possible right.

If it is said, that the directors are answerable individually to the injured creditors; that could only be on the legal result of the acts done by them; for, if they act within their chartered authority, they are mere agents of the bank; and as such, expressly exempted from all personal responsibility. It
*670] is only *by an excess or abuse of their authority, that they cease to be agents, and act at their individual peril; and it follows, necessarily, that in so doing, their acts are void as to the bank, and cannot operate as a corporate transfer of corporate property, to one who is a party to an unauthorized transaction.

If the charter gives power to apply the corporate effects to one creditor only, when it is unable to pay all, the directors have the same power to prefer one stockholder, after the debts are paid; and in either case, might prefer themselves. Stockholders, debtors to the bank, might apply their

notes to the reimbursement of their capital paid in; throw all the losses on those stockholders who had borrowed no money, and on whose funds the operations of the bank had been carried on. The directors themselves, and the preferred debtors of the corporation, would thus receive back their whole stock, while the creditor stockholders lose all theirs.

When the debts of a bank, due to the holders of their paper, or their customers, are paid; stockholders, being creditors, are entitled to payment of their demands. The 13th section directs the directors to manage the funds, "for the use and benefit of the stockholders;" and the 12th pledges them for all demands upon the bank. After the out-of-doors debts are paid, the claims of stockholders are as sacred as those of depositors were before payment; and any acts of the directors, not strictly authorized by these sections of the charter, are inoperative and void, as well against the bank as against those who are creditors by holding their notes, or depositors or stockholders.

The charter of any corporation is the only source of its powers, and the only authority by which any can be exercised; it is opposed to all sound rules of construction, to consider that which confers, as merely restraining and controlling powers, incident to the incorporation; and therefore, to be constructed strictly as a limitation or exception to powers which pre-existed, or necessarily resulted from it; as is the power to make by-laws, to sue and be sued, &c. The power to manage, control and dispose of the corporate property, is a special authority given by the charter. None can be exercised which is not explicitly granted; and it can only be exercised on the precise subjects over which it is given, and within the *limits definitively assigned. No charter ever gave a right of preference of one creditor [*671 of the corporation to the exclusion of all others; none ever authorized a transfer of all its property, as this assignment does; and those who claim a right under it are bound to show, affirmatively, the authority of the directors to do so, by the terms of the charter. The injured creditors are not bound to show a negative of the power, by any restrictions or prohibitions. It is an universal principle, that he who claims under a special authority must show its existence and lawful exercise; to throw the burden of proof on the party whose rights will be destroyed by its abuse, would be the utter reversal of every rule which governs the execution of powers. The charter expressly pledges the whole property of the bank to the payment of the demands upon it. The creditor who claims the whole, by the act of the directors, the agents of the bank, and the trustees for all creditors and stockholders, must, especially when plaintiff, clearly make out their power to give him the preference. The absence of a restriction is no evidence of the grant of the power. The general pledge for all demands can only be dispensed with, by express power to transfer that pledge to the satisfaction of one, by withdrawing it from all others. This rule clearly results from the cases before cited, and is clearly established in those which follow. An act of parliament authorized the directors of an incorporated company, in order to raise money by loan, and secure its repayment, to give a mortgage of their tolls: it was held, not to empower them to mortgage their toll houses; and they are not estopped by their deed from denying their power, 2 T. R. 171. Where a mortgage was given, pursuant to a similar act of parliament, in order to secure their loans to one creditor of the company.

contrary to the provisions of the act prohibiting a preference, it was declared, that he was a bailee for all others who loaned their money under the authority of the act, that they should receive their due proportion. *Banks* v. *Booth*, 2 Bos. & Pul. 222. Where tolls were granted to a company, to reimburse them for money subscribed to a canal, they cannot diminish their rate, or make their rate unequal, by giving a preference to one person, using
*672] it for transportation, over *another (*Lees* v. *Manchester Canal*, 11 East 656); or reduce tolls at one gate and not at all. *King* v. *Bury*, 4 Barn. & Cres. 361.

The principle of these cases applies to this; the second is much stronger. The thing mortgaged was only the profits; the property from which they were to accrue remained in fee to the company, subject to the payment of the loan. The preference given by a mortgage to one lender, was only as to the time of payment; and did not diminish the security of the lenders. Both cases show the great strictness in which the powers of a corporation must be exercised. The case of canal tolls seems conclusive, so far as any decision of the court of king's bench can be, to show that an agreement to give a customer a preference in a reduced rate of toll is void, as an excess of the corporate powers of the directors. An agreement to transfer the whole property of the corporation to one creditor, or stockholder, would not have been enforced in Westminster Hall.

"No argument drawn from convenience can enlarge the powers of a corporation." 4 Pet. 169. "A general authority in the charter, that the directors shall have power to do whatever shall appear to them 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. 4 Pet. 171. Such words are restricted by the other provisions of the charter. Ibid.

Construing the one to the Bank of Somerset, by rules so well settled, I cannot consider the agreement in question to be within the legitimate powers of the directors. In the case of *Slee* v. *Bloom*, 19 Johns. 456, 477, the court of errors decided, with only one senator dissenting, that a resolution of the board of directors of a manufacturing company, giving the stockholders the privilege of forfeiting their shares, on paying thirty per cent., "was utterly inoperative, against the fundamental principles of law and equity; legally fraudulent, and therefore, void and inoperative," because a debt due to an only creditor would have been only partially paid, by depriving him of his
*673] only means of satisfation by a resort to the stockholders *ratably until his debt was paid. The agreement in this case produced a worse effect, as it cut off a class of creditors to the amount of $60,000 from the hope of a dividend.

If the directors have this power of preference among the holders of their notes, depositors and stockholders, it must be as incidental, not only to all banking, but other insolvent corporations; if incidental to corporate trustees, it must be applied to those who act under individual authority, to hold the trust fund answerable for demands or debts due by the person giving the directions to manage and dispose of it, for his use and benefit. I must dissent from the adoption of these principles, which my judgment tells me forms no part of the common law.

If this were the case of a bank, solvent but embarrassed, requiring only time to wind up its concerns, and the preference given to the United States were only as to time, the question would assume but little importance; but in this case, the insolvency was apparent on the statement of the general account of the bank. There could have been no possible hope of retrieving its affairs, with debts to the amount of $130,000, with not one dollar in their vaults, and an admitted deficit of $21,000. It is evident, that the continuance of their corporate functions, after May 1820, was not to carry on banking operations, for they had no means whatever to do it. The only possible object was to collect from the wreck what could be saved. The preference, therefore, given to the United States, could operate in no other manner than as a final extinction of all hope to the private depositors and note-holders, by throwing on them alone the loss arising from the deficiency of the funds. This, I think, was wholly unauthorized by the charter, and directly opposed to its spirit and meaning; that it was an abuse of their trust, which a court of law would not enforce, and equity would restrain. Whenever a court of chancery interferes in cases of trusts, they make no discrimination between individuals and a corporation; "a corporation being a trustee, is in this court the same as an individual." 2 Ves. jr. 46–7; 14 Ves. 252–3. If they misapply trust revenues, and by misbehavior are unable to pay moneys due by them, chancery will take the estate out of their hands. *Coventry Case*, 7 Bro. P. C. *235. So, if they mis-spend or misapply trust money, [*674
2 T. R. 200, 204; or as trustees, having the management of a productive fund, abuse their trust, 14 Ves. jr. 252–3; pledge corporate property for purposes not corporate, 1 Ves. & B. 242; deprive, by a by-law, one member of the company of his share of the profits, 1 Ves. jr. 316, 322 (where the chancellor examines fully the jurisdiction of the court over corporate trusts); or if the twelve jurymen of a manor court should make a by-law, that the next year's profits should be divided among themselves exclusively, 17 Ves. 321.

Thus believing that where property is devised or assigned to trustees to pay debts, the law of all courts is perfectly well settled, that the trustee has no power to pay one, in exclusion of another creditor, where the fund is not sufficient to pay all; finding that by the best-established principles of courts of chancery, corporate trusts are within their jurisdiction, and to be exercised by the same rules which control the execution of individual trusts; seing no authority in the charter for the directors of this bank to make the agreement which is the subject of this suit; and utterly unable to discriminate between the powers and duties of a private or corporate trustee; I must, though standing alone, record my decided dissent from the doctrine settled by the decision of the court in this case.

Though this point has not been made by counsel, nor noticed in the opinion of the court, it necessarily arises on the record; it enters into the very vitals of the cause; its merits cannot be settled, without a direct decision upon it; and thinking that the affirmance of the agreement to appropriate the whole effects of the bank exclusively to the United States, establishes, by the high authority of this court, a general principle, applicable to all corporations, all trustees, private or corporate; extending to creditors and stockholders, equally novel and alarming; it is my duty to notice and examine the question with the deliberation and research peculiarly necessary

from its intrinsic importance, and the circumstances under which it arose and was considered; it is equally my duty, to express the results of my judgment.

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*675] *James Sheppard and others, Appellants, *v.* Lemuel Taylor and others, Appellees.

Seamen's wages.

The ship Warren, owned in Baltimore, sailed from that port, in 1806, the officers and seamen having shipped to perform a voyage to the north-west coast of America, thence to Canton, and thence to the United States; the ship proceeded, under the instructions of the owners, to Conception Bay, on the coast of Chili, by the orders of the supercargo, he having full authority for that purpose; the cargo had, in fact, been put on board for an illicit trade against the laws of Spain, on that coast. After the arrival of the Warren, she was seized by the Spanish authorities, the vessel and cargo condemned, and the proceeds ordered to be deposited in the royal chest; the officers and seamen were imprisoned, and returned to the United States; some after eighteen months, and others not until four years from the term of their departure; the king of Spain subsequently ordered the proceeds of the Warren and cargo to be repaid to the owners, but this was not done; afterwards, the owners having become insolvent, assigned their claims for the restoration of the proceeds, and for indemnity from Spain, to their separate creditors; and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship Warren. The officers and seamen having proceeded against the owners of the ship, by libel for their wages, claiming them by reason of the change of voyage, from the time of her departure until their return to the United States, respectively, and having afterwards claimed payment out of the money paid to the assignees of the owners, under the treaty, it was held, that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners; with interest on the amount, from the period when a claim for the same from the assignees was made by a petition.

If the ship had been specifically restored, the seamen might have proceeded against her in the admiralty, in a suit *in rem*, for the whole compensation due to them; they have by the maritime laws an indisputable lien to this extent. There is no difference between the case of a restitution in specie of the ship itself, and a restoration in value; the lien re-attaches to the thing, and to whatever is substituted for it; this is no peculiar principle of the admiralty; it is found incorporated into the doctrines of courts of common law.

Freight, being the earnings of the ship, in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid; for although the ship is bound by the lien of the wages, the freight is relied on as the fund to discharge it, and is also relied on by the master to discharge his personal responsibilities for disbursements and wages.

Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction *in rem*, as well as *in personam*;[1] and wherever the lien for the wages exists, and attaches upon the proceeds, it is the familiar practice of that court, to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry,
*676] and *salvage; and is equally applicable to the case of wages: the lien will follow the ship, and its proceeds, into whose hands soever they may come, by title or purchase from the owner.[2]

Appeal from the Circuit Court of Maryland. In December 1810, a libel was filed by James Sheppard and others, officers and seamen of the merchant ship Warren, against Lemuel Taylor, Samuel Smith, James A. Buchanan, John Hollins and Michael McBlair, owners of the merchant ship Warren,

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[1] The James and Catharine, Bald. 544. L'Arina *v.* Manwaring, Bee 199.

[2] Brown *v.* Lull, 2 Sumn. 444; Pitman *v.* Hooper, 3 Id. 50; Vandever *v.* Tilghman, Crabbe 66.

claiming wages ; they having shipped in 1806, at Baltimore, for a voyage from that port to the north-west coast, thence to Canton, and home to the United States. The facts of the case, as they appeared in the libel and supplemental libels, petition, and in the depositions and documents filed and taken in the case, were :

That the ship Warren, of the burden of about 600 tons, and armed with twenty-two guns, commanded by Andrew Sterrett, sailed from Baltimore, on the 12th of September 1806. The crew, including the officers and apprentices, consisted of about 112 persons, and were shipped for a voyage designated in the shipping articles, to be from the port of Baltimore to the north-west coast of America, thence to Canton, and home to the United States. No other voyage but that expressed in the articles was known to be intended by any one on board of the Warren, except Mr. Pollock, who was the supercargo of the vessel. There were, however, two sets of instructions ; one, those which expressed the voyage as stated, and which were given to Captain Sterrett ; the other, sealed private instructions, and which were delivered to Mr. Pollock. When the ship arrived at a certain latitude, the sealed instructions were opened, and were communicated to the master. These instructions changed the destination of the ship, and the nature and character of the voyage. They gave the entire control over the course of the voyage to Pollock ; and from that time, she proceeded directly for the coast of Chili, to prosecute an illicit and smuggling trade with the Spanish provinces, on the western coast of South America ; all trade with those provinces being then notoriously forbidden, under *heavy penalties, [*677
unless conducted under a license from the crown of Spain.

The officers and crew of the Warren protested against this deviation from the prescribed voyage ; and Captain Sterrett, from disappointed and wounded feelings, disdaining himself to engage in an illicit trade, and unwilling to expose his officers and men to its perils and consequences, became partially deranged, and shot himself as the Warren was doubling Cape Horn. Mr. Evans, the chief mate, succeeded in the nominal command of the ship ; but Pollock asserted and maintained the entire control over her ; and he ordered her to steer direct for Conception Bay and the port of Talcahuana, on the coast of Chili, where they were to feign distress, and ask for an asylum. The vessel arrived on the 20th of January 1807, wtihin a short distance of that port, after an absence from Baltimore of 120 days ; and on her arrival was hailed by the *guarda costas* of the government. Pollock answered in Spanish, and took the ship's papers with him on shore, where he had an interview with the commandant of Talcahuana. During his absence, an altercation took place between Captain Evans and the Spanish armed vessels, which resulted in the exchange of some guns, but no lives were lost on either side. Pollock having remained on shore under a flag of truce, on the following day communicated by a verbal message to Captian Evans, an order to enter the port ; alleging, that the firing on the Warren by the *guarda costas*, had been through mistake, and that all things would be well managed. The crew remonstrated, and proposed to proceed with the ship on the voyage for which they had sailed, and to leave the supercargo on shore. Captain Evans refused to enter the port, unless by a written order, which was then sent to him ; and he was informed by the messenger, that Pollock was under no restraint whatever.

The Warren then entered the port of Talcahuana, and Captain Evans went on shore; and the seamen, under a pretence that their depositions were required relative to the death of Captain Sterrett, were taken on shore, twenty at a time, and at once put into prison. The officers and the apprentices being *put on board the ship, proposed to rescue her, and communicated the purpose to Pollock, who immediately took his baggage and that of Captain Evans on shore. Soon afterwards, some Spanish officers came on board the Warren, unbent the sails, and unshipped the rudder. The officers and crew of the ship were ordered to Conception, and thence were marched to various prisons and dungeons, and suffered captivity from eight months to four years, being permitted to return to the United States at various periods. The apprentices and some of the officers were the first who were allowed to return; their absence from the United States was after an imprisonment of from six to eighteen months.

*678]

On the part of the libellants, it was alleged, that by arrangements between the Spanish commandant and Pollock, the cargo was smuggled on shore. By a sentence of a court, the vessel and cargo were sold, and the proceeds of the same were ordered to be deposited in the king's treasury, subject to an appeal interposed by the supercargo. Thus, either by the private arrangements between Pollock and the Spanish governor, or by the proceedings of the court, the voyage was broken up, and the ship and the whole of the cargo were sold. The cargo appeared to have been peculiarly adapted to the coast of Chili and Peru, and altogether unfit for the north-west coast of America or Canton. The libellants claimed wages from the time of the sailing of the Warren, to the time of their return to the United States, respectively; deducting the wages advanced, and any sum of money, received as wages, during absence.

The proceedings in the case, asserted by the libellants to be amply accounted for by various causes, were delayed from 1810 to 1819. In 1819, all the owners became insolvent; and, on the 13th of December 1819, Lemuel Taylor assigned to Robert Oliver the *spes recuperandi* of his interest in the Warren, her cargo, &c. On the 9th of November 1820, Smith & Buchanan assigned their interest in the Warren and cargo to Ellicott and Meredith, trustees, for the use of the Bank of the United States, at Baltimore; and on the 15th of May 1821, Hollins & McBlair assigned their interest in said vessel, cargo, &c., to the Union Bank of Maryland.

*679]

*The owners of the ship Warren and cargo having made application to the crown of Spain for the restoration of the proceeds of the same, which were, under the decree of the court condemning the same, to be deposited in the royal treasury; the following proceedings took place:

Copy of the Royal Order of Restitution.

Most excellent Sir:—In the month of September 1806, the ship called the Warren, belonging to Samuel Smith, Buchanan, Hollins, McBlair and Lemuel Taylor, of Baltimore, sailed from that port, under the command of Andrew Sterrett, and laden with sundry merchandise for Canton in China. In the month of December following, after the vessel and crew had experienced various misfortunes, they were in the latitude of Conception, in Chili; when finding it impossible to continue the voyage, they were obliged to take shel-

ter in some port contiguous to that of Talcahuana, on the 20th January 1807. The commander of the port gave the vessel permission to enter, which she had scarcely done, however, before she was taken possession of by troops, and her cargo seized, under the pretence of her being a smuggler. This was followed by a sentence for the confiscation and sale of the goods; which was carried into execution, notwithstanding the protest of the supercargo; and the proceeds, amounting to about $300,000, deposited in the royal chests, to await the decision of the appeal carried before and received by the Supreme Council of the Indies. Smith and his partners having received intelligence of this, made a complaint before the senate in Maryland, who looking only to the registers of the custom-house, from which it appeared that the vessel had cleared out for China, declared the confiscation unjust, and gave the complainants permission to detain by way of indemnity, any property which might be in that country belonging to the Spanish government. Don Luis de Onis, the Spanish minister in the United States, received unofficial information of this decision; and knowing that there had not been sufficient cause for the sentence of confiscation, and desiring to prevent the disagreeable consequences which might arise from claims, made an agreement with Smith and his companions that he would cause to be returned to them in this capital, the *amount of the proceeds of the cargo of the ship Warren, which had been deposited in the treasury; and that he would [*680 permit them to send out a vessel, laden with a small cargo of licit merchandise and some tobacco, upon which the customary royal duties were to be paid, for the purpose of prosecuting it; upon which they were to acknowledge themselves indemnified for all the losses and expenses resulting from the voyage. The king, having been gradually informed of what has been related, notwithstanding that the ministry here had received no intelligence of the confiscation in question, has thought proper, for good and prudential reasons, to ratify without delay the agreement made by the minister Onis with Smith, Buchanan and their companions; and has desired that instructions should be sent to your excellency, to have the ship Warren and her cargo, or the amount produced from their sale, delivered to the agents of those persons; and to permit them to import another small cargo of licit merchandise, and some leaf tobacco, upon which they must pay the royal duties, and take the value of it in silver or produce, paying duties in like manner. Which I notify to your excellency, by his majesty's orders, for your information; and in order that you may issue the necessary orders for its fulfilment. God preserve your excellency many years. Madrid, 13th June 1815.

To the Viceroy of Peru. LANDIZABAL.

PETITION.

Most excellent Sir :—We, Samuel Smith and Anthony Faulac, supercargo of the American ship Sydney, on behalf of the owners of the ship Warren and cargo, and by virtue of their power of attorney, which we formally exhibit, respectfully appear before your excellency, and say, that by a royal order of the 13th June 1815, his Catholic Majesty has ordered restitution to be made of the said ship Warren and her cargo; and notwithstanding that she was sentenced to be confiscated, has been pleased, upon just

and prudential considerations, to absolve her, and decree her restoration. Your excellency, in a decree of the 9th October 1815, commanded that the said royal order should be obeyed and fulfilled, and in order that the necessary measures conducive to the *restitution of ship and cargo might *681] be adopted, commanded the original order to be deposited in the archives, and a certified copy to be made of it, and annexed to the records on the case. The immediate execution of this royal order is much to be desired, under present circumstances; as it is necessary that we should return to the United States, where we must notify the result both to Don Luis de Onis, the Spanish minister plenipotentiary, and to the owners, for whom we are to recover the money from the royal treasury. For the fulfilment of the agreement, ratified by the Spanish sovereign, and of the decree of restitution sent to your excellency, there is nothing more requisite than the tenor of the royal order, which is sufficiently intelligible in its origin and object. Any delay will occasion a serious injury, and it was from his Catholic Majesty's desire to avoid this, that he ordered the restitution, even before he had received official notice of the confiscation. The ship Warren was sold in this capital; the purchaser's title to the property, which is the record of the proceedings on her confiscation, must, therefore, have been exhibited. The value of the cargo which his Catholic Majesty orders to be restored, is estimated in the royal order at near $300,000; which can by some means or other be procured; it being a matter of indifference to the owners, whether it was deposited in the chests here, or in any others of the kingdom. Under the impression, therefore, that restitution ought to be made by the royal treasury, without any further testimony than the appraisement of the vessel and cargo; in conformity with the just and wise considerations which induced his majesty to decree the restoration and delivery, we implore your excellency that, on view of the records relative to the sale of the ship Warren, and knowing the sum at which her cargo was valued; you will be pleased to draw a bill against the officers of the royal treasury, and represent to them the serious injuries which would result from any delay in fulfilling the royal order issued under such circumstances. Wherefore, we pray and supplicate your excellency, that considering as duly exhibited the power of attorney, and in consequence of what has been set forth; you will be pleased to order an authenticated copy of the royal order, the fulfilment of which is required, to be annexed to the records of the sale of the ship Warren, *and on view of them, issue the orders *682] for which we pray, as is just, and as we expect from your excellency's equity. Smith, Nicholas, Anthony Faulac.

Order.

Lima, 21st March 1817.

Let it be filed with the records of the subject, and be seen by his majesty's officer of the exchequer, and let the tribunal of accompts make a report.

Acebal. His Excellency's Rubrick.

Report.

Most excellent Sir:—The tribunal of accompts, in compliance with your excellency's order of this date, has examined the petition of Don Samuel Smith and Don Antonio Faulac, filed with the records which originated in

the letters written by the Spanish consul in Baltimore, respecting the fitting out in that port, of the ship Warren, for the purpose of carrying on an illicit commerce in these seas; and all that it can represent is, that the said vessel was captured off the coasts, or in some port of the kingdom of Chili, and all the proceedings in such cases had, without this government being informed of anything further than the sale of the vessel; which was sent hither for that purpose by the president of Chili; as will appear by his official letter of the 14th January 1808, registered in folio 22, and the proceeds deposited, at his request, to the credit of his treasury. The vessel was sold for the sum of $25,000, to Don Xavier Maria Aguirre, and the amount deposited in the royal chests in this capital, on the 4th of February 1819, and along with 263,285 dollars, six reals, which had been received from various sources on deposit to the credit of the Chilian treasury, was remitted to the Peninsula, in the ships Primero and Joaquina, in consequence of an official letter from the president, of the 12th April 1809, and in obedience to an order of this viceregal government, dated 13th May, of the same year. Authenticated copies of which are inclosed, along with an account, No. 585, from the office of the royal chests in this capital. Your excellency, on *view of all this, and of the royal order of the 13th June 1815, in which the proceeds of the vessel and cargo are ordered to be restored [*683 to the claimants, will resolve whatever you may deem most conducive to the royal service. Tribunal, 21st May 1817.

The Marquis de Valdeluies,
Leon de Astolaquine,
Joaquim Bonet.

Report.

Most excellent Sir:—The officer of the exchequer having examined the petition of Samuel Smith, and his agents for the ship Warren, relative to the royal order of the 13th June 1815, in which his majesty commands that restitution should be made to them in this capital, of the proceeds of the cargo of the said vessel, which were deposited here, states, that, from the records of the only proceedings in the case which were had before this government, which are ready to be exhibited, it appears, that the seizure and confiscation took place in Chili, and that the amount of the proceeds of the vessel only was deposited in the chests here. It results, therefore, that the supposition in the royal order, that the proceeds of the cargo had been deposited here, is erroneous. And as, moreover, the impoverished condition of this treasury, and its indispensable disbursements, will not allow it to refund so large an amount; and as the royal order has so far been complied with as to permit the entrance of the vessel which they brought here; your excellency might find it expedient to give his majesty a knowledge of these facts, by sending him an authenticated copy of the records, in order that he may determine according to his sovereign pleasure.

Lima, 24th May 1817. Pareja.

Order.

Lima, 3d June 1817.

Having seen the foregoing, let the records be carried to the superior

board of the royal revenue; in order that it may determine as soon as possible what course ought to be pursued.

ACEBAL. His Excellency's Rubrick.

*684] *The owners of the ship Warren and cargo, and their assignees, presented memorials for indemnity to the commissioners of the United States, appointed under the Florida treaty of 22d February 1819, and thereupon the commissioners made the following award:

24th April 1824.

Ship WARREN, EVANS: Thomas Ellicott and others, claimants.

The board having heretofore received, examined and allowed this claim as valid, this day proceeded to ascertain the amount thereof; and do award to the claimants the sum of $184,162.35 (less the unclaimed interest of Bonnifils, a foreigner, of $15,011.37), in full for the loss sustained for the seizure, confiscation and sale of this vessel and cargo, by the Spanish authorities at Talcahuana, in 1806; the proceeds of which sale were ordered to be paid to the claimants, by his Catholic Majesty, in 1815, which sum is to be thus divided:

No. 471.—To Robert and John Oliver, as trustees of Lemuel Taylor,	$63,920 88
Ellicott and Meredith, as trustees of Smith & Buchanan,	45,034 14
Union Bank of Maryland, as trustees of Hollins & McBlair,	40,030 34
John Stiles, as executor of George Stiles,	20,015 17
The unclaimed interest of Bonnifils,	15,011 37
	$184,011 90

True copy from the record,

JOSEPH FORREST, Clerk.

Eight and one-third per cent., or one-twelfth, in all cases, was abated from the gross amount. The items forming the aggregate sum allowed by the commissioners in the case of the ship Warren, Evans, master, were as follows:

*685] *For the value of the vessel, $25,000 00
Cargo, 125,131 93
Taylor's adventure, 4,025 83
Premium, twelve per cent., 16,144 59
Freight, one-third off, 13,860 00

$184,162 35
Deduct therefrom, 150 45

$184,011 90

The last final report made to the department of state of the United States, on the 8th of June 1824, by the commissioners under the Florida treaty, contained the following general observations:

"In making such allowances to underwriters, the commission was well aware, that its effects would be to allow them more than they had lost, by the amount of the premium received from the party insured, which premium he had voluntarily paid, and must have lost in any event; so too,

in making the allowance of freight, the commission was well aware, that the full wages of seamen had not been paid, probably, in any of the cases where such freight was given. But in these and many other cases which occurred, the board having ascertained the full amount of the loss, distributed this amount so ascertained, amongst the different parties claiming it before them, and seeming to have a right to receive it (no matter in what character); without deciding or believing itself possessed of the authority to decide upon the merits of conflicting claims to the same subject. To whom, of right, the sum thus awarded, when paid, may belong, or for whom, how, or in what degree, the receiver ought to be regarded as a trustee of the sum received, were questions depending upon the municipal laws of the different states of the Union; the application of which to the facts existing in any case, the board did not feel itself authorized to make; and therefore, abstained from instituting any inquiry as to the facts necessary to such a decision. These remarks the commission think it proper thus to state, lest their award may be considered as barring and finally settling pretensions, into which this board have, in truth, neither made, or believed itself authorized to make, any examination whatever; but have purposely left open, for the adjudication of others, who will have better means of ascertaining the facts."

*Answers were put in by the owner of the Warren and cargo. After the assignments made by them, answers were filed by the several assignees. [*686

The answer of Robert Oliver denied the jurisdiction of the district court of the United States over the funds in his hands, under the assignment. It stated the assignment made to him by Lemuel Taylor, on the 13th of December 1819, of his interest in the ship and cargo; and that the claim was prosecuted before the commissioners under the Florida treaty; and the net sum of $58,594.32 was received; all knowledge of any agreement between the owners of the Warren and cargo with the seamen was denied.

The Bank of the United States answered, and denied the jurisdiction of the court; and also all knowledge of the alleged contract between the original parties to the cause. The answer stated, that the firm of Smith & Buchanan executed a deed of trust to Ellicott and Meredith on the 9th of November 1820, being an assignment of their interest in the ship and cargo, in trust for the Bank of the United States, in the first instance; and that the trustees had received about $50,000. That at May term 1825, of the circuit court of the United States, the bank filed a bill in equity, calling on the trustees to pay them the money so received; and the same was paid into court: and the libellants filed a petition in the cause praying the court to retain for them so much of the said sum as they should prove themselves entitled to. The circuit court directed the sum received by the trustees to be deposited in the Bank of the United States.

Ellicott and Meredith, assignees in trust of Smith & Buchanan, answered, stating the assignment, and the payment of the money received by them. The Union Bank of Maryland answered, protesting against the jurisdiction of the court, and stating the assignment to the bank by Hollins & McBlair, and that they were ignorant of the claims of the libellants.

On the 16th of March 1827, the district court dismissed the libel and petition; and the libellants appealed to the circuit court. In that court, on

the 20th of May 1828, the decree of the circuit court was affirmed, and the libellants appealed to this court. It was understood, that both in the district and circuit courts, the decrees were entered *pro forma.*

*687] *The case was argued by *Mayer* and *Hoffman*, for the appellants; and by *Taney* and *Wirt*, for the appellees.

Hoffman and *Mayer*, for the appellants:—1. The doctrine that "freight is the mother of wages" is neither absolutely and universally, nor even generally true. Vessels may, by the plan of the particular enterprise, sail in ballast, for the whole or the greater part of a voyage; so, in some cases, a single package of merchandise might be taken on freight; and it would be strange to say, that that should be the exclusive pledge of the sailor's right: and it sometimes happens, that the earning of freight is prevented by a blockade, or by the misconduct of the master or owners; and yet, in such cases, wages have been allowed, without regard to the fact of freight earned. If the doctrine of the maxim were true, seamen could not be allowed wages out of savings of wreck; and it is now settled, that they are allowed as wages, and not as salvage. The "safety of the ship," another branch of the maxim, is not essential to the claim of wages; because they are awarded, even where the ship has been condemned, if the cargo be restored. The true principle of the seamen's right to wages must be, that they contract to serve to insure the safety of the ship; to bring the *res* safe into the hands of her owners: for which the owners are to pay, if no *vis major* shall occur to take the vessel out of their hands, or break up the voyage; the wages-claim being incident to the ship and the voyage, and not to the freight. Where freight is earned, the seamen, the law decides, ought to have their wages; but the converse of the rule is not true, as is observed by Lord Stowell in *The Neptune*, 1 Hagg. Adm. 232. These views are sustained by the following cases: 2 Pet. Adm. 426; 2 Mason 319; 3 Mass. 563; 3 Kent's Com. 145; Anthon's N. P. 32.

2. The owners are liable for wages, where they or the master or their agents are in fault, either negligently or wilfully, in reference to the ship or the voyage: as, where they have deviated from the voyage specified in the seamen's contract; or have been guilty of contraband trade, not in the view of both the parties by the contract, and the vessel is captured and lost; where the seamen are separated, by cruelty, or without cause, from the ship; and in all such instances, the seamen earn their wages, without regard to the fact of the ship's safety. *688] **Hoyt* v. *Wildfire*, 3 Johns. 518; 2 Pet. Adm. 261, 266, 403, 420, 437; 9 Johns. 138, 227; 1 Pet. Adm. 51; 1 Mason 51, 151; Pet. C. C. 142; 2 Kent's Com. 144; 2 Pet. Adm. 415; Abbott 442–4, 748, 434–6; 11 Johns. 56; Bee 395, 402. *The Countess of Harcourt*, 1 Hagg. 250; Ibid. 347; 2 Rob. 216; 2 Gallis. 477; 11 Mass. 545; 3 Ibid. 472; Anthon's N. P. 32. And so where a vessel is unseaworthy, at the commencement; and the owners are only constructively in fault. Abbott 447, 450, 457; 2 Pet. Adm. 266. And in all these instances, as in the case of sickness and expenses attending it, the seamen receive damages in the shape of wages; and the claim is treated precisely as a claim for wages. 1 Mason 51; 2 Ibid. 541; 1 Dods. 37; 2 Gallis. 164; Abbott 443–4. The rule is the same, where a voyage is broken up or abandoned, before being begun; and damages are recovered as wages.

Abbott 449, 450, *notis;* 2 Pet. Adm. 266; Pothier's Mar. Cont. 120, 125. The ship-owners are implicated in the supercargo's conduct, even where they do not own the cargo; because the freighter is answerable over to the owners for the supercargo's acts. Pothier's Mar. Cont. 122, § 201; Abbott 280; 3 Mass. 472; Bee 369.

3. Where seamen suffer in the service of the vessel, whether separated or not from her, their wages continue, though their actual labor be suspended, and though the vessel in the meantime incur heavy loss from the cause which separates the seamen from the vessel, or occasions their suffering. 1 Pet. Adm. 115, 123, 128; 2 Ibid. 384; 3 Kent's Com. 144–5; Bee 135; *Beale* v. *Thompson*, 4 East 546; s. c. 1 Dow P. C. 299; 2 Mass. 39, 44; 12 Johns. 324. The admiralty closely scans the actions of seamen; and even protects them from the consequences of such as are inadvertently made. 3 Kent's Com. 136, 141, 150, 154; 1 Hagg. 355, 357; Abbott 435, 449; 1 Pet. Cond. 135, 136, 187.

4. The seamen's claim is not in law connected with the contract of affreightment. It suffers no diminution from any *delays, or actual loss of profits of the voyage to the ship-owners, in freight, or otherwise. 1 Dow 299; 4 East 546; 11 Mass. 545; 14 Ibid. 74. And so little are the seamen, in their right to wages, identified with the enterprise, that they do not contribute to general average. 2 Gallis. 182. But as their right is connected with the ship, they contribute to the expense of her ransom; and, perhaps, might be bound to contribution, on the same principle, in case of re-capture. The cases of seamen earning wages, where there has been a capture and re-capture, or a capture, condemnation and ultimate restoration of the ship, all show that the seaman is legally interested for his wages, in no concern of the voyage, except the ship's safety. And further, it is in these cases settled: 1st. That it is the duty of the seamen to remain with the vessel, until the first adjudication, and until the hope of recovery shall thus appear to be gone; and when the vessel is sold and restored, they are paid their wages out of the proceeds, up to the time they so adhere to the vessel. 2d. That where the vessel is condemned, and that sentence reversed, and freight is decreed, or damages in lieu of freight, wages are payable for the time of the actual service of the seamen. 12 Johns. 324; 2 Gallis. 164; Bee 135; 2 Mason 161; 1 Ibid. 45; 1 Pet. Adm. 128; 14 Mass. 72; Abbott 459–63; 2 Browne (Pa.) 335; 3 Kent's Com. 149–50; 4 East 546; 1 Dow P. C. 299. Further, to show that the seamen's contract is in no wise dependent on the freight, adventure or interest; the cases may be cited, where their wages have been awarded, though the vessel went in ballast, or in quest of freight, and was disappointed; and where it has been settled, that the port of destination is, in legal effect, the port of delivery, if no cargo be in fact taken thither. 1 Hagg. 233; Abbott 447, 300; 1 Pet. Adm. 187, in note; 2 Gallis. 175; 2 Mason 319; 7 Taunt. 319. And so, where vessel and cargo belong to the same persons, no freight actually and literally is earned, and yet wages are due. 3 Kent's Com. 149.

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5. The positions stated being sustained, the appellants claim to be paid the full amount of wages, from the commencement of the voyage, throughout the whole term of imprisonment, and of *absence from the United States. It is contended, that this amount ought to be paid out of the fund now represented in court, without regard to the pretensions of the

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holders of it, as respects their assignors; or to the fact of all the holders of the means derived from the treaty, not being before the court in this case. The claim pervades the whole and every part of the fund recovered; and those before the court may recover the proper contributory portion from such as are not parties; as, in cases of judgment, binding several pieces of land, and executed entirely upon one; or where, as in Pothier's Mar. Cont. 122, § 201, the merchant occasions a loss, and the ship-owner has to pay the seamen's wages, because of his claim over against the merchant. Abbott 245; 1 Stark. 490; 2 Eng. C. L. 480.

6. The resources of the seamen for the payment of their wages are numerous. 1st. They have the ship as security. Their lien on it is of a peculiar and enduring character: a mortgage created by the law; which places the ship in the owner's hands, as a trustee for the seamen's claim. 2 Dods. 13; 1 Pet. Adm. 194, note; Roccus 91; 1 Hagg. 238; 4 Mass. 563. Although bottomry liens may be lost by delay, it is not so with the seamen's lien. Abbott 131. *Laches* never divests the lien, although staleness may destroy the claim. *Willard* v. *Dorr*, 3 Mason 91, 161. The lien is paramount to all bottomry liens. *The Sidney*, 2 Dods. 13; Abbott 131. And even to a claim of forfeiture to the government. *The St. Jago de Cuba*, 9 Wheat. 409. The result from these and other cases is, that the seamen's lien on the ship is not an ordinary lien, like that of a factor, or a mere right to seize or hold; but that they have a *quasi* proprietary interest, co-extensive with their right of wages; and operating as a judgment binding lands, controls and appropriates the estate in them to the creditor's benefit. 2d. The seamen has a lien on the freight for his wages. 1 Pet. Adm. 194, 130; 2 Ibid. 277; 3 Mason 163. The master has a lien on the freight for his advances, and for his liabilities to the seamen for their wages. Abbott 476; 3 Mason 255.

*691] 3d. He has a lien on the cargo to the extent of freight *actually carried, where the owner of the vessel is not the owner of the cargo; or to the extent of what would be a reasonable freight, where the same person is owner of ship and cargo. 1 Gallis. 164.

7. We are next to ascertain, whether these liens extend in this case to the proceeds of these three several specific securities of the seamen; and can reach those proceeds in the hand of assignees like the appellees, who hold the funds in question. The thing assigned was a mere *chose in action*, and a claim for that in which the sailor had a clear interest as a *cestui que trust;* and the object of the assignment was to satisfy antecedent debts, not contracted on the faith of the assignment, and for which no release, as a consideration for the assignment, was given. The owners of the property could assign only an interest commensurate with their right; and only so far as the sailor's lien gave the subject free to the owners, had they any right. The lien of the seaman on the thing is fixed and intrinsic; and announced by the law on the very face of the thing to exist: and thus carrying notice of it to all who claim any benefit out of the specific object; as much so as the law regards all assignees of a *chose in action* as owner of the equities between the original parties to it, and implicated in them. *Norton* v. *Rose*, 2 Wash. 233. A *bona fide* purchaser, without notice, takes the thing clear of all latent equities. 2 Johns. Ch. 443; *Redfern* v. *Ferrier*, 1 Dow P. C. 40. But a seaman's lien is not a latent equity. To show that a lien which is intrinsic, is a legal right, and not a mere transient and accidental equity,

and is not to be extinguished by assignment, the following cases were cited: 3 Meriv. 85, 99, 104, 106; *Mann* v. *Shifner*, 2 East 523; *United States* v. *Sturges*, 1 Paine 535; and also, Abbott 245, in notes; *The Flora*, 1 Hagg. 298; *The St. Jago de Cuba*, 9 Wheat. 409.

No actual notice to the assignees then was necessary; the notification of the seamen's lien being furnished by the subject itself. The claim assigned being the effective proceeds of that to which the lien adhered, notice was imparted from the very source of the assignees' title; and it was by law, and *so necessarily known to them, because published by the law as a legal right to the whole world, that the claim could not be prosecuted for [*692 the exclusive use of the owners of the ship. There was, however, notice here to the assignees, in fact, by the history of the claim, which is connected with its title; and it was like the case, where the tracing of the title may carry the party to the view of a particular right or circumstance, of which the law then imputes notice to him. There was, at least, enough in the events on which the claim arose, to put the party on inquiry, and so to affect him with notice. 1 Johns. Ch. 302; 8 Ibid. 345; 5 Ibid. 427; 7 Cranch 507, 509. There was, too, a *lis pendens*, to give notice of the seamen's pretensions; the suit of the seamen against the owners at the period of the assignments. 1 Johns. Ch; 566; 3 Mason 187; 2 Rand. 93. Also, 3 Kent's Com. 175; Abbott 244, 245; *Campbell* v. *Thompson*, 1 Stark. 490; Roccus, note 91; 1 Dods. 31. 2 Ibid. 13; 2 Gallis. 360; 4 Cranch 332; 2 Brown's Civ. & Adm. 143.

Having thus identified the assignees with the owners, it is to be seen, whether there is anything in the nature of the seamen's present claim, or of the fund in question, which prevents a lien arising, or has intercepted that lien. It may be premised, that the means from which satisfaction is sought, if referred to the royal act, may be regarded as flowing rather from an act of state, than a judicial decision. The legal nature of the fund is not varied by this circumstance, as concerns the sailor's rights. *Beale* v. *Thompson*, 4 East 561.

8. It cannot be said, that looking to the fund in question, the appellants are endeavoring to get the benefit of a matter of damages to which the lien of the seamen cannot attach, or a mere matter of indemnification, collateral entirely to the *res*. Whenever the specific thing is not restored, the satisfaction, technically speaking, is regarded as damages; but there is no reason why the moneys which afford that satisfaction may not be regarded as the effective substitute of the thing. *Manro* v. *Almeida*, 10 Wheat. 471. In case of reversal of condemnation of property, and an intermediate sale, the restitution of the proceeds of sale is virtually only a satisfaction in damages, and is so considered; damages being contradistinguished from the specific thing. *Willard* v. *Dorr*, 3 *Mason 164. So it is said, in 1 Pet. 130, [*693 that wages shall be allowed in the case there put, "if freight be awarded, or damages in lieu of it." There is nothing, therefore, in the mere term of damages, so vague and transitory, that they can be identified in law to nothing specific. Besides, if there be but damages in question, they are fixed and liquidated by the royal order of Spain, in 1815, before the assignment; and in that award, we held a vested interest, although it be even admitted, that only a claim was by it established. The commissioners under the treaty with Spain merely executed the royal order; affording only the satisfaction which, under that order, the officers of Spain should have

afforded. There was a sufficient grievance for the redress of the commissioners, in the fact that Spain had, by the royal order, directed the satisfaction, and that the authorities had not obeyed the direction. The merits of the case, antecedent to the royal order, need not have been presented to the commissioners. The order, and the commissioners, in their award, speak, too, only of a restitution of "proceeds;" so that the appellants have the benefit of that phrase for the moneys we claim, if there be any force in it. The commissioners awarded what the king of Spain had directed to be done, and because it had been so directed. Our interest in the case, therefore, relates back to the date of the royal order, overreaching the assignments.

It may be said, that this is an attempt to follow a matter of damages, as would be the case of a seaman claiming wages out of a recovery upon an insurance of a vessel, when she has been totally lost; or out of a recovery of damages for a collision, when, by that circumstance, a vessel has been lost. In both such cases, it is admitted, as a general rule, that the seaman would be entitled to no satisfaction. 2 Pet. Adm. 276; 11 Johns. 279; Abbott 257, 457; 18 Johns. 257. The difficulty in the way of the seaman, in either of the supposed analogous cases, is not that the fund recovered cannot be considered as the substitute of the *res*, but only that the seaman has no claim against the owner, for which either the *res*, or the fund, can be a collateral recourse; for in every case of a total loss of the *res*, if the equivalent *res* be made liable, it is only under a charge or lien that must be
*694] incidental to a *personal right; a claim against the owner. Supposing, therefore, the perfect innocence of the owner respecting the loss of the vessel, in the two cases, it would appear, that the very event which puts an end to the seamen's claim, gives rise to a collateral demand of the owners. Could the success of the owners in that demand revive the already extinct claim of the seamen? Can a lien exist, unless to support and effectuate a claim? Is not, in the cases supposed, the right or complaint of the owner founded on the reason that he has been prevented from attaining that benefit, which, after deduction of expenses, including, of course, seamen's wages, would have resulted to him from the voyage? The claim of the seamen being gone, by the fact of the disaster, the recovery can have no respect to it as an incumbent burden on the owners. What, then, is the portion of the recovery that answers to the seamen's wages? In the case of the insurance recovery, it was further observed, that to make the seamen's wages good out of the fund recovered, would (where the claim of the seamen is supposed to be gone) be allowing the seamen in effect to insure their wages—which is not permitted.

In 3 Mass. 443, a satisfaction of a claim, as that here in question, under a treaty, is regarded as salvage. Courts of admiralty are courts of equity, in reference to all rules of interpretation, and as regards all constructions. They decide *ex æquo et bono;* and require but certainty to guide them, and substance to rest upon. Abbott 435; 3 Mason 16, 17, 263; Abbott 435. And all these elements are here found, to connect the fund in question with the original *res*.

9. It may be said, that viewing the fund here as proceeds, it has lost the legal qualities of the specific thing; that it is turned into mere currency, and not specifically liable, any more than would be the general means of the owners. It is a well-established rule of common law and equity, that the

proceeds or pecuniary result of the thing is regarded as the representative of the thing; as the thing itself: and that money may be specifically appropriated and bound, if it can be traced, and, as a fund, identified. And such is the principle, too, of admiralty. 1 Johns. Ch. 119; 2 Ibid. 444; 4 Ibid. 136; 7 Ibid. 52; 6 Ibid. *360; 2 East 523; *De Wolf* v. *Harris*, 4 Mason 515; *Smart* v. *Wolff*, 3 T. R. 323; Parke 53; Jacobsen's Sea Laws 276; *Hunter* v. *Prinsep*, 10 East 378; 1 Day 193; 4 Rob. 302, 314, 347; 2 Ibid. 343; Cowp. 251, 271; 15 Mass. 408; 1 Burr. 489; 6 Price 309; 1 Camp. 251; 3 Bos. & Pull. 449; 5 Barn. & Ald. 27; 1 P. Wms. 737; 1 Atk. 94, 102, 232; 2 Vern. 566; Co. Bank. Law 556; 1 T. R. 26, 747; 3 Mason 238; 1 Ibid. 99; *United States* v. *Peters*, 5 Cranch 115. Assuming that, in point of law, the assignees stand identified with the owners, in reference to the fund, which the appellants heretofore endeavored to establish; it is clear, that the fund is affected by the lien of our demand as the *res* from which it springs would be. [*695

10. It may be said, however, that whatever may be the principle as to the lien on the proceeds, yet that the admiralty cannot carry its jurisdiction to the proceeds which have been produced on land, and by distinct operations there; and that the lien or specific claim can only be effectuated in a court of equity. It is difficult to see what greater advantages that court could afford to any of the parties, especially, since an admiralty court, as has been shown, acts as a court of equity; and where a court of admiralty has possession of a marine subject, as a marine claim, or the *res* involved in it, it will, by its incidental jurisdiction, go on as a court of equity to distribute a fund among claimants; over whose commands it could pretend to no original jurisdiction. *The Packet*, 3 Mason 263; 4 Ibid. 386, 387; 1 Hagg. 356–7. The assignees are here amenable to this jurisdiction, as the possessors of the fund, as to which they are liable equally with the fund itself. 1 Gallis. 75; 1 Show. 177; 3 T. R. 332; 10 Wheat. 497; 1 Mason 99; 7 Ves. 593; 10 Wheat. 473. The fund, as the result of the thing, is, like the thing, subject to the admiralty jurisdiction. This grows out of the powers of incidental judicature, belonging to a court of admiralty. This incidental power necessarily attaches to all jurisdictions. As regards the admiralty, it is not confined to prize jurisdiction. 2 Wheat. app'x 2; 2 Bro. Civ. & Adm. 101; 8 Cranch 138. *It once being admitted, that the fund is in law liable for the claim, it is clear from the authorities, that the admiralty must have jurisdiction to apply those means; since it is established, that if the original claim be within the admiralty cognisance, all that is necessary to enforce or satisfy that claim, whether as respects persons or property, is within the jurisdiction; and that without regard to locality. 3 T. R. 333, 344; 1 Pet. Adm. 126, 232; 2 Ibid. 309, 324; Abbott 483; 4 Cranch 431; 2 Gallis. 435, 436, 446, 462; 1 Vent. 173, 308; Hardr. 473; 1 Ld. Raym. 22, 271; 2 Ibid. 1044, 1285; 12 Mod. 16; 2 Lev. 25; Cro. Eliz. 685; Roll. Abr. 533; 12 Co. 97; 1 Lev. 243; 3 T. R. 207; Bee 99, 370, 404; Carth. 499; 2 Mason 541; 3 Ibid. 255; 4 Ibid. 380; 1 Ibid. 99; 1 Hagg. 298; 9 Wheat. 409; 2 Price 125; 10 Wheat. 497; 7 Ves. 593; 2 Str. 761; 3 Mass. 161. [*696

11. It may be objected, however, that the royal act in the case is a judicial declaration of the innocence of the owners, and cannot be averred against by these libellants; but is conclusive against their present claim,

which is founded on the idea of the breach of contract by the owners; a conclusion directly the reverse of the royal decision: and secondly, that the libellants cannot contradict that decision, because they seek the benefit of a fund which flows from it, and of a retribution which could have been awarded only to owners free of the delinquency charged in the libel. On these objections, it may be observed, that the act of the king of Spain, according to its purport, may fairly be deemed only a bounty prescribed for prudential reasons, and prompted by motives of state, under the fancied power of reprisals threatened; as the royal missive says, to be exercised by the senate of Maryland. It professes not to be an examination of the facts of the case, nor to know anything of the confiscation that had taken place in Chili; and declares, in effect, that the proceeding in the cause was, at the time of the royal award, before the council of the Indies, in the regular order of judicial investigation.

It is contended, on the other side, that the royal decree is a judicial decree, and *in rem*, and like a prize court decree, and in its conclusive scope, embracing all the world. *Admitting that it is a judicial decree, *697] and that the king sat as prize-judge in pronouncing it; it will still be inoperative as against us, when all the principles are taken into view which regulate the effect of such decrees. It is a general principle, that judgments are binding only on those who are parties to them; and it is said by Justice Washington, in 4 Cranch 434, that the conclusiveness of foreign sentences was not to be enforced as a departure from that general principle; but that that, as understood and applied, was only a sequel of that very principle. The sailors were not parties to this supposed decree of Spain, actually; and they were not so constructively, if the views presented by us be correct, as to the distinctness of the claim involved in the Spanish cause, and that now in question. In prize sentences, and in exchequer decrees, all are supposed to be parties, who have a legal interest in the questions directly in the cause; and all such are allowed to intervene, and are, therefore, regarded as actually parties; whether they avail themselves of their privileges, or forbear to do so. Hardr. 194; 2 W. Bl. 977; 5 T. R. 255; 13 Johns. 561; 3 Wheat. 246, 315; *The Apollon*, 9 Wheat. 362; 2 Evans's Pothier, 350–64. Hence, the conclusiveness of these judicial acts; and such is the standard and limit of their operation; extensive as it is, but not unbounded. This is the position, in effect, of Chief Justice Marshall, in 9 Cranch 126. No one is bound by a judgment who was not actually a party to it, or might have made himself so, is the principle of common law, as to judgments generally; and we see, is not deviated from, in the case of the sentences and decrees now in question. 2 Stark. 191. So, at common law, no judgment is conclusive beyond the point decided. 2 Bac. Abr. 630; 1 Paine 552. So, a prize sentence or a decree of an ecclesiastical court, is conclusive against all legally concerned in the point of the decree, only as to the fact concluded, on which the decree is founded; and only as regards the direct operation of the decree or sentence. 2 Evans's Pothier 355, 356; 8 T. R. 192.

The result of the decisions then is, that in fixing the conclusive operation of these sentences, regard must be had to the particular right in ques- tion; and the sentence is evidence of the fact on which it rests, only *698] so far as the fact bears any *relation to that right. Hence, these po-

sitions have been determined: 1st. That nothing collateral is to be inferred from these sentences. 1 Salk. 290; 11 St. Tr. 261; 2 Stark. 234. 2d. That nothing is considered as established by them, except that without which they could not have been pronounced; that is, the points of right, and the points of fact, as related to the questions of the right specially under adjudication. 3 Cranch 488; *Jennings* v. *Carson*, 4 Ibid. 2; *The Mary*, 9 Ibid. 126; *Simms, administrator*, v. *Slacum*, 3 Ibid. 300; *Ammidon* v. *Smith*, 1 Wheat. 447. 3d. That courts, when a sentence of this kind is invoked, will examine into all the facts on which it is founded; except only that concluded point of fact, perhaps, which is the direct and essential basis of the sentence. 4 Cranch 185; 6 Ibid. 29. These positions seem to follow from the principles of justice that should regulate judgments; and without them, there would, in the efficacy of foreign sentences, be a departure from the fair rule of law that judgments shall bind only parties; and Mr. Justice WASHINGTON's remark, already referred to, as to the force of these sentences, would not be sustained.

If the act of the King of Spain does not conclude the rights of the appellants, it cannot be pretended, that such can be the effect of the award of the commissioners under the Florida treaty. That award, we have endeavored to show, was nothing more than the execution of the royal order; or rather was founded on the conclusiveness of that royal order, as a testimonial of the right of the owners to redress at the hands of Spain. And the disobedience of the Spanish authorities, was, of itself, a grievance, in behalf of which the commissioners would interpose; without looking into the circumstances of the owner's case, as that stood when under judgment before the King of Spain. Consequently, the award and the royal order are to every effect identified; and are as much so, as the judgment of the appellate tribunal is identified with that of the original. A reference to the report of the commissioners of their proceedings, which was made at the close of the commission, will support these views, as to the light in which they regarded the *acts of the government, or of the judicial authorities of Spain in the particular cases. With regard, however, to the effect of these awards, this court has already determined, that the equities of none shall be precluded by them, whose pretensions have not been actually and directly passed upon by the awards. *Comegys* v. *Vasse*, 1 Pet. 212–13. [*699

It is said, finally, that any recovery of the libellants in this cause must be limited to the amount of freight of the voyage, and to that amount as adjusted by the award of the commissioners. As regards the effect of that adjustment, having shown that our claim is not under the royal act, nor under the award, it can be subject to no limitation by virtue of either. The freight awarded, if it be supposed to have included in its estimate the claim of seamen's wages, cannot be understood to have considered the enhanced wages, nor the claim for the long confinement in prison, and the whole period of suspension of our labors; which, though regarded as wages in admiralty, are intrinsically damages. The award, as concerns the freight, cannot be considered, then, as involving an ascertainment of the amount of our claim; and the freight fund is not, consequently, to be regarded, as our opponents' proposition would view it, a trust fund, of which only a part belongs to us; and that part regulated by the proportion which our wages might bear to the whole expenses of the voyage. On the other hand, there is no principle

which would make even the full amount of the freight, the limit of our recovery. If the owners had been perfectly innocent, and our claim were not founded, for almost the whole amount, on their wrong, there might be reason for saying, that our recovery should diminish in proportion to the deficiency of freight awarded to the owners; as might, in such a case, be inferred to be the proper rule, from 3 Mason 163. But, even in such a case, there would be nothing to exonerate the ship from the charge; which by all is admitted, to be subject to the lien. Freight, as clearly, we think, is subject to this lien; and we hold, that, at least, freight and ship are here chargeable; but that under the decision of Judge WARE, and the positive authorities to which he refers, the cargo also is liable to the extent of a reasonable freight. The evidence in this cause shows, that the fair freight
*700] *on such a voyage as the Warren's, would vastly have exceeded the amount granted by the commissioners. If their award be not binding against our rights, as we have endeavored to show, why should their estimate of the freight supersede all the evidence adduced to show its proper amount? If the owners of the ship had not owned the cargo, and a freight had been actually charged on it, our pretensions could not have transcended the value of the ship and of the freight, as charged; but ship and cargo belonging to the same persons, the freight is but a speculative item; and the amount is to be determined by evidence such as we have adduced, and on the supposition of the ship-owners not owning the cargo. The proceeds of the cargo, it is always to be presumed, will pay all the freight and expenses attending it. Whatever sum, therefore, the commissioners have failed to allow, less than the fair charge of freight, is to be considered as part of the proceeds of cargo allowed for. To the extent of that reasonable freight, therefore, we should be permitted to be satisfied out of the freight awarded, and out of the proceeds of cargo allowed. Unconnected as the mariner's contract has been shown to be with the contract of affreightment, it seems strange, that our claim is to be commensurate only with the amount of freight; and that, too, awarded by a tribunal whose act is in no wise conclusive, to any extent, against us, as regards the merits of our claim.

Taney and *Wirt*, for the assignees, appellees, stated, that the assignees, for whom alone they appeared, were not interested in controverting the allegations of the illegality of the Warren's voyage, or the fraud charged to have been practised upon the libellants by the owners; and those points of fact would, therefore, not be contested, but, as concern the assignees, may be deemed to be conceded. And the only points of law which would be controverted among those presented in the statement of the appellants, are those which are involved in the following propositions, on which alone they should insist: 1. That the fund received by the assignees under the award of the commissioners, as stated in the record, is not liable, in their hands,
*701] for the wages claimed, or any part of them. *2. If the fund in the hands of the assignees be liable for the wages or any part of them; the admiralty court, in its character of an instance court, has not jurisdiction to compel payment. 3. If the fund in the hands of the assignees be liable, and the court of admiralty have jurisdiction to enforce it, the libellants are entitled to recover only such proportion of the sum awarded for freight, as was given as a compensation for wages.

The claim originally presented in this case was against the owners personally. It was founded on no idea of a lien. It asserted no right against the ship, that having been condemned, and the lien gone ; nor did it assume that any freight had been or would be earned, or that any restitution would or might be made by Spain. The pretension of the claimants had no reference to any restoration by Spain, until after the treaty was, in 1819, entered into with Spain. The assignments to the appellees (who alone are here represented) were made in 1819, 1820 and 1821. They are absolute ; without any reservation for the seamen's claims. The libel alleges no notice to the assignees of these claims ; and no contract between the assignees and sailors is pretended to exist. The original proceedings pursue a personal remedy ; and the amended libel purposes to enforce the claim against a fund, under an asserted lien which is to overreach the assignments. These claims are at war with each other ; and the latter cannot be incident to the former.

1. The fund in question accrues under that section of the treaty with Spain (the Florida treaty, § 9) which establishes indemnification for unlawful seizures ; the United States being bound, by the 11th section, to pay the compensation. This Spain owed as a debt to our citizens ; and she placed funds in the hands of the United States to pay it ; thus making the latter trustees for the claims of a particular description ; for claims, among others, arising from unlawful seizures. The commissioners of claims under the treaty have decided the seizure in this case to be unlawful ; but, admitting the inquiry to be yet open, and that this court should decide the seizure in Chili to have been lawful, what claim would the seamen have to this fund which was to pay debts of which seamen's wages was not one? *These seamen had no claim on Spain ; and the fund which the [*702
treaty furnished belongs only to persons who had claims against her ; and a decision that the voyage was illegal, or that the royal decree was obtained by fraud, would create no right for the seamen. Nor would they derive any claim from the royal decree, if considered as an act of munificence. But the only ground on which their claim can colorably be set up, is the illegality of the seizure, and that there has been no change of property ; all which is contradictory to the principle on which the fund has been awarded, and which must determine its distribution. Upon the cases in 1 Bos. & Pul. 3, 296, and 5 T. R. 562, cited in answer to these views, it is to be observed, that there the fund was admitted to have been received for the benefit of the plaintiffs ; and therefore, the court would not allow the inquiry into the illegal source of it.

If the fund be the result of fraud, in imposing on the King of Spain, this court will not touch it. If thus produced, it does not belong to any of the parties now before the court, but should have been distributed among the other claimants under the treaty ; the treaty not having furnished a full indemnification. It is immaterial, whether the seamen were concerned or not in the fraud, so far as respects the present question ; but the case shows that they were induced to abstain from appearing before the commissioners in opposition to the assignees. If the fund was the product of fraud, it does not represent the *res ipsa ;* nor is it a case, as presented, where there could be a *spes recuperandi*, if the voyage was unlawful and the capture legal. All this might be open to inquiry, if the proceedings were against the own-

ers. The award of the commissioners is, however, conclusive, and we cannot go behind it. *Comegys* v. *Vasse*, 1 Pet. 193. The libel, in 1810, against the owners, *in personam*, was proper; and cannot assume a different shape when the fund comes into existence. The ship being gone, and the lien with it, the claim should continue *in personam*, if it may be prosecuted against the owners. We, however, defend only the fund; and need not inquire how far the owners may be personally liable. The claim now pursued cannot be a lien on the debt, unless the debt was due to the owners; and *according to the case as exhibited by the complainants, nothing was due to the owners. 1 Pet. 212.

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In this view of the subject, the demand of the seamen can avail, at all events, only against such proportion of the commissioners' allowance for freight, as included wages: and the amount of that would be small. 1 Pet. Adm. 130; 3 Mason 166. The amount to be recovered would be very different from that which, in a suit against the owners, would be allowed, where the voyage was lost by the fraud of the owners, and the sufferings of the seamen were imputable to them. 3 Kent's Com. 145, 146, 149. But the imposition practised upon the seamen by the owners, gave them no claim against the Spanish government. The innocency of their intentions might excuse them from punishment, but could not entitle them to reward. If the seizure were deemed unlawful, and a restoration made, the owners, but not the fund restored, would be liable for all wages; because, with the condemnation of the *res*, the wages are lost and gone. The restoration of a sum, as freight, might re-attach the lien to the money, if received by or under control of the owners; but not to the money, if owned by assignees. 1 Pet. Adm. 130, 186, note; 3 Mason 91, 92, 96; 3 Kent 149.

In reference to the freight, or damages in its place, the right to wages springs into existence, at the moment when the money comes into the hands of the owners. If the owners are free from blame, and they receive the freight-fund, they are liable for the wages only upon the equity of their contract; and although the wages-claim may depend on the contingency of receiving freight, yet it is not a lien on the fund, but rests exclusively in contract, and on the personal liability of the owners. There was no lien for the wages on this fund. On the ship, it existed; and until a lawful condemnation, might have been pursued; but there was no lien on the claim against the foreign government; and none attaching to that debt, the proceeds of the debt could not be subject to it. If the debt be due at all, it is so from the moment of the unlawful condemnation and sale. How can the demand be a lien on the money received from the debt, if not a lien on the debt itself? Suppose, the *owners to be solvent in this case: the owners becoming liable as soon as they had received the money, would there, at the same time, be a lien on the fund in the hands of the assignees? The true principle would seem to be, that on restitution and allowance of freight, the owner is personally liable on his contract to the seamen; but the ship being gone, there can be no lien on it. It is so treated in 3 Mason 91, 92, 95; 2 Mass. 39, 44; 2 Dods. 13; Abbott 247, 476; 1 Barn. & Ald. 575. All liens are attached to the thing, or to what is placed as its substitute in the hands of the court, and through the act of the court; but not to what is the result or proceeds of the thing, after many mutations. If a ship, liable to a lien for wages, were exchanged for another

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the lien would not become attached to the ship received in exchange, nor upon any other specific substitute for the ship. Thus, in *Brooks* v. *Dorr*, 2 Mass. 39, 44, the underwriters, on abandonment, had taken the ship, but they were not held answerable for the wages. So, owners receiving freight from underwriters, are not on that account liable for wages. The assignees here stand precisely on the ground with underwriters after abandonment. 3 Kent 153; 1 Pet. Adm. 213–14; 3 Mass. 563.

The claim of the seamen, being in suspense, could not be a lien. Suppose, the fund in question had been paid to the agent of the owners, and he had remitted, and they had drawn for it; would the claim have been a lien on the demand, in the hands of the payee; nay, of every indorser who had notice? Or suppose, the owners, after wages earned, sell the ship, will they be a lien on the debt due from the purchaser? Or suppose, the owners had received the fund here, and paid it to the assignees, they having notice; could it be followed by the seamen, in the hands of the assignees? Or suppose, a mortgagor of personal property sells it, and receives a note for it, which he assigns; or that he assigns the claim against the purchaser, and that the property perishes; can the debt be followed by the lien in the hands of the assignee? Through how many changes is this lien to follow? 1. The ship; 2. The money in the Chilian treasury; 3. The debt from the Spanish government; 4. The Florida lands; 5. The money paid for those lands.

*It is said, that the assignee of a claim takes it subject to all equities. This is true, as between debtor and creditor; and so far as there is any equity of Spain, the debtor, the assignees take it subject to it; because of Spain they can inquire; but not so as to a third person. It is to be proved, that the debt due from the King of Spain was incumbered with this claim of seamen's wages. The assignees had no notice of this claim. The libel does not charge it, and the answers deny it. A *lis pendens* is notice, but only of the particular claim in the suit; and that here was a claim against the owners, personally; not upon the foundation of a demand against the *spes recuperandi*. It was, therefore, not notice of a claim against the fund, but rather a disclaimer of such pretension. The royal order was in 1815, and yet the libel of the seamen continued *in personam*, and was for a personal injury, under the charge of fraud and imposition. If the seamen had appeared before the commissioners, they could not have decreed anything for them, for they had no claim on the Spanish government. They certainly are not entitled, on the ground that they concealed, what, if disclosed, as they seem to allege, would have defeated the recovery of the assignees before the commissioners. But the order of the commissioners must speak for itself; and that awards the fund to the assignees, and on the ground of the unlawfulness of the seizure; which contradicts and repels the basis and merits of the present demand against the fund. [*705

2. If the fund be liable to this claim, the assignees are to be considered as receiving it as trustees; and if they be trustees, a court of admiralty has no jurisdiction in this case. 1 Pet. Adm. 212–15; 8 Johns. 237; 1 Ves. sen. 98; 3 Mass. 464; 5 Rob. 155, 158, 160. The obligation to pay, here, if it exist, must arise from a contract implied by courts of common law and of equity; and this contract cannot be the foundation of proceedings in the instance court. The only ground of claim on which the appellants rely, is the supposed lien. But it must be remembered, that the present is a pro-

ceeding *in rem*, and not *in personam;* and the question of lien is not identical with that of jurisdiction, which last is the antecedent inquiry: a
*706] *jurisdiction once established over the *res*, the court, then, but not until then, exercises incidental powers; and may, over such an admitted subject of jurisdiction, act upon the principles of a court of equity. But the *res* must be in possession of the instance court to attach the jurisdiction, and that *res* to which the lien was fastened. 4 Cranch 23; 1 Paine 620; 1 Gallis. 75. The case is not to be likened to that of a prize court's jurisdiction, for that jurisdiction is exclusive, and no other court can try the questions. And in prize courts, therefore, the proceeds are followed, not by reason of any supposed lien, but because the question of prize or no prize is involved in the controversy. 2 Doug. 594, 613, note; 3 T. R. 323; 6 Taunt. 439; 2 Brown's Adm. 217–19; 1 Dall. 218; 1 Bay 470; 16 Johns. 327. No aid can, therefore, be borrowed from the decisions in prize causes; a prize court following the proceeds, not on the ground of lien, but of exclusive jurisdiction. But where is this jurisdiction to end? In the cases of prize, when the rights of parties, immediately springing from the capture, are settled, the jurisdiction ceases; but not so with this doctrine of lien on the proceeds of the *res ipsa*, which would make the jurisdiction, it would seem, interminable. The ship is sold for goods; the goods are converted into money; the money is invested in land; yet it is still proceeds, subject to the lien, and liable to be followed by the admiralty court, and subject to its jurisdiction. And under the authority of 1 Paine 180, it is said, too, that notice is not necessary to charge the *bonâ fide* purchaser, in the pursuit of these proceeds.

3. So far as this fund is concerned, it is conclusively settled, that the seizure was unlawful, and the owners not in fault; and the voyage not having been performed, it is only the recovery and receipt of the freight which gives the right to wages, and furnishes the fund for paying them. The entire freight was not allowed by the commissioners. The full amount due, as claimed and proved, was $40,000; and the amount allowed was only $13,860. As freight, then, for the whole voyage, was not allowed, the seamen are entitled to wages *pro rata* only. 3 Mason 166; 3 Kent's Com. 149; 1 Pet. Adm. 186, Judge Winchester's opinion; 10 Mass. 143.
*707] *It does not appear for what part of the voyage freight was allowed. The just rule in this case, then, as laid down in 3 Kent's Com. 149, would seem to be, to regulate the amount of wages by the amount of freight recovered; that is, to apportion it between the owners and the seamen. In reference to the present questions as to the fund, the owners, in distributing the fund, are to be regarded as innocent sufferers, and share in the freight. By the royal order, they were entitled to $300,000; but the commissioners' award gave them (subject to the deduction of one-twelfth) only $169,150.98. Two months' wages had beeen advanced to the seamen, at the beginning of the voyage. The amount of freight awarded, was not in the control of the owners. If no freight had been awarded, the seamen, according to our present views, would have become entitled to no wages. To make the amount of wages, then, more than proportional to the amount of freight recovered, would be to punish the owners for not abandoning all claim for freight. The wages cannot be recovered for a period beyond the time of capture, making a term of five months; from which must be

deducted two months, the wages for that time being paid in advance. This view is founded on the conclusive nature of the award.

Story, Justice, delivered the opinion of the court.—This is an appeal from a *pro formâ* decree of the circuit court of the district of Maryland, in a case in admiralty, for mariners' wages. The original libel (which was filed in December 1810) was against the owners *in personam;* alleging, among other things, that the libellants (six in number) shipped on board the Warren, in August 1806, to perform a voyage from Baltimore to the north-west coast, thence to Canton, in the East Indies, and thence back again to Baltimore; that they proceeded on the voyage; but that with the privity and consent of the owners, the ship deviated, without any justifiable cause, from the voyage, and arrived at Conception Bay, on the coast of Chili, for the purpose of carrying on an illicit trade against the colonial laws of Spain; that the vessel was there *seized by the Spanish authorities, and finally decreed to be forfeited; the crew were taken on shore [*708 and held for a great length of time in imprisonment; and afterwards, having effected their escape, arrived in the United States, in 1810. The owners appeared and made a defensive answer; which was excepted to, and afterwards amended. Some testimony was taken; but no further proceedings appear to have been had, until October 1818, when an amended libel was filed by the libellants and others (in all fifty-seven persons); and in June 1819, another amended libel by another of the seamen. The only allegation in these supplements, which it is material to mention, is, that the owners had received the whole or a part of the proceeds of the ship and cargo. At a later period, in the year, 1819, all the owners became insolvent. In December 1819, Lemuel Taylor (one of the owners) assigned to Robert Oliver all his interest in the proceeds of the Warren and cargo, whenever recovered; in November 1820, Smith & Buchanan (two other owners) assigned, among other things, all their interest in the proceeds of the ship and cargo to Jonathan Meredith and Thomas Ellicott, in trust for the Bank of the United States and other creditors; and in May 1821, Hollins & McBlair, the other owners, assigned all their interest in the proceeds of the ship and cargo to the Union Bank. All these assignments were made to secure debts antecedently due. Long before these assignments, to wit, in June 1815, the owners had procured from the King of Spain, a royal order for the restitution of the ship and cargo. But no restitution having been in fact made, the assignees laid their claim before the commissioners appointed under the treaty with Spain of 1819, commonly called the Florida treaty; and the commissioners, in 1824, awarded them compensation, as follows: for the ship Warren $25,000; for the cargo $125,131.93; and for the freight $13,860. This amount was accordingly paid to them by the United States. In December 1825, the libellants filed a new libel, by way of petition, against the owners, and against their assignees, setting forth their grievances in a more aggravated form; and alleging the award and receipt of the proceeds *by the assignees, and the promises of the [*709 owners to indemnify and pay them out of the proceeds, whenever recovered, to the full amount of their wages; and accounting for their not having proceeded to a decree *in personam*, against the owners; except so far as to have a docket entry, in June 1822, of a "decree on terms

to be filed" (which was afterwards rescinded), solely upon the faith of those promises; and praying process against the owners, and also against the assignees, to pay them the amount out of the proceeds in their hands. Answers were duly filed by the owners and the assignees; the former asserting that they had parted with all their interest in the funds; and the latter asserting their exclusive title to the same, under the assignments, and denying any knowledge of any agreement of the owners in respect to the claim of wages, or of the other matters stated in the petition. Further testimony was taken; and finally, by consent of the parties, at May term 1828, a decree *pro formâ* passed, affirming the decree of the district court, dismissing the libels and petition exhibited in the cause; from which decree, the case now stands upon appeal before this court.

Such is a very brief statement of the principal proceedings in this protracted suit; in its duration, almost unparalleled in the annals of the admiralty, whose anxious desire and boasted prerogative it is to administer justice, as the metaphor is, *velis levatis*. A great portion of the delay (which would otherwise seem a reproach to our law) can be attributed to no other cause than the voluntary acquiescence of all the parties, under the peculiar circumstances growing out of new emergencies in its progress.

The cause has been most elaborately and learnedly argued at the bar, upon a variety of points suggested by the different postures of the case. The view, however, taken by us of the merits, renders it wholly unnecessary for us to go into any examination of many of these points; and this opinion will be accordingly confined to those only which are indispensable to a decision; and which, we trust, after such a lapse of time, will prove a final decision.

The first question is, whether, in point of fact, the libellants have substantially sustained the allegations in the libels and *petition in respect
*710] to the voyage; viz., their ignorance of the intended illicit trade; and and the seizure of the ship, and their own imprisonment and separation from it: which are necessary to maintain their claim for wages. And we are of opinion, that the evidence upon these points is conclusive. Without going into the particulars, it may be said, that few cases could be presented, under circumstances of more aggravation; and in which the proofs were more clear, that the seamen were the victims of an illicit voyage, for which they never intended to contract, and in which they had no voluntary participation.

Such then being the state of the facts, the law upon the subject is very clear. It is, that the seamen are entitled to full wages from the time of their shipping on the voyage, to the time of their return to the United States: deducting their advance wages, and whatever they have earned (if any) in any intermediate employment. This is the general rule in courts of admiralty, in cases of this nature; where the libel seeks nothing beyond compensation in the nature of wages. To this extent, the seamen are entitled to a decree against the owners. But they being insolvent, it becomes necessary to inquire, whether they have not also a remedy against the assignees holding the proceeds of the ship, cargo and freight in their hands?

If the ship had been specifically restored, there is no doubt, that the seamen might have proceeded against it in the admiralty, in a suit *in rem*, for the whole compensation due to them. They have, by the maritime law, an indisputable lien to this extent. This lien is so sacred and indelible, that it

has, on more than one occasion, been expressively said, that it adheres to the last plank of the ship. 1 Pet. Adm. note, 186, 195 ; 2 Dods. 13 ; *The Neptune*, 1 Hagg. 227, 239. And, in our opinion, there is no difference between the case of a restitution in specie of the ship itself, and a restitution in value ; the lien re-attaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lien-holder, whose claims have been wrongfully displaced, may follow the proceeds, wherever they can distinctly trace them. In respect, *therefore, to the proceeds of the ship, we have no difficulty in affirming [*711 that the lien in this case attaches to them.

In respect to the freight, there is more room for argument. That there is an intimate connection between the freight and the wages, that the right to the one is, generally, though not universally, dependent upon the other, is a doctrine familiar to all those who are conversant with maritime law, and has given rise to the quaint expression, that freight is the mother of wages. Indeed, freight being the earnings of the ship, in the course of the voyage, it is the natural fund out of which the wages are contemplated to be paid ; for though the ship is bound by the lien of wages, the freight is relied on as the fund to discharge it, and is also relied on by the master, to discharge his personal responsibility. We think, then, that this relation between the freight and wages does, by the principles of the maritime law, create a claim or privilege in favor of the seamen, to proceed against it, under the circumstances of the present case. Here, the owner of the ship is also owner of the cargo. There has been an award allowing the assignees freight, as a distinct item ; and the owners are insolvent. If the master of the ship were living, he would have a direct lien upon the freight for his disbursements, and liability for wages ; and through him the seamen would have the means of asserting a claim on it. We can perceive no principle, then, why, in the present case, the seamen may not justly assert a claim on the freight, if the proceeds of the ship are exhausted, without satisfying the amount of their wages. No authority has been produced against it ; and we think it justly deducible from the general doctrines of the maritime law on this subject.

It has been argued, that the admiralty has no jurisdiction in this case ; but we are of opinion, that the objection is unfounded. Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction, *in rem*, as well as *in personam ;* and wherever the lien for the wages exists, and attaches upon proceeds, it is the familiar practice of that court, to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry, and salvage ; and is equally applicable to the case of wages.

*In respect to the claim of the assignees to hold the proceeds for [*712 their exclusive use, as *bonâ fide* purchasers, we think, it cannot be maintained in point of law. In respect to the ship and its proceeds, they stand in no better situation than the original owners. They take the title, *cum onere*. The lien will follow the ship, and its proceeds, into whosever hands they may come, by title or purchase from the owner. In respect to the freight, the same consideration does not necessarily apply. But here, the assignees (though there is no doubt that they are *bonâ fide* holders) have

taken their asignments as mere securities for antecedent debts, and had either actual or constructive notice of the claims of the seamen, when they received their conveyances. There was not only the *lis pendens* to affect them with constructive notice; but the very circumstance of the derivation of their title from the owners, was sufficient to put them upon inquiry. It was indispensable, to enable them to make an available claim before the commissioners. So that, in both views, they are unprotected, as against the libellants. This view of the matter disposes of the principal questions necessary for the decision of the cause; as we are of opinion, that the whole proceeds of the ship and freight, in the hands of the assignees, are liable to the payment of the seamen's wages. We think, there is no claim whatsoever upon the proceeds of the cargo; as that is not in any manner hypothecated, or subjected to the claim for wages.[1]

It has been supposed, at the argument, that there is some repugnancy in the petition of the seamen, in asserting a claim for wages, on the ground, that the voyage was illicit, and in asserting a claim against the proceeds in the hands of the assignees, upon the ground, that the voyage was lawful, and therefore, the award of compensation to the owners was rightful; but, upon a just consideration of the matter, no such repugnancy exists. The allegation on the part of the seamen is, that they shipped on one voyage, which was lawful, and that they were carried on another voyage, for which they did not ship; and in which the ship was seized, and they were imprisoned for being engaged in an illicit trade. Now, the voyage in respect to them might be wholly tortious and illicit, because it was not within the scope of their contract; and they may have been thereby subjected to all the consequences of an *illicit trade, although as between *713] the owners and the Spanish authorities, the voyage may have been specially permitted, as an exception to the general colonial prohibitions, or, at least, may not have been disapproved of in the particular instance. If the King of Spain had a right to make the seizure, and pursue it to condemnation; yet he might, under all the circumstances, deem it just or expedient, as between the owners and himself, to order restitution; and when such restitution was so made, as between himself and them, the voyage might be deemed no longer subject to the imputation of illegality. If the order of restitution was not complied with, it constituted a good claim against Spain; and consequently, a good claim under the Florida treaty.

The award of the commissioners is conclusive on this subject; but it concludes no more than its own correctness. Suppose, the ship, after a

[1] In Skolfield *v.* Potter, 2 Ware 402, Judge WARE says: "This was a mere *dictum*, and the point was not necessarily involved in the cause. It may be true, that the cargo is not directly, but it certainly is indirectly bound for the wages; for it is a first principle of the maritime law that the cargo is bound to the vessel for the freight; and another, equally evident and undoubted, that the freight is pledged for the wages; indirectly, therefore, to the amount of the freight due upon it, the cargo is bound for the wages. The master is not obliged to deliver it, until the freight is paid or received; and if not paid, he may sell so much as is necessary to pay the freight. The seamen may, therefore, indirectly, through the master, proceed against the cargo itself, for their wages, to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see no objection, in principle or convenience, to allowing the seamen to do that directly, in their own name, what they may do indirectly, thro gh that of the master."

seizure and condemnation by the local Spanish authorities, had upon appeal, been specifically restored by the King of Spain; there is no pretence to say, that she might not have been proceeded against in the admiralty, for the full compensation of the seamen. Their right to such compensation, in such a case, would depend, not upon the fact, whether there were an illegal service or not, but upon the fact, whether there had been an unjustifiable deviation from the voyage contracted for; and there is no legal distinction, as has been already stated, between proceeding against the ship and against the proceeds restored in value.

In respect to the claim of interest made by the libellants, we are of opinion, that under the peculiar circumstances of this case, none ought to be allowed upon their wages, except for the period of time, which has elapsed since the petition was filed against the assignees and owners, on the 1st of December 1825. The previous delay was, as it seems to us, either a voluntary delay, assented to by all parties; or else, under circumstances of so much doubt as to the nature and extent of the claim, as ought to preclude any claim for interest. The assignees having had the funds in their hands since that period, must be presumed to have made interest on them; and therefore, there is no hardship in considering them liable to pay interest to the seamen.

The cause not having been heard upon the merits, either in *the district or circuit court, it is impossible for this court to ascertain [*714 the precise amount, to which the libellants are respectively entitled, without a reference to a commissioner to ascertain and report the amount, upon the principles already stated. It will be necessary, therefore, to remand the cause to the circuit court for this purpose; and it is to be understood, in order to avoid any further delays, that the commissioner is to proceed with all reasonable dispatch; and is to report to the court the amount due to each seaman, as soon as he shall ascertain the same; so that each may have a separate decree (as in libels of this sort he well may), for his own share, without waiting for any final decree upon the claims of the others. Where the exact time of the return of any seaman cannot be ascertained, the commissioner will make an average estimate, as near as the facts will enable him to do so. In case of the death of any seaman, who is a libellant, his administrator is to be brought before the court, before any final decree is entered upon his claim.

A special order will be drawn up by the court, to be sent to the circuit court for its direction upon these points; and the decree of the circuit court is reversed, and the cause remanded accordingly.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by the court, that the decree of the circuit court affirming the decree of the district court, dismissing the libels and petition in this cause, be and the same is hereby reversed: and this court, proceeding to render such decree as the circuit court ought to have rendered, it is further ordered, adjudged and decreed, that the libellants are entitled to full wages, according to the terms of their original shipping articles or contract, from the time of their shipping, until their return and arrival in the United States,

after the seizure of the said ship Warren and cargo, in the manner in the proceedings mentioned ; deducting therefrom any advance wages paid to them, and any wages earned by them, in any employment, in the intermediate period ; *and that a decree be entered against the owners of the said ship, in the said procedings mentioned, for the amount of such wages, as soon as the same shall be ascertained in the manner hereinafter stated, with interest thereon from the 1st day of December 1825.

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And it is further ordered, adjudged and decreed, that a decree be rendered against the other respondents in this cause for the payment of the same wages, when so ascertained, with interest as aforesaid, out of the funds and proceeds (but not exceeding the funds and proceeds) of the said ship Warren, and freight received by them, under the assignments and the award of the commissioners under the treaty with Spain in the said proceedings mentioned : to wit, out of the sum of $25,000 awarded for the said ship ; and the sum of $13,860 awarded for the freight thereof ; according to the proportions thereof by them respectively received as aforesaid : and that interest at the rate of six per cent. per annum, be paid by them, and considered as a part of the said funds and proceeds, from the time when the petition and libel against them was filed, to wit, from the 1st day of December 1825, until the time when a final decree is and shall be made in the premises by the circuit court ; or until the same funds and proceeds shall by order of the circuit court be brought into the registry of the court.

And it is further ordered, and adjudged and decreed, that this cause be remanded to the circuit court with the following directions: 1. To refer it to the commissioner to ascertain, from the evidence and proceedings, and other proper evidence, the amount due to each of the libellants, for wages and interest thereon, upon the principles stated in this decree. And that he be required, forthwith, and as soon as may be, to proceed upon this duty and to report to the circuit court the amount due to each of the libellants, separately, as soon as he shall have ascertained the same ; so that a separate and several decree may be entered therefor to each libellant respectively. 2. In cases where the exact time of the return of any of the libellants cannot be ascertained, the commissioner is to make *an average estimate of the time, as near as the facts will enable him to do so, and to report accordingly. 3. In cases where any of the libellants have died during the pendency of the proceedings in this suit, no final decree is to be entered in respect to such libellant, until his personal representatives shall become party to the suit.

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Taney, of counsel for the appellees in this cause, filed the following suggestions in writing : " The supreme court having announced their intention to send a special direction to the circuit court, stating the principles on which this case is to be finally settled ; and the case on the part of the assignees, who are appellees, having been prepared merely with a view to obtain the decision of this court on the points which have been argued and decided ; they pray that they may be allowed to offer further proof, on the following points, either in this court or the circuit court. 1. The expenses incurred by the owners in prosecuting this claim in Spain, in order to procure the order of restoration. 2. The expenses of the assignees in prosecuting the claim before the commissioners under the Florida treaty. 3. The amount

of the compensation to which the assignees are entitled for their services, as general agents for those interested in the fund. 4. The said appellees beg leave also to be permitted to offer in evidence, either in this court or in the circuit court, the records of the proceedings against them in the said court, sitting as a court of chancery, in relation to the fund now in question; in which said proceedings the money received by them, under the award of the commissioners under the Florida treaty, was, by order of the said circuit court, paid into court, by the aforesaid assignees, and by the decree of the said court, distributed among certain claimants. 5. The said appellees also pray to be permitted to offer in evidence, the record of the proceedings in the chancery court of Maryland, in relation to a part of the said fund; so that, in case there should be a conflict of the jurisdiction, they may not be made liable to pay the amount due into both courts."

The counsel for the appellee, on these suggestions, moved the court to rescind and annul the decree entered in this cause, and for leave to re-argue the same. *This motion was opposed by the counsel for the appellants; and an argument in writing, for and against the motion, was submitted. Afterwards, the court made the following order: [*717

And now, upon another and subsequent day of said January term, upon hearing the written motion made in behalf of the assignees, who are respondents in the said cause, and the arguments thereon, by the parties, it is further ordered, adjudged and decreed by this court, that the said assignees shall be allowed, in taking an account of the funds in their hands, to deduct therefrom a portion, *pro rata*, of the disbursements and expenses which have been actually incurred by them in prosecuting their claim before the commissioners, under the Florida treaty, in the proceedings mentioned; and also shall be allowed to deduct therefrom two and one half per cent commission, as a compensation for their services, in and about the prosecution thereof as aforesaid; and for this purpose they shall be allowed to produce new proofs before the said circuit court, and any commissioner appointed by the said court to take an account in the premises. But the parties (respondents) shall not be at liberty to adduce any proof of, or be allowed to deduct from said funds any expenses, or disbursements, or charges, incurred by the owners of the said ship Warren, in Spain, or otherwise; in order to procure the royal order of restoration in the said proceedings mentioned. And it is further ordered, adjudged and decreed, that the said assignees shall be at liberty to offer in evidence the proceedings in the said chancery suits, in the said written motion mentioned, in the said circuit court, and before the commissioner aforesaid; reserving to the said circuit court, and commissioner, respectively, the full right and liberty to judge whether the same suits, or either of them, are properly admissible, or competent as evidence, in any matter before the said court, or commissioner, under the farther proceedings in this cause, to be had in the said circuit court.

Baldwin, Justice, dissented from the order in relation to the proceedings in the circuit court, and the allowance of a commission to the defendants.

*Elisha R. Potter, Appellant, *v.* Hannah Gardner and others.

Appeal from the decree of the circuit court of Rhode Island, on the report of the master, made upon a reference to him of the decree of this court, in the case of Potter *v.* Gardner, 12 Wheat. 498.

Appeal from the Circuit Court of Rhode Island. The facts of the case are fully stated in the opinion of the court.

The cause was argued by *Pearce*, for the appellants; and by *Brigham* and *Webster*, for the appellees.

McLean, Justice, delivered the opinion of the court.—This is a suit in chancery, brought by Potter, the appellant, from a decree of the circuit court in Rhode Island. The controversy arises out of the following decree of this court, between the same parties, in 1827, and reported in 12 Wheat. 498.

"On consideration whereof, this court is of opinion, that there is error in so much of the decree of the circuit court, as subjects Elisha R. Potter to the payment of a larger sum of money than now remains in his hands, of the original purchase-money, added to the sum he has applied to the payment of the debts of Ezekiel W. Gardner, after deducting therefrom the amount given for the estates purchased from Isabel Gardner; and in so much of the said decree as directs the said Elisha R. Potter to pay the sum he has applied to the debts of Ezekiel W. Gardner, and for which he, the said Ezekiel, is liable in the first instance, before he, the said Ezekiel, shall have failed to pay the same. It is, therefore, the opinion of the court, that so much of the said decree, contrary to this opinion, be reversed and annulled; and that the same be, in all other respects, affirmed; and the cause is remanded to the said circuit court, with directions to reform the said decree, according to this opinion; and to do all other things therein, as justice and equity may require. In taking an account between the
*719] *parties, which may be necessary to give effect to this decree, interest is to be computed according to law and usage."

The facts on which this decree was founded are substantially these: on the 20th of April 1819, Potter purchased from Ezekiel W. Gardner, a tract of land, called the Ferry farm, for which he agreed to pay $15,000. Two-thirds of this tract of land was charged, by the last will of Peleg Gardner, with the payment of his debts. Ezekiel claimed under the will. By an agreement made at the time of the purchase, it seems, that Gardner was to remain in possession of the farm, until the 25th March 1822, at a rent of $900 per annum; the consideration money to be paid when the lease expired; and if any part of it should be paid before that period, interest was to be allowed on the sum thus advanced. The rent stipulated to be paid was in lieu of interest on the purchase-money, and to the same amount. It was the intention of the parties, that the one account should balance the other. The original bill was filed against Potter, in behalf of the creditors of Peleg Gardner, deceased, to secure an application of the purchase-money to the payment of their debts. As a part of the money had been paid by Potter, in discharge of debts due by Ezekiel W. Gardner, the court held, that this was a misapplication of so much of the fund; and decreed that Potter should pay the same amount to the creditors of Peleg Gardner, if it could

not be recovered from Ezekiel; and also, the balance that remained due of the two-thirds of the purchase-money.

The cause being remanded to the circuit court, the decree was referred to a master, who made the following report: "That the amount of debts due from the estate of the said Peleg Gardner, deceased, with the expenses which have accrued on several of the claims, and the compensation of the commissioners on that estate, including the interest on the claims to the date of this report, is $11,887.92. That in ascertaining the amount of the several claims of the creditors, he computed the interest on those which had not been reduced to judgment, from the time the claims began to carry interest, up to the date of the report; and on those which were reduced to judgments, from the judgments to the same period. *And he further reported, "that the said Elisha R. Potter had paid, on account of the [*720 purchase of that part of the Ferry farm devised to the said Ezekiel W. Gardner, in cash, the sum of $4318.64; which when deducted from the principal sum, liable to the payment of the debts of the said Peleg, left the sum of $5681.36. "And that the said Elisha R. Potter is liable, according to the principles of the decree and opinion of the supreme court, directly and immediately, to pay the sum of $3929.62; being so much of the purchase-money as remains in his hands, and being part of the before-named sum of $5681.36; and the residue of said sum, being $1751.74, the said Ezekiel Gardner is, according to the said decree, in like manner liable in the first instance to pay; and in case of failure on his part to pay the same, the said Potter is required to pay the same, &c." "He calculated the simple interest on the before-named sum of $3929.62, from the 16th of October 1820, the day when the summons, in this cause, was served on said Potter, to the date of the report, amounting to $2042.80; which, with the principal sum remaining in his hands, makes the sum of $5972.42, which sum the said Potter is liable to pay directly. And the simple interest on the before-named aum of $1751.74, which the said Ezekiel W. Gardner is liable in the first instance to pay, from the 16th October 1820, to the date of the report, is $910.49; which, when added to the principal, amounts to the sum of $2663.23; and for the payment of this, the said Potter is liable, if it shall not be paid by the said Gardner."

Exceptions were taken to this report, but they were overruled by the circuit court, and a *pro formâ* decree entered *against Potter, for [*721 payment of $5972.42, with interest on the same from the time the report was made; and also for the payment of $2662.23, with interest from the same time; provided, that sum should not be paid by Ezekiel W. Gardner, or collected from him by execution. From this decree, Potter appealed, and relies for its reversal on the following exceptions: 1. That no allowance was made to him of said two-thirds of the rent of the Ferry estate; which he alleges was received by said Ezekiel, towards payment of said estate. 2. That the claim of said Potter for $900, which he paid to said Ezekiel on the 21st of March 1821, was disallowed. 3. That interest is charged on said sum of $3929.62; when no interest ought to be allowed thereon. 4. That the sum of $5972.22, is reported to be due immediately and directly from said Potter; whereas, only $3929.62, being the amount of the security payable in mortgages, is due, either directly or ultimately. 5. That by said report, he is made ultimately liable, on failure of said

Ezekiel, to pay the sum of $8634.65 ; whereas, he ought not, in any event, to be liable for any more than said sum of $3929.62.

The rights and obligations of the parties being fixed by the decree which was formerly made by this court, it now only remains to carry into effect the principles of that decree. As the purchase-money was not to be paid by Potter until the 25th of March 1822, no interest should be charged against him prior to that time. But he objects to the payment of any interest, on the ground, that it was not in his power to pay the money and discharge his obligation, before the final decree in the case be made. The suit was pros-
*722] ecuted by the complainants, for the *benefit of the creditors of Peleg Gardner, deceased ; and although a question, as to their right to prosecute the suit, was raised by the defendant ; yet it was in his power to discharge himself from the payment of interest, by bringing into court whatever balance he conceived to be due, and paying it over under the order of the court. On the balance thus paid over, interest could not have been charged. As this was not done, it appears, that the defendant below did not do all that was in his power to exempt himself from the charge of interest.

By the decree of this court, he is made eventually responsible for the sum stated in the master's report, as having been paid by him to the creditors of Ezekiel W. Gardner. For this sum he is liable to the creditors of Peleg Gardner, in the same manner as though it had never been paid, if it cannot be recovered from Ezekiel. The interest on this sum, whether paid by Ezekiel W. Gardner or Potter, should only be charged from the 25th March 1822.

It appears, that possession of the farm was retained two years by Ezekiel W. Gardner, under the lease ; and then it was surrendered to the appellant. He paid to Gardner, as he alleges, for the rent of the farm, or the interest on the purchase-money, for the third year, the sum of $900 ; and for two-thirds of this sum, he claims a credit. As interest is not charged against the appellant on the purchase-money, until the 25th March 1822, which was after the expiration of the lease ; this sum, whether paid as interest or for rent, cannot be credited as so much paid on the principal, or in discharge of interest which subsequently accrued. To apply the credit, as contended for, would be contrary to the intention of the parties, at the time the payment was made ; and against the justice of the case. The appellant having possession of the farm the third year of the lease, was bound in justice to pay the rent ; which Gardner had agreed should be considered in his hands, as an off-set against the interest on the purchase-money. During the two years which Gardner occupied the farm, the rent was balanced by the interest ; and of course, no credit can be claimed by the appellant, on that account. Under this construction of the former decree of this court, the appellant is
*723] bound to pay the sum of $3929.62, *with interest from the 25th March 1822 ; and he is also bound to pay, eventually, the sum of $1751.74, with interest from the same time ; if that amount cannot be collected from Ezekiel W. Gardner. And as the last decree of the circuit court is contrary to this opinion, it is reversed and annulled.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel : On consideration whereof, this court is of opinion, that

there is error in so much of the decree of the said circuit court as subjects Elisha R. Potter to the payment of interest from the 16th of October 1820, and that said decree be reversed and annulled: and this cause is remanded to the said circuit court, with directions to enter a decree that the said Elisha R. Potter pay into the registry of the circuit court, within thirty days from the next term of that court, the sum of $3929.62, with interest from the 25th of March 1822—to be paid over to the complainants, or to the creditors of Peleg Gardner, under the directions of that court; and unless payment be made within thirty days, that the complainants have execution thereof: and that the said court also enter a decree, that Ezekiel W. Gardner do pay into the registry of the court, subject to its order, within thirty days as aforesaid, the sum of $1751.74, with interest from the 25th of March 1822, for which he is in the first instance liable, and the said Potter ultimately; and in default thereof, that execution issue against the said Ezekiel; and if such execution shall be returned unsatisfied, then the amount shall be immediately paid into the registry aforesaid, by the said Potter; and on his failing to pay it, the circuit court are directed to award an execution against him for the same.

RULE, No. 37. [*724

1. In all cases, the clerk shall take of the plaintiff a bond, with competent security, to respond the costs, in the penalty of two hundred dollars; or a deposit of that amount, to be placed in bank subject to his draft.

2. In all cases, the clerk shall have fifteen copies of the records printed for the court; provided the government will admit the item in the expenses of the court.

3. In all cases, the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

Baldwin, Justice.—I concurred with the court in the first and second items of this rule, but I dissent on the third.

By the common law, costs were not recoverable in any action, real, personal or mixed. They were first given by the statute of Gloucester, 6 Edw. I., c. 1, and subsequently, by various statutes; but courts do not allow them, when not given by some statute. 3 Com. Dig. 205, Costs, A. 1; 210, A. 2; 6 Vin. 321; 2 Bac. Abr. 33, 10; 116, A; 1 Str. 615, 617. By the statute of Hen. III., c. 10, costs were given on an affirmance of a judgment on a writ of error brought by defendant. Where the plaintiff in the court below brought the writ of error, he paid no costs on affirmance, until the statute 8 & 9 Wm. III., c. 11, which gave them to the defendant on affirmance, discontinuance or nonsuit. None were given, where the writ of error was quashed, for variance or other defect, till the statute 4 & 5 Ann., c. 16; 3 Com. Dig. 230, B, Costs in Error, and cases cited. There is no statute giving costs in cases of reversal, and therefore, they are never allowed. 1 Str.

615, 617 ; 3 Com. Dig. 232 ; 6 Vin. 339. In the case in Strange, the court
*725] say, *it would be wrong to make a party pay costs for the error of the court below. The reason is obvious ; a court of error can only give such judgment as the court below ought to have given. If the judgment is affirmed, it relates only to the one rendered in the inferior court, and can include nothing more than was recovered there ; if it is reversed, and the cause goes back for a new trial, the effect is merely to annul the erroneous judgment and leave the case open. If the case goes up on a demurrer, case stated or special verdict, and the superior court, on a reversal, proceed to render judgment, it is only such an one as ought to have been rendered by the inferior court, which could, on no principle, be authorized to tax costs, which were to accrue only in another court, which was to revise the first judgment, but are necessarily confined to costs incurred in the original action. 12 East 668, 671 ; 1 Ld. Raym. 10 ; 1 Salk. 403 ; Carth. 180 ; 2 Tidd's Pr. 1243–4. Costs are considered as a penalty ; and though the courts in England may think it agreeable to natural justice to allow them, they never do it, unless in cases provided for by law. It is with them a settled and established rule, that all acts which give costs are, and ought to be, construed strictly, and according to the letter. 3 Burr. 1286–7 ; 4 Binn. 13, 14 ; s. p. 9 Mass. 372.

In cases of reversal, the English rule has been adopted in the state courts. 5 Binn. 204 ; 1 Mass. 85 ; 4 Ibid. 436 ; 1 Serg. & Rawle 436 ; 7 T. R. 468. The judiciary act gives costs on affirmance. (1 U. S. Stat. 85.) But no law gives them on reversal. In 4 Cranch 467, this court decides that they are not allowed ; and affirms the same rule in 6 Ibid. 86. Where a writ of error is dismissed for want of jurisdiction, costs are not allowed (2 Wheat. 368 ; 9 Ibid. 650), unless the plaintiff in error was the plaintiff below. 3 Cranch 514. In 3 Dall. 338, this court refused to allow the cost of a printed statement of the case for the use of the judges ; observing, that however convenient it might be, there was no rule authorizing the charge.
*726] *In 7 Cranch 276, the court stated their opinion to be, that each party was liable to the clerk for his fees for services performed for each party ; and it is immaterial to the clerk, which party recovers judgment Duvall, Justice, stated this to be the rule in Maryland ; that if either party requires a copy of the record, he must pay for it, as for any other service, but it is not a part of the costs which are to be taxed against the other party as costs of suit.

I can find but one case in which this court have ever allowed costs on a reversal, which is *Clerke* v. *Harwood*, 3 Dall. 342, where a judgment of the court of appeals of Maryland, reversing a judgment of the general court was reversed, the judgment of the general court affirmed, and the mandate for execution issued to that court, which expressly included the costs in this court. This was done, without argument, or reasons assigned ; but it has never been followed up in any reported case ; on the contrary, all the subsequent cases adopt the rule of the English and state courts, of allowing no costs on reversal. It may fairly be considered as an exception to the general rule ; as, though the judgment of the court of appeals was reversed, that of the general court was affirmed, and costs recoverable, under a liberal construction of the 23d section of the judiciary act ; at all events, a special order in this case is no precedent for a standing rule of court.

Rule, No. 37.

As to costs and expenses, in proceedings in courts of admiralty, "they are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court." And no appeal lies from a mere decree respecting costs and expenses. 3 Pet. Cond. 319. But neither of these rules apply to writs of error or appeals, in any other cases. The rules of courts of admiralty in England and here are peculiar as to costs and expenses; having no analogy to costs in courts of common law; and not being governed by the same rules.

The fees of the clerk of the supreme court are declared by the act of May 1792, § 3, to "be double the fees of the clerk of the supreme court of the state where the supreme court of the United States shall be holden." (1 U. S. Stat. 277.) *The only discretion given to the court as to the clerk's [*727
fees, is in the same section, which provides, that where any clerk performs any kind of service which is not performed in the courts of the state, and for which the laws of the state make no allowance, the court may allow a reasonable compensation. (Ibid.) This law can have no application to this rule, for the laws of the states all allow fees for copies of records, and the clerks of their courts of appellate jurisdiction do perform the same kind of services provided for by this rule. Besides, this rule does not profess to allow a reasonable compensation for services not embraced in state laws; but directs and orders which party shall, in the specified cases, pay for the copy of the record. It does not say what those fees shall be; that having been ascertained by the rules in the court of the state where this court is holden. The clerk is not ordered to make out a copy of the record, but the costs of a copy shall be taxed against the plaintiff. His right is as complete under the rule, whether the copy is made at the request of defendant, or not made at all, as if actually done at the request of party charged with it; or whether the cause is argued or dismissed, for a cause unconnected with the merits, so as to dispense altogether with the necessity of a copy for either party or the court. This is not the exercise of a discretion over cases not provided for by law, to be used as exigencies may occur; it is a general summary order or decree, extending to all cases depending. The cost of a copy is not a compensation for services rendered, in the nature of fees; but in the nature of a penalty imposed on suitors, which forms a legal item of taxed costs. If the court had allowed what was, in their opinion, a reasonable compensation for superintending the printing of the records, to be ascertained after the service had been performed; there might have been some justice in enacting it, as well as some color of authority for it, under the law of 1792. Even then, the court would have no power to order that compensation to be paid by a party not liable to costs; or in a case where none were recoverable—as on a reversal or dismission for want of jurisdiction.

The imposition of costs on a party litigant is, in England, in all the states, and by congress, considered as the subject of *legislation, as much [*728
regulated by laws, and as binding on courts as rules of decision on questions of costs, as of damages or property. There is no more authority to change the rules of law on this subject than any other. The federal courts may make rules of practice; process and other proceedings may be in the forms they prescribe (1 U. S. Stat. 83, 276, 335); but fees are to be regulated by those in the state courts, with only the one exception where services are

performed by clerks, for which state laws made no allowance, or where specially regulated by congress.

I know of no principle which empowers courts to regulate questions of costs by a standing rule, more than questions of evidence, under a law giving them power to make rules respecting practice, process or proceedings. Costs are in their nature penal; to impose them, without a law for their allowance, in cases where none are taxable, for want of jurisdiction in the court over the parties, or the subject-matter in controversy, or on parties not liable, is the infliction of a penalty, without the scope of the judicial power, under any principle of common, statute, state law, or act of congress. It is, in its effect, the imposition of a fine, for the benefit of the clerk, on one party, for the right of prosecuting; and on the other, for defending his interest on a writ of error in this court.

As the rule does not profess to be founded on any pre-existing law, written or unwritten; on any usage or practice established by the decisions of this court; but prescribes and enacts a new one, in direct opposition to all previous law and usage; I view it as a direct act of judicial legislation over a subject not embraced in the judicial power, unless expressly conferred by congress.

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VOLUNTARY BOND.

1. A bond voluntarily given to the United States, and not prescribed by law, is a valid instrument upon the parties to it, in point of law; the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided by law; it is an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confined to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers; unless brought into operation by express legislation; a doctrine to such an extent is not known to this court as ever having been sanctioned by any judicial tribunal. *United States* v. *Tingey*.....*115
2. A voluntary bond, taken by authority of the proper officers of the treasury department to whom the disbursement of public money is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department; and the United States being authorized in a political capacity to take it, there is no objection to its validity in a moral or legal sense.....*Id.*

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