REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1832.

By RICHARD PETERS,

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

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

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

} Associate Justices.

R. B. TANEY, Esq., Attorney-General.

HENRY ASHTON, Marshal.

WILLIAM THOMAS CARROLL, Clerk.

Mr. Justice Johnson was prevented attending the Court during the whole term, by severe and continued indisposition.

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.

A

B

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

Rule No. 38.

It is ordered by the court, that hereafter the judges of the circuit and district courts do not allow any bill of exceptions, which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters of law, in such charge, to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court.

Rule No. 39.

Mr. Jones, in behalf of himself and other members of this bar, inquired of the court, whether the rule of this court, of January term 1831, would not supersede the necessity of a compliance with the requisites of Rule No. 29, of February term 1821, of this court; and whether it would be necessary for counsel to furnish the court with printed briefs or abstracts: in reply to which, Chief Justice Marshall informed Mr. Jones and the bar, that the court still considered a compliance with the requisites of Rule No. 29 necessary; and that the court expected to be furnished by counsel with printed briefs or abstracts under said rule.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1832.

GERRET SCHIMMELPENNICK and ADRIAN TOE LAER, trading under the firm of R. & J. VAN STAPHORST, *v.* JOSIAH and PHILIP TURNER.

Pleading.— Variance.

The declaration contained to counts: the first, setting out the cause of action, stated "for that whereas, the said defendants and copartners, trading under the firm of Josiah Turner & Co., in the lifetime of said William, on the 1st day of March 1821, were indebted to the plaintiffs; and being so indebted, &c.:" the second count was an *insimul computassent*, and began, "and also whereas, the said defendants, afterwards, to wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money due and owing from the said defendants," &c. The defendants, to maintain the issue on their part, gave in evidence to the jury, that William Turner, the person mentioned in the declaration, died on the 6th of January 1819, that he was formerly a partner with Josiah and Philip Turner, the defendants, under the firm of Josiah Turner & Co.; but that the partnership was dissolved in October 1817, and that the defendants formed a copartnership in 1820. The defendants prayed the court to instruct the jury, that there was a variance between the contract declared on, and that given in evidence—William Turner being dead. The only allegation in the second count in the declaration, from which it is argued, that the contract declared upon was one including William Turner with Joseph and Philip, is, "that the said defendants accounted with the plaintiffs;" but this does not warrant the conclusion drawn from it; the defendants were Josiah and Philip Turner; *William Turner was not a defendant; and the terms, "the said [*2
defendants," could not include him. There was no variance between the contract declared upon in the second count, and the contract proved upon the trial, with respect to the parties thereto.

CERTIFICATE of Division from the Circuit Court of Maryland. In the circuit court, the plaintiffs, on the 29th of April 1825, sued out a writ of *capias ad respondendum*, in an action of *assumpsit*, against "Josiah Turner and Philip Turner, surviving partners of William Turner, citizens of Maryland, merchants."

The declaration in the case contained two counts: the first count charged the defendant for work, labor and services, for goods sold and delivered, and for money lent, paid and advanced, in the following terms: Josiah Turner and Philip Turner, surviving partners of William Turner, citizens of Maryland, merchants, were attached to answer the plaintiffs, "of a plea

of trespass on the case, &c., and thereupon, the said plaintiffs, by J. Glenn, their attorney, complain, for that whereas, the said defendants, merchants and copartners, trading under the firm of Josiah Turner & Company, in the lifetime of the said William," on the 1st day of March 1822, were indebted to the plaintiffs, &c. The second count was on an alleged *insimul computassent*, charging that "the said defendants, afterwards, to wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendants to the said plaintiffs, and then being in arrear and unpaid, &c."

The defendants pleaded *non assumpsit;* and before the case came on for trial, depositions of witnesses were taken in New York and in Holland, under commissions issued for the purpose; which showed, that the ground of action was for advances made by the agent of the plaintiffs, in September and October 1819, and in January 1820, on shipments of tobacco, the property of Josiah Turner and Philip Turner, consigned to the plaintiffs, and by them sold for the account of the defendants. From these transactions, a balance was, by the accounts-current of the plaintiffs, claimed to be due to them; and the accounts-current of the plaintiffs were, by the testimony in the case, shown to have been furnished to the defendants, by
*3] *the agent of the plaintiffs, at different periods, and particularly in June 1822. No acknowledgment or admission of the correctness of the account was given in evidence.

The defendants, to maintain the issue on their part, gave in evidence to the jury, that William Turner, the person mentioned in the declaration, died on the 6th day of January 1819; that the said William was formerly a partner with the said Josiah and Philip, under the firm of Josiah Turner & Company, but that the said copartnership was dissolved in October 1817; and that a new copartnership was formed between the said Josiah and Philip in 1820, under the firm of Josiah Turner & Company.

Whereupon, the defendants, by their counsel, prayed the opinion of the court and their direction to the jury, that the plaintiffs were not entitled to recover, because the defendants were sued as surviving partners of William Turner; whereas, the proof was, that William Turner had departed this life, some months before the first transaction took place between the plaintiffs and defendants, and therefore, could not constitute one of the firm of the defendants, at any time during the transactions in question; and that, therefore, there was a variance between the contract declared on, and the contract given in evidence; upon which prayer, the opinions of the judges were opposed, and the same, on motion of the plaintiffs, by their counsel, was certified to the supreme court, agreeable to the act of congress.

The case was argued by *Stewart*, for the plaintiffs; and by *N. Williams*, for the defendants.

For the *plaintiffs*, it was contended, that the description of the defendants in the writ did not control the further proceedings, so as to make them erroneous, if they did not conform to that description. 2 W. Bl. 722; 1 Bos. & Pul. 383; 3 Day 472. The declaration properly recites the writ, but this does not make the writ a part of the declaration. The declara-

tion shows the ground of claim, and can alone be considered as exhibiting it. 1 Chitty 289 ; 2 W. Bl. 848 ; 11 East 62, 65 ; 1 W. Bl. 250.

The declaration in this case fully sustains the claim of the plaintiffs, if the words "surviving partners" are rejected ; and they should be, as surplusage. This being done, it states no *cause of action against William Turner, but against Josiah Turner and Philip Turner. But if [*4 the words "surviving partners" cannot be stricken out, the objection of erroneous description does not apply to the last count in the declaration, as there they are not found. That count refers to the defendants in the suit, and those defendants were not William Turner, Josiah Turner and Philip Turner, but the two latter only. 1 Har. & Gill 234. A plaintiff may recover, in the same action, against a defendant, an individual debt, as also a debt due by him as a surviving partner. 5 Burr. 263 ; 5 T. R. 493 ; 1 Barn. & Ald. 29, 224 ; 2 Chit. Pl. 436.

As to the alleged variance between the writ and the declaration, he cited, 2 Wheat. 45 ; 1 Har. & Gill 384. If the defendants assert a variance between the second count and the writ, that should have been made the subject of exception, before plea. 12 Johns. 344.

The evidence on the record shows that the parties had accounted together. The accounts of the plaintiffs were delivered to the defendants, and no evidence that objections were made to them, until after three years, was offered. If the evidence upon this point was slight, yet it should not have been taken from the jury by the court ; it was with the jury only to determine on its sufficiency.

Williams, for the defendants, argued, that although an action against a surviving partner, charging him as an individual, upon a partnership debt, can be sustained, yet there is no case where, in a suit on an individual contract, the defendant can be charged as a surviving partner ; each partner being liable individually for the debts of the partnership ; but partners are not liable for individual debts.

The rule of law is, that contracts must be set forth in the declaration truly ; and the slightest variance in substance will be fatal. Arch. Plead. & Evid. 122 ; 1 T. R. 240 ; 3 Stark. 60 ; 1 Chit. Plead. 304. Another rule of pleading is, that if the declaration contains too many defendants, or too few plaintiffs, it is a fatal defect. 1 Chit. Plead. 31 ; Arch. Plead. & Evid. 78 ; 1 East 52 ; Pet. C. C. 26–7 ; Arch. Pract. 54. *The declaration [*5 in this case comes fully within both these rules. No evidence in the cause applied to transactions occurring before the death of William Turner ; and all the dealing between the plaintiffs and Josiah and Philip Turner was subsequent to his decease.

The statement in the first count, by which the defendants are charged as surviving partners, cannot be changed, by considering the words "surviving partners" as surplusage. The contract alleged, is a contract with the firm of "Josiah Turner & Company," in the lifetime of William Turner ; and thus more parties are asserted to have made the *assumpsit* than those who are proved by the evidence to have been engaged in it. The second count refers to the first ; the plaintiffs count against the defendants, as "the said defendants." If the word "said" refers to the writ, or the first count, it has the same effect, and alleges a contract made by Josiah and Philip Turner as

surviving partners. 1 Chit. Plead. 233 ; 2 Doug. 667 ; 1 Mason 66 ; 1 Camp. 466. Nor can the declaration be sustained, as if the defendants had been individually described. Arch. Plead. & Evid. 122 ; 1 Chit. Plead. 31 ; 6 T. R. 363 ; 2 Johns. 213 ; 1 Pet. 317 ; 12 Johns. 349 ; 2 Wms. Saund. 121 ; 4 Barn. & Ald. 374 ; Arch. Pract. 60 ; 2 Stark. 356 ; 5 Cow. 58.

Thompson, Justice, delivered the opinion of the court.—This case comes up from the circuit court for the district of Maryland, upon a division of opinion in that court upon a point stated on the record in the following manner, viz : And thereupon, the defendants, to maintain the issue on their part, gave in evidence to the jury, that William Turner, the person mentioned in the declaration in this cause, died on the 6th of January 1819 ; that the said William was formerly a partner with the said Josiah and Philip, under the firm of Josiah Turner & Company, but that the said copartnership was dissolved in October 1817, and that a new copartnership was formed between the said Josiah and Philip in 1820, under the firm of Josiah Turner & Company. Whereupon, the defendants, by their counsel, prayed the *6] *opinion of the court, and their direction to the jury, that the plaintiffs are not entitled to recover, because the defendants are sued as surviving partners of William Turner, whereas, the proof is, that William Turner had departed this life, some months before the first transaction took place between the plaintiffs and defendants, and therefore, could not constitute one of the firm of the defendants, at any time during the transaction in question, and that, therefore, there is a variance between the contract declared on, and the contract given in evidence. Upon which prayer, the opinions of the judges were opposed.

The declaration contains two counts. The first, setting out the cause of action, states as follows : for that whereas, the said defendants, merchants and copartners, trading under the firm of Josiah Turner & Co., in the lifetime of said William, on the 1st day of March, in the year 1821, were indebted to the plaintiffs, &c., and being so indebted, the defendants undertook and promised to pay, &c. The second count is upon an *insimul computassent*, and begins : whereas also, the said defendants, afterwards, to wit, on the day and year aforesaid, accounted with the said plaintiffs, of and concerning divers other sums of money, due and owing from the said defendants, and then in arrear and unpaid, and being so found in arrear, the defendants promised to pay, &c.

Whatever objection may arise under the first count in the declaration, with respect to a variance between the contract or cause of action, and the evidence to maintain it, that objection does not exist as to the second count. It is to be borne in mind, that it forms no part of the question upon which the opinion of the judges was opposed, whether the evidence was admissible under the count upon an *insimul computassent.* The point of objection was, that the cause of action, as stated in the declaration, arose against the defendants and William Turner, and the evidence only showed a cause of action against the two defendants, unconnected with William Turner, and which arose since his decease. The only allegation in the second count in the declaration, from which it is argued, that the contract declared upon was one including William Turner with Josiah and Philip, is, that the said defendant accounted with the plaintiffs,

&c. But *this does not warrant the conclusion drawn from it; the defendants were Josiah and Philip Turner; William Turner was not a defendant, and the reference by the terms "the said defendants" could not include him. It does not even describe the defendants as survivors, nor allegate that they accounted as such, or in the lifetime of William Turner. But the whole cause of action, as set out in this count, arose against Josiah and Philip, entirely unconnected with William. The evidence, therefore, showing that William Turner died before the first transaction took place between the defendants and plaintiffs, did not show any variance between the contract declared upon in this count, and the contract proved. The one declared upon in the second count was between the plaintiffs, and the defendants, Josiah and Philip Turner, and the evidence did not show a contract varying from it.

We are, accordingly, of opinion, that there was no variance between the contract declared upon in the second count, and the contract proved upon the trial, with respect to the parties thereto.

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*Bank of the United States, Plaintiffs in error, *v.* Bank of Washington, Defendants in error. [*8

Money paid under erroneous judgment.

The defendants in an execution paid to the agents of the plaintiff the amount of the debt, and gave a verbal notice, that it was their intention to sue out a writ of error to reverse the judgment; this was afterwards done, and the judgment was reversed; the agents of the plaintiff paid over to him forthwith the amount received, and the defendants instituted a suit against the agent, to recover the sum paid to them: *Held*, that they could not recover.

It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party may justify under it, until the judgment is reversed, for an erroneous judgment is the act of the court.

On the reversal of an erroneous judgment, the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object, may be regulated according to circumstances; sometimes, it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost; in other cases, a *scire facias* may be necessary, to ascertain what is to be restored; but as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding.[1]

Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it, and the law, at the very time of payment, creates the obligation to refund it; a notice to refund the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.

Bank of Washington *v.* Bank of United States, 4 Cr. C. C. 86, reversed.

Error to the Circuit Court of the District of Columbia, for the county of Washington. The action was *assumpsit* in the circuit court, and was instituted by the Bank of Washington against the Bank of the United States for money had and received, to recover the sum of $881.18, with

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[1] Though the supreme court, on a reversal, refuse to make an order of restitution (the money having been collected by execution), yet, if a second trial result in a verdict and judgment for the defendant, the money paid may be recovered back, in an action of *assumpsit*. Travellers' Ins. Co. *v.* Heath, 95 Penn. St. 333. See Ex parte Morris, 9 Wall. 605; South Fork Canal Co. *v.* Gordon, 2 Abb. U. S. 479.

interest. The case was submitted to that court on the following case agreed:

In this case, Triplett & Neale recovered a judgment, at Alexandria court, at April term 1824, against the Bank of Washington, which was afterwards taken to the supreme court by writ of error and there reversed, as appears by the record of the same in the supreme court, and the proceedings in that court in the matter of the writ of error, *Bank of Washington*
*9] *v. *Triplett & Neale*, decided at January term 1828, of the supreme court. 1 Pet. 25. The Bank of Washington, on the 2d of June 1824, had petitioned for the allowance of a writ of error in the said case, and presented such petition to one of the judges of the supreme court, by whom it was refused; and afterwards, the said petition was presented to the chief justice of the United States, by whom the writ was allowed, on the 15th of March 1825; and the same was accordingly issued, as by the record; on the 30th of August 1824, Triplett & Neale sued out execution on said judgment, and immediately sent the same, inclosed in a letter to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, with an indorsement thereon in writing, who wrote another indorsement thereon, as appears from the said execution and the indorsement thereon, in the words following:

Triplett & Neale *v.* The Bank of Washington. Use and benefit of the office of discount and deposit of the United States, Washington city.

CHARLES NEALE.

Pay to Mr. Brooke Mackall. R'D SMITH, Cashier.

Received eight hundred and eighty-one dollars and eighteen cents.

B. MACKALL.

Brooke Mackall, the runner in the said office, and the person mentioned in the last of said indorsements, presented the said execution, &c., to the Bank of Washington, and there, on the 9th of September 1824, received the sum of $881.18, and signed the receipt thereon. And at the time of signing the same, William A. Bradley, then cashier of the Bank of Washington, verbally gave notice to said Mackall, that it was the intention of said Bank of Washington to appeal to the supreme court, and that the said office of discount and deposit would be expected, in case of a reversal of the judgment, to refund the amount. The said Mackall received the said sum as the amount of principal and interest accrued on said judgment, as appeared by his receipt on the said execution; which sum he delivered to said Smith, who entered it to the credit of C. Neale, one of the firm of Triplett & Neale, on the proper books of the said office. Before the delivery of the said
*10] execution to the said Smith, as aforesaid, C. Neale, one of the *said firm of Triplett & Neale, had promised said Smith to appropriate the money expected to be recovered from the Bank of Washington in said suit, to reduce certain accomodation discounts which he, the said Neale, had running in said bank, upon notes drawn by him and indorsed by indorsers, as sureties for the due payment thereof, which discounts were still running upon such notes, at the time and times the said execution was so delivered, and when the money was paid as aforesaid. The said Smith received the said execution, with the said Neale's said indorsement thereon, as he understood and considered, for collection; and when collected, he deposited the

same in bank to said Neale's credit, generally; and would have sent the same to him at Alexandria, if he had requested him to do so, or would have paid his check for the amount; and immediately on the receipt of said money as aforesaid, said Smith wrote a letter to the said Neale, in the words following, to wit:—

OFFICE OF THE BANK OF THE UNITED STATES,
Washington, September 9, 1824.

CHRISTOPHER NEALE, Esq.

Dear Sir:—I have received the sum of eight hundred and eighty-one dollars and eighteen cents from the Bank of Washington, in payment of your judgment against it, and have placed the same to your credit. Be good enough to give me specific directions of the way in which you wish it applied. R'D SMITH, Cashier.

To which letter the said Neale returned the following answer:

Dear Sir:—In reply to your esteemed favor, I have to request that you will apply the money received from the Bank of Washington to the reduction of the notes indorsed by John H. Ladd & Co., and John A. Stewart, equally, after paying Thomas Swann and Walter Jones one hundred dollars between them, or fifty dollars each, as their fees.

10th September 1824. C. NEALE.

The said Smith applied the money pursuant to the directions of the last-mentioned letter. It was submitted to the court, upon the foregoing case agreed, whether the plaintiffs were entitled to recover of the defendants, the money, with interest, so received and applied by said Smith, as aforesaid; if the court decide in the affirmative, judgment to be entered for *the plaintiffs for the sum of $881.18, with interest from the 9th day of [*11
September 1824, until paid, and costs; otherwise, for the defendants, with costs, &c. (any objections to the competence of the evidence to be considered by the court).

The circuit court gave judgment for the plaintiffs, and the defendants prosecuted this writ of error.

The cause was argued by *Lear* and *Sergeant*, for the plaintiffs in error; and for the defendants, by *Dunlap* and *Key*.

For the *plaintiffs*, it was contended, that the money which was received from the Bank of Washington, by the Bank of the United States, was received as the funds of Triplett & Neale, and as their agents; the Bank of the United States did not act as the assignees of the judgment, but placed the amount to the credit of Christopher Neale; and afterwards, by special directions, appropriated it to the reduction of the notes of Triplett & Neale in the bank, upon which notes there were good and substantial indorsers, who thereby became released to the extent of the appropriation.

The judgment against the Bank of Washington was valid and subsisting, at the time the money was received. If land had been taken in execution and sold under the judgment, the title of the purchaser would have been good, although the judgment was afterwards reversed, the writ of error not having operated as a *supersedeas*. Indeed, no writ of error was prosecuted, until after the payment of the money. 2 Bac. Abr. 505; *Barney* v. *Patter-*

son's Lessee, 6 Har. & Johns. 182. The judgment being then good and in force, and Triplett & Neale having, at the time it was paid, a right to demand and receive the money, the action for money had and received will not lie; that action is an equitable one. The proper remedy for the defendants in error was a writ of restitution. 6 Com. Dig. Plead. 468–9; 2 Salk. 587–8; Rast. Ent. 388; 10 Mass. 433. If money received under circumstances of this kind could be pursued, there would be no limit to such actions.

There was no assignment of the judgment to the Bank of the United States; nor would the court have allowed an assignment *to be entered on the record, upon the production of the order of Mr. Neale upon the execution, as stated in the case agreed. The Bank of the United States were not treated in the proceeding upon the writ of error, as the assignees of the action, and no regard was paid to them, in the proceedings in the case of the *Bank of Washington* v. *Triplett and Neale*, 1 Pet. 25. *12]

The Bank of the United States were not affected by the notice which was given to the runner of the bank, when the money was paid. It was not given to one who had a right to receive it, nor in a form which entitled it to consideration. Could the notice have any effect? The decision of this question does not depend upon the question of agency. To make this notice available, it is indispensable, that it should be of a matter of which the party has a right give notice, and of which the party to whom the notice is given is bound, or, at least, has the power to take notice. It must be of something which the party has a right to require.

Had the Bank of Washington a right to stay the receipt of the money by Triplett & Neale, or to prevent them from using it as they pleased, directly or indirectly? The argument supposes, necessarily, that they had a right to intercept it in its course; or, at all events, to prevent the use of it, and detain it for themselves. When and where did the right arise? The judgment was in full force, and warranted the issuing of this execution; and proceedings under it could not be stayed. The command of the writ was to levy the money, and to pay it to the plaintiffs. The money could not be stopped in the hands of the marshal, who was bound to pay it to the plaintiffs; and if he had not paid it, they could have brought suit for it. The Bank of Washington could not have stopped it in his hands, after payment to the marshal; and yet this is what is sought to be accomplished by the notice. The case is then only the ordinary case of a judgment liable to be reversed on error; but until reversed, the money belongs to the plaintiff in the execution, to all intents and purposes; liable to pay an equal amount in case of reversal, but not a specific thing. The notice, therefore, is of a thing totally immaterial, and to be disregarded. *These observations apply to the argument founded on the agency. The utmost extent to which the principle can be carried is, that if an agent, after notice, pay over to his principal what he ought not to pay over, he is himself liable. The mere notice itself is nothing; the important feature is, that he ought not to pay over the money. In this case, the agency of the cashier was accompanied with no such condition; on the contrary, he was bound to pay over. The Bank of Washington had no right to prevent his doing so. Will *assumpsit* lie on an order of restitution against the party? This has never been decided, but has been strongly contested. *13]

Dunlap and *Key*, for the defendants in error, contended, that the judgment of the circuit court should be affirmed on the following grounds: 1. That money paid on an erroneous judgment, afterwards reversed, is recoverable in an action for money had and received, against the person receiving it, either as original plaintiff, or as assignee of the plaintiff. 2. That the indorsement on the execution and the delivering to the Bank of the United States, in this case, made them the assignees of the judgment. 3. That if not so, and Mr. Smith received it, as he says he considered it, for collection, the Bank of Washington had no reason so to consider it—but every reason to believe, that the Bank of the United States held the judgment for their own "use and benefit," as the indorsement purported, and that they might safely pay it to them, and look to them to refund the money, in the event of a reversal. 4. And if not so, and the Bank of the United States were only the agents of Triplett & Neale, and were even known to the Bank of Washington to be so, yet the notice given to them, on the payment, makes them liable to the action.

1. The action was well brought, and the case was not one for a writ of restitution, because there was no assignment of the judgment to the Bank of the United States, of record. The cause was sent from this court for further trial; and there could be no restitution until a final trial. A writ of restitution only lies against a party on the record. Tidd's Practice, 936–7, 1137. *Assumpsit* will lie to recover money paid on an erroneous *judgment. Esp. 6, 19; 1 Dane's Abr. 181; 2 Munf. 272; 1 Taunt. 359; 7 T. R. 269; 6 Cow. 297. [*14

2. The Bank of the United States were liable to the Bank of Washington, as the assignees of the judgment—as assignees they can be in no better situation than the principal, and they are liable to the same equities. They received the money as the owners of the judgment, as it became theirs by the indorsement on the execution. This is the usual mode of transferring judgments; and the circuit court, had an application been made for the purpose, would have made an entry of the assignment on the record. In this state of the facts, no suit would have laid against Triplett & Neale, as the money was not paid to them.

3. As agents, they are liable to repay the money. The notice to the runner of the bank, who became, by the authority to receive the money, the agent of the bank for all purposes connected with the transaction, was sufficient. If money is paid by mistake, it can be recovered back. Cowp. 565; 1 Chit. Pl. 25; 2 Ld. Raym. 1210; Paley on Agency 304–5; 3 M. & S. 344; Livermore 261. The agent must be known, to protect him from personal liability to rapay the money; *per* Mr. Justice THOMPSON, in 13 Johns. 77.

The Bank of the United States have the money in their own hands; it has never been paid over. They paid a debt due to them by Triplett & Neale; but it does not appear, that they gave any new credit, in consequence of this appropriation of the money; or that the indorsers of the notes reduced by the same were discharged. The original securities were retained by the bank.

It was the duty of the Bank of the United States to have given notice of their agency in the transaction, and then an injunction to stay the funds in their hands would have been obtained; or they could have refused to

receive the money, after the notice was given; or, having received it, they should have retained it, and have filed a bill of interpleader. In this state of the proceedings, the payers of the money would have been safe, and no prejudice would have arisen to the Bank of the United States.

*15] *THOMPSON, Justice, delivered the opinion of the court.—This case comes up on a writ of error to the circuit court of the United States for the district of Columbia. The judgment in the court below was given upon a statement of facts agreed upon between the parties, substantially as follows:

Triplett & Neale, in April 1824, recovered a judgment against the Bank of Washington, for $881.18. A writ of error was prosecuted by the Bank of Washington, and that judgment was reversed by this court, at the January term 1828. But whilst that judgment was in full force, and before the allowance of the writ of error, Triplett & Neale, on the 30th of August 1824, sued out an execution against the Bank of Washington, and inclosed it to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, with the following indorsement:

Triplett & Neale *v.* The Bank of Washington. "Use and benefit of the office of discount and deposit U. States, Washington city." Chr. Neale. "Pay to Mr. Brooke Mackall." R'd Smith, cashier. "Received eight hundred and eighty-one dollars and eighteen cents." B. Mackall.

B. Mackall, who was runner in the branch bank, presented the execution to the Bank of Washington, and received the amount due thereon, on the 9th of September 1824. At the time of receiving the same, William A. Bradley, cashier of the Bank of Washington, verbally gave notice to said Mackall, that it was the intention of the Bank of Washington to appeal to the supreme court, and that the said office of discount and deposit would be expected, in case of reversal of the judgment, to refund the amount. Mackall paid the money over to Smith, who entered it to the credit of Neale, one of the plaintiffs in the execution. Before the execution was sent to Smith, Neale had promised him to appropriate the money, expected to be recovered from the Bank of Washington, to reduce certain accommodation discounts, which he had running in the office of discount and deposit. Smith, when he received the execution, with the indorsement thereon, understood and considered that it was for collection, and the money, when received by him, was deposited to Neale's credit, generally, and he would have sent the

*16] money to him at Alexandria, if he had requested *him so to do, or would have paid his check for the amount. Immediately on the receipt of the money, Smith wrote to Neale, informing him thereof, and asking him for specific directions how to apply it; which letter Neale immediately answered, giving him directions, and the money was applied according to such directions.

Upon this statement of facts, the court below gave judgment for the plaintiffs; to reverse which, the present writ of error has been brought.

That the Bank of Washington, on the reversal of the judgment of Triplett & Neale, is entitled to restitution, in some form or manner, is not denied. The question is, whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed? When the money

was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, nor any measures whatever taken, which could operate as a *supersedeas* or stay of the execution. Whatever, therefore, was done under the execution, towards enforcing payment of the judgment, was done under authority of law. Had the marshal, instead of the runner of the bank, gone with the execution, and received the money, or coerced payment, he would have been fully justified by authority of the execution; and no declaration or notice on the part of the Bank of Washington of an intention to appeal to the supreme court, would have rendered his proceedings illegal, or made him in any manner responsible to the defendants in the execution Suppose, it had become necessary for the marshal to sell some of the property of the bank, to satisfy the execution, the purchaser would have acquired a good title under such sale, although the bank might have forbidden the sale, accompanied by a declaration of an intention to bring a writ of error. This could not revoke the authority of the officer, and while that continued, whatever was done under the execution would be valid. It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party may justify under it, until the judgment is reversed; for an erroneous judgment is the act of the court. 1 Str. 509; 1 Vern. 195. If the marshal might have sold the property of the bank, and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not *be equally valid, as it respects the rights of third persons. In neither case, does the party against [*17 whom the erroneous judgment has been enforced, lose his remedy against the party to the judgment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes, it is done by a writ of restitution, without a *scire facias;* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary, to ascertain what is to be restored. 2 Salk. 587–8; Tidd's Pract. 936, 1137–8. And, no doubt, circumstances may exist, where an action may be sustained to recover back the money. 6 Cow. 297. But as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment, at any future day, be reversed, it would, virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties; the writ of error may be so taken out as to operate as a *supersedeas;* or, if a proper case can be made for the interference of a court of chancery, the execution may be stayed by injunction.

It has been argued, however, on the part of the defendants in error, that the Bank of the United States stands in the character of assignees of the judgment, and is thereby subjected to the same responsibility as the original parties, Triplett & Neale. Without entering into the inquiry whether this would vary the case, as to the responsibility of the plaintiff in error, the evi-

dence does not warrant the conclusion, that the Bank of the United States stands in the character of assignees of the judgment. There is neither the form nor the substance of an assignment of the judgment. No reference whatever, either *written or verbal, is made to it. The mere indorse- *18] ment on the execution, "use and benefit of the office of discount and deposit of the United States, Washington city," cannot, in its utmost extent, be considered anything more than an authority to receive the money, and apply it to the use of the party receiving it. It is no more an assignment of the judgment, than if the authority had been given by a power of attorney, in any other manner, or by an order drawn on the Bank of Washington. The whole course of proceeding by the cashier of the office of discount and deposit, shows that he understood the indorsement on the execution merely as an authority to receive the money, subject to the order of Neale with respect to the disposition to be made of it. He did not deal with it as an assignee, having full power and control over the money, but as an agent, subject to the order of his principal. He passed it to his credit on the proper books of the office; and wrote to him, asking specific directions how the money should be applied. He received his directions, and applied it accordingly; and all this was done, six months before the allowance of the writ of error.

It is said, however, that although Mr. Smith might have considered himself a mere agent to collect the money, the Bank of Washington had no reason so to consider him. There is nothing in the case showing that the Bank of Washington had any information on the subject, except what was derived from the indorsement on the execution; and if that did not authorize such conclusion, the plaintiff in error is not to be prejudiced by such misapprehension. It was a construction given to a written instrument, and if that construction has been mistaken by the defendant in error, it is not the fault of the opposite party.

But again, it is said, the payment of the money was accompanied with notice of an intention to appeal to the supreme court; and that, in case of reversal, it would be expected that the office of discount and deposit would refund the money. If the plaintiff in error could be made responsible by any such notice, given even in the most direct and explicit manner, that which was given could not reasonably draw after it any such consequence. It is vague in its terms, and does not assert that the office of discount and deposit would be held responsible to refund the money, but only that it would be expected *that it would be done. This is not the language *19] of one who was asserting a legal right, or laying the foundation for a legal remedy. And there is no evidence, that even this was communicated to the office.

But the answer to the argument is, that no notice whatever could change the rights of the parties, so as to make the Bank of the United States responsible to refund the money. When the money was paid, there was a legal obligation on the part of the Bank of Washington to pay it; and a legal right on the part of Triplett & Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under that execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retro-

spective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost, by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers, there is no such privity; and if no legal right existed, when the money was paid, to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money, does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.

The judgment must accordingly be reversed; and judgment entered for the defendant in the court below.

Judgment reversed.

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*Thomas Kirkman, Jr., Plaintiff, *v.* John W. Hamilton and [*20 others, Defendants.

Statute of limitations.—Action on promissory note.—Jurisdiction.

The statute of limitations of North Carolina, passed in 1715, in force in Tennessee, bars the particular actions which it recites, and no others; it does not bar actions of debt, generally, but those only which are brought for arrears of rent.

In an action of debt on a promissory note, instituted in the circuit court of Tennessee, the defendant pleaded the statute of limitations of North Carolina of 1715, in force in Tennessee: *Held*, that the statute did not extend to the action, and that the plaintiff was not barred.

By the acts of the legislature of North Carolina, in force in Tennessee, the indorser of a promissory note is entitled to sue in his own name, as on inland bills of exchange in England; and he may, therefore, bring an action of debt on a promissory note held by him.

Raborg *v.* Peyton, 2 Wheat. 385, cited and re-affirmed.

H. and D., citizens of Tennessee, gave their promissory note to T. R. & Co., also citizens of Tennessee, payable in fifteen months; before the note became, due T. R. & Co. removed to and became citizens of Alabama, and also before the day appointed for the payment of the note, indorsed it to K., a citizen of Alabama; and in the declaration on the note, the plaintiff averred, that T. R. & Co. were citizens of Alabama: *Held*, that the circuit court of Tennessee had jurisdiction of the suit, under the 11th section of the act of 1789; the payees of the note having, before the note became due, become citizens of Alabama, could have prosecuted a suit on the note in the circuit court of Tennessee, if no assignment had been made.[1]

Certificate of Division from the Circuit Court of West Tennessee. In that court, Thomas Kirkman, jr., a citizen of Alabama, instituted, in April 1823, an action of debt, against John W. Hamilton and Thomas Donoho, citizens of Tennessee, upon a promissory note made by the defendants, under the firm of Hamilton & Donoho, in West Tennessee, on the 22d of September 1818, for the sum of $3000, payable fifteen months after date, to Thomas Ramsey & Co., or order; and Thomas Ramsey & Co. having become citizens of Alabama, and the note being unpaid, indorsed the same to the plaintiff, Thomas Kirkman, jr.

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[1] Catlett *v.* Pacific Ins. Co., 1 Paine 594.

To this declaration, the defendants pleaded: 1. The statute of limita-
*21] tions of Tennessee, alleging that the cause of action *did not accrue within three years. 2. That at the time the note was given, they were citizens and inhabitants of Smith county, in the state of Tennessee, of which state the plaintiff was then a citizen, and in which state the note was given.

To the plea of the statute of limitations, and to the second plea, the plaintiff demurred, and assigned as causes of demurrer: 1. That the plea does not state that this is an action of debt for arrearages of rent. 2. The declaration is not in debt for arrearages of rent. 3. The cause of action sued upon is not arrearages of rent. 4. The second plea is uncertain, unsound and insufficient.

Upon the argument of the demurrer in this cause, as applicable to the plea of the statute of limitations to the second count in the plaintiff's declaration, the court were divided in opinion upon the following questions: Whether the plea of the statute of limitations is a bar to the recovery of the plaintiff on the second count in the declaration? and whether an action of debt can be supported on the cause of action set forth in said second count? whether the averment of the citizenship of Thomas Ramsey & Co., the payees of the note in the said second count, is sufficient to sustain the jurisdiction of this court, under the provisions of the 11th section of the judiciary act of 1789? Which certificate of division of opinion was ordered to be certified to the supreme court of the United States, according to law.

The case was argued by *Webster*, for the plaintiff. No counsel appeared on the part of the defendant. Mr. Webster also presented to the court a written argument from *Thomas Washington*, the counsel for the plaintiff in the circuit court.

It was contended, that the plea of the statute of limitations of Tennessee does not apply to the action of debt at all, unless to debt for arrearages of rent, which is not the nature of this action. Act of 1715 of North Carolina, ch. 27, § 5 (Scott's Revisal 15). This act applies exclusively to the form of the action. Besides, acts of limitation bar the remedy and not the right. The act of 1715, ch. 31, § 7, does not apply, even if, by that act, the act of James is in force in Tennessee; because six years had not elapsed before the
*22] bringing *of this suit. It has not yet been decided by the supreme court of Tennessee, whether the act of James is in force in Tennessee or not; but the question is depending at this time. The defendants, in support of that plea, rely upon the act of 1786, ch. 4, § 5. In answer to that, the plaintiff says, that by the act of 1786, the limitation is only to apply in the same manner, in a suit founded upon an indorsed note, under seal, as it would apply in a suit upon a promissory note indorsed; and that the action against the maker of the former, would be debt, and that against the maker of the latter, might be debt. *Raborg* v. *Peyton*, 2 Wheat. 385. So that the limitation intended by the act of 1786 never could apply, unless in a suit against an indorser of a sealed note. (See act of 1762, ch. 9, § 2; also act of 1789, ch. 57, § 3.) There has been no decision of the supreme court upon the applicability of the act of 1786 to an action of debt against the maker of a sealed note, nor is the question depending.

As to the averment of the citizenship of the original parties to the note,

it was contended, that the payees of the note, Thomas Ramsey & Co., although citizens of Tennessee, when the note was made, yet, if they had become citizens of Alabama, and had not assigned it, they could have maintained a suit in their own names in the federal court; and that, consequently, if they had the right, they could communicate it; or, at least, that their assignees would not be precluded by any disability of their assignors.

Marshall, Ch. J., delivered the opinion of the court.—This case comes up from the court of the United States for the seventh circuit and district of West Tennessee, on a certificate that the judges of that court were divided in opinion on the following questions: 1. Whether the plea of the statute of limitations is a bar to the recovery of the plaintiff, on the second count in the declaration? 2. Whether an action of debt can be supported on the cause of action set forth in said second count? 3. Whether the averment of the citizenship of Thomas Ramsey & Co., the payees of the note, in the second count, is sufficient to sustain the jurisdiction of this *court, under the provisions of the eleventh section of the judiciary act of 1789? [*23

The second count is a declaration in debt on a promissory note executed by the defendants, made payable to Thomas Ramsey & Co., then citizens of Tennessee, and indorsed by them, after becoming citizens of Alabama, to the plaintiff, a citizen of Alabama, who instituted the suit, as assignee of the said note.

The first question depends on an act of the state of North Carolina, passed in the year 1715, and was the law of Tennessee; the 8th section of which enacts, "that all actions of trespass, detinue, actions *sur* trover and replevin for taking away of goods and chattels, all actions of account, and upon the case, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought, at any time after the ratification of this act, shall be brought within the time and limitation in this act expressed, and not after; that is to say, actions of account-render, actions upon the case, actions of debt for arrearages of rent, actions of detinue, replevin and trespass *quare clausum fregit*, within three years next after the ratification of this act, or within three years next after the cause of such action or suit, and not after." This statute bars the particular actions it recites, and no others. It does not bar actions of debt, generally, but those only which are brought for arrearages of rent. This is not brought for arrearages of rent; and is, consequently, not barred. The action of debt, unless it be brought for arrearages of rent, not being within this statute, the court perceives no other which bars it. If the 7th section of the 31st chapter of the act of 1715 was even to be considered as adopting the act of limitations of the 4 James I., it would not affect this case, because the suit was brought within the time allowed by that act. The act of 1786, ch. 4, was intended to make all bills, bonds, &c., negotiable, though under seal, and to enable the assignee to sue in his own name, and to bring an action on the case, notwithstanding the seal. The proviso of the 5th section, that "the act of limitations shall apply to all bonds, bills, and other securities hereafter executed, made transferrible by this *act, after the assignment or indorsement thereof, in the same manner as it operates by law against promissory notes," [*24

cannot, we think, be fairly construed to extend the act of limitations in its operation on promissory notes. We are, therefore, of opinion, that the plea of the statute of limitations is not a bar to the recovery of the plaintiff, on the second count in his declaration.

The second question propounded is, whether an action of debt can be supported on the cause of action set forth in the second count? The cause of action is a promissory note, made by the defendants, and indorsed by the payees to the plaintiff. In 1792, the legislature of North Carolina passed an act, ch. 9, "for the more easy recovery of money due upon promissory notes, and to render such notes negotiable." The second section declares, that all such notes, payable to order, "may be assignable over, in like manner as inland bills of exchange are by custom of merchants in England," and that the person or persons "to whom such money is, or shall be, payable, may maintain an action for the same, as they might upon such bill of exchange," and the person or persons "to whom such note so payable to order is assigned or indorsed, may maintain an action against the person or persons," &c., "who signed or shall sign such notes, or any who shall have indorsed the same, as in cases of inland bills of exchange." The note claimed in the second count of the declaration is payable to order. In 1786, the legislature passed "an act to make the securities therein named negotiable," by which notes not expressed to be payable to order are placed on the same footing with those which are made so payable. The indorsee being thus entitled to sue in his own name, in like manner as on inland bills of exchange in England, the inquiry is, whether the indorsee of an inland bill of exchange may maintain an action of debt thereon in England? This question was fully considered by this court in the case of *Raborg* v. *Peyton*, 2 Wheat. 385, which was an action of debt brought by the indorsee of a bill of exchange against the acceptor. The cases were reviewed in the opinion then given, and the court decided clearly, that both on principle and authority, the action was maintainable. *We, therefore, think, that an action of debt can be supported on the cause of action set forth in the second count.

*25]

The third question asks, "whether the averment of the citizenship of Thomas Ramsey & Co., the payees of the notes, in the said second count, is sufficient to sustain the jurisdiction of this court, under the provisions of the 11th section of the judiciary act of 1789? That section gives jurisdiction to the circuit courts of the United States, where "the suit is between a citizen of the state where the suit is brought, and a citizen of another state." This suit is brought in the circuit court for the state of Tennessee, by a citizen of Alabama, against a citizen of Tennessee. It comes, therefore, within the very words of the section, and is within the jurisdiction of the court, unless taken out of it by the exception. The words of the exception, so far as they apply to the case, are, "nor shall any district or circuit court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made." When this note was assigned, the payees, as is averred in the second count, had become citizens of Alabama, and might, consequently, have prosecuted a suit to recover the contents of the said note, in the circuit court of the United States for Tennessee, if no assignment had been made.

The averment of the citizenship of Thomas Ramsey & Co., in the said second count, is, therefore, sufficient to sustain the jurisdiction of that court, under the provisions of the 11th section of the judiciary act of 1789.

All which was ordered to be certified to the circuit court of the United States for the seventh circuit and district of West Tennessee.

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*Bank of the United States, Plaintiff, *v.* William Green and others, Defendants. [*26

Division of opinion.

Upon motion of the defendants, a rule was granted, in the circuit court of the United States for the district of Ohio, on the marshal, to show cause why the taxation of costs in the case, upon execution, should not be reversed and corrected, in respect to the marshal's poundage taxed against the defendants; the judges of the circuit court were divided in opinion upon the questions of costs, presented on the hearing of the rule, and certified the division to this court; *Held*, that this court had not jurisdiction of the cause.

Certificate of Division from the Circuit Court of Ohio. In the circuit court, at July term 1829, on the motion of the defendants, a rule was granted on the marshal of the district of Ohio, and on the plaintiff, to show cause why the taxation of costs in this case, upon execution, should not be reversed and corrected, in respect to the marshal's poundage taxed against the defendants.

Upon showing cause, it appeared, that on the 30th September 1824, the plaintiff sued out of that court a writ of *fieri facias et levari facias* against the goods and chattels of the defendants, for $61,140.49, with interest from the 5th September 1821, until paid, returnable the first Monday in January 1825; on which said writ was indorsed by the parties an agreement waiving any levy on goods and chattels, and that a levy should be made on real estate; in pursuance whereof, the marshal made return of a levy on various parcels of real estate in the city of Cincinnati and elsewhere, that he had sold the same, and made part of the money, but had made no further levy for want of time. This return was made the first Monday of January 1825. It further appeared, upon a further process on the same judgment, a further levy was made on real estate, the sale of which was stayed by plaintiff; and that, for the sale of various parcels of real estate, so levied by the marshal, the plaintiff, on the 9th day of April 1827, issued out of the court, upon the said marshal's return, a writ of *venditioni exponas*, *returnable to the second Monday of July 1827; which writ the plaintiff's agent [*27 returned to the clerk's office, the 5th July 1825, not having placed the same in the hands of the marshal, but having received satisfaction of the judgment from the defendants. It further appeared, that the marshal, upon the last-mentioned levy, indorsed the taxation of his poundage at $792.50, under the act of congress, which was the taxation complained of, and sought to be reversed and corrected by the said rule *nisi*.

It further appeared, that, by a law of the state of Ohio, passed the 19th February 1824, and then and ever since regulating the fees of certain officers, the poundage of sheriffs, on writs of executions from all courts of the said state, was granted by a single clause in the following words: "poundage on all moneys made on execution, two per cent.," which was the only

law of the state regulating or granting poundage. The whole of the law of Ohio was referred to as a part of the case. It further appeared, that at the December separate session of the supreme court of Ohio, in the year 1826, in the case of *Vance* v. *Bank of Columbus* (2 Ohio 214), that court decided, that the words "money made on execution" in the above clause, could only relate to such sums as were actually paid into the sheriff's hands "upon the execution," and not to such sums as were actually paid to the creditor. It also appeared, that no counsel appeared in that case for the sheriff. It further appeared, that in the taxation aforesaid, complained of in the rule, the marshal claimed and taxed the rate of poundage allowed by the before-mentioned act of congress. In showing cause, the following questions arose, upon which the opinions of the judges were opposed, which, on the request of the marshal, by his said attorneys, were stated, and ordered to be certified by the clerk of the court, under the seal thereof, to the supreme court of the United States, at their next term, for their decision, viz:

1. Whether the marshal's poundage on moneys collected, made or paid on executions issued out of a circuit or district court of the United States, is confined and regulated by the following words, viz: "for sales of vessels and other property, and for receiving and paying the money, for any sum under $500, two and one-half per cent.; for any *larger sum, one and one-quarter upon the excess," in the first section of the act of congress, passed 28th February 1799, entitled, "an act for providing compensation for the marshals, clerks, attorneys, jurors and witnesses in the courts of the United States," viz., "for all other services not herein enumerated, except as shall be hereafter provided, such fees and compensation as are allowed in the supreme court of the state where such services are rendered."

*28]

2. If regulated by the words first mentioned, then, whether the marshal's poundage attaches upon a levy and return, where afterwards the debt shall be paid to the party, or only accrued upon a sale and receipt of the money and paying it over by him? Or,

3. Whether the marshal's poundage is confirmed by the before-mentioned words in the proviso, and are, in the cause here stated, to be regulated by the before-mentioned law of Ohio?

4. If the marshal's poundage in the cause here stated is to be regulated by the law of Ohio, then, whether, by a just construction of that law, poundage is due upon the levy and return in question? Or,

5. Is this court bound by the construction of that law given by the supreme court of Ohio?

The case was argued by *Doddridge*, for the marshal of the district of Ohio; and by *Ewing*, for the defendant.

Marshall, Ch. J., delivered the opinion of the court, that the case was not within the jurisdiction of this court. The division of opinion was not upon any matter arising at the trial of the cause, but was upon a mere matter arising upon the service of the execution by the marshal; and was a mere question for the circuit court upon a collateral contest between the marshal and the bank, as to his right to fees. It was not, therefore, a case within the purview of the judiciary act of 1802.

*United States *v.* State Bank of North Carolina.

Priority of the United States.

The right of priority of payment of debts due to the government, is a prerogative of the crown of England, well known to the common law; it is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, to secure an adequate revenue to sustain the public burdens and discharge the public debts.

The claim of the United States to priority does not stand upon any sovereign prerogative, but is exclusively founded on the actual provisions of our own statutes; the same policy which governed in the case of the royal prerogative may be clearly traced in their statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strait and narrow interpretation; like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.[1]

The priority of payment out of the estates of insolvents, in favor of the United States, was, under the statutes of the United States, first applied to bonds for the payment of duties, and to persons engaged in commerce.

The term "due," as applied to debts, is sometimes used to express the mere state of indebtment, and then it is equivalent to "owed" or "owing;" and it is sometimes used to express the fact that the debt has become payable.

The priority of the United States extends as well to debts by bonds for duties, which are payable after the insolvency or decease of the obligor, as to those actually payable or due at the period thereof.

In the strictest sense, the bond for duties is *debitum in præsenti;* although, looking to the condition, it may be properly said to be *solvendum in futuro;* it is in this sense that the legislature is to be understood in the use of the words "debt due to the United States."

Wherever the common law would hold a debt to be *debitum in præsenti, solvendum in futuro*, the statutes giving the United States priority embrace it, just as much as if it were presently payable.

Certificate of Division from the Circuit Court of North Carolina. The facts of the case upon which the question submitted to this court arose, were as follows:

William H. Lippett, a merchant of Wilmington, North Carolina, was, on the 14th of October 1828, indebted to the United States, and to sundry persons, and among others, to the State Bank of North Carolina; and on that day, he made a general assignment of all his property to Talcott Burr, in trust to pay his creditors. The assignment directed that the sum of $16,612.47 *should be paid to particular creditors, and that the residue of the property assigned, should be appropriated to the payment of bonds [*30 for duties to the United States. At the time of the assignment, Mr. Lippett had given bonds to the United States, for duties on merchandise, amounting to $7486.86; of which bonds, but one only, amounting to $419.97, was due and unpaid when the assignment was executed.

In the cause in the circuit court, the question arose, "whether the priority to which the United States are entitled, in case of a general assignment made by the debtor, of his estate, for the payment of debts, comprehends a bond for the payment of duties, executed anterior to the date of the assignment, but payable afterwards." Upon this question, the judges differed in opinion; and on motion of the attorney of the United States, the point of law on which the disagreement arose, was stated, under the direction of the said judges, and certified, under the seal of the court, to the supreme court of the United States, to be finally decided.

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[1] Beaston *v.* Farmers' Bank, 12 Pet. 134.

The case was argued by *Taney*, Attorney-General of the United States, for the plaintiffs ; and by *Peters*, for the defendants.

Taney stated, that the single question which was presented by the case for the consideration of this court, was, whether the priority of the United States attaches to bonds given to the United States for duties, which are not due, but which had been given to the United States, before the insolvency of the obligor.

The right of the sovereign to be first paid, existed at the common law ; it was an acknowledged prerogative of the crown, and the laws of the United States have done no more than adopt this known and established principle. If, therefore, the language of the acts of congress is doubtful, we may safely appeal to the common law, not as authority on this point, but for its sanction of the principle upon which this interpretation of our own statutes is claimed for the United States. *The principle upon which the debts
*31] to which the plaintiffs are entitled are considered as due, at the time of the execution of the bond, is familiar to the court. The obligatory part of a bond acknowledges a present debt, and it is by the condition only, that its period of payment is postponed. In the distribution of assets, in England, a preference is given to debts due by sealed instruments, although not payable at the time of the distribution. Toller's Exec. 275.

The construction of the law of the United States now claimed, has been that of universal practice since it was enacted. From 1797 down to the present period, it has been applied in favor of the United States to bonds not due, as well as to others to become due ; and the estates of insolvents and intestates have been adjusted and settled on this principle, in every section of the Union. This received construction will induce the court to hesitate before it will adopt another ; as it would open those long-established settlements, and would be productive of great difficulty and confusion. The principle contended for by the government, was recognised in the case of *Thelusson* v. *Smith*, 2 Wheat. 396, and in *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386. The point arose in the first case, although it was not discussed.

The act of congress of March 3d, 1797 (1 U. S. Stat. 515), gives the priority to the United States, where persons are indebted to the United States by bond or otherwise. This is a provision for all debts due by public debtors ; and it operates upon all cases, unless some exception in favor of particular persons shall be found in subsequent laws, which is not the case. The act of March 2d, 1799, by the 65th section, declares, the priority shall apply to bonds for duties ; and it is upon the language of that section, that the doubt which has arisen in this case has been founded. The provision is, that where bonds for duties are not satisfied on the day they become due, suits shall be brought ; and where the estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due, the United States shall be first paid. There is nothing in the provisions of this section which interferes with those of the law of 1797. Both are in force, and *both
*32] operate on the case of a debtor by duty bonds. All duties are in fact due, when the goods are imported upon which they accrue, and the indulgence which is given for their payment, does not take away the essential feature in them. Even, then, upon this section alone, the right of the United

States rests in safety ; but if the words of the section are equivocal, as the act of 1797 is not repealed, and is not inconsistent with it, the priority will be protected by that act. The fifth section of that act applies to the cases of all persons "indebted to the United States." It has been so held in the case of the *United States* v. *Fisher*, 2 Cranch. 358, 394 ; and the title of the act, as was decided in that case, does not limit its provisions to receivers of public money only. In construing a statute, the court always looks to laws *in pari materia.*

There is a stronger reason for the application of the rights of the United States to a priority of payment, in the cases of debts due to them by merchants, as the business of commerce is more precarious than any other. A large portion of the revenue of the nation is derived from its commerce, and it is essential, that this revenue should be secured and certain. It was a part of the early legislation of the United States, to introduce this provision for the protection of the revenue ; and hence it is found in the 45th section of the act of August 4th, 1790.

Peters, for the defendant, contended, that from the first organization of the revenue system, by the government of the United States, down to the period of the last legislation on the subject of duty bonds, they had been treated differently from other debts due to the United States. While it was admitted, that, by the act of 1797, all persons, other than those who were liable to pay bonds given for duties on merchandise, were subject to the provisions of that law, and the priority of the United States attached equally to debts which were payable, or not, at the time of insolvency ; such was not the law in reference to duty bonds. There was a good and satisfactory reason for this distinct and different course, as to the debts due by those engaged in commerce. The government is deeply interested in the preservation of mercantile credit, and the existence of an incumbrance, the extent and operation of *which could not be ascertained, if it attached to all the business of a merchant, and which might sweep away, in [*33 favor of one preferred creditor, all his means ; it was seen, would take largely from the confidence which was essential to the success of all operations in trade. Where bonds for duties have become due, and are unpaid, the amount of such debts could be known, but until then, they could not be ascertained.

The question here submitted to the court has never been judicially decided ; and whatever may have been the practical construction heretofore given to the law, this court will decide the case upon a careful examination of the provisions of the statutes, and upon those provisions only. The preference given to the United States is *stricti juris*, and has no foundation in prerogative. It exists by statutory provision only, if it exists at all.

The 45th section of the act of 1790 declares, that "any bond for the payment of duties, not satisfied on the day it becomes due, shall be sued ;" and it enacts, that in cases "where any estate is in the hands of assignees, and shall be insufficient to pay all the debts due, the debt due to the United States on any such bond shall be first satisfied." In this section—and there is no other in the act of 1790, upon the matter—bonds not satisfied on the day they become due are to be put in suit, and any such bonds are to be first paid ; no others are within the terms of the law. The 65th

section of the act of 1799 adopts the same language. Bonds, not satisfied on the day they become due, are to be sued out, and the preference is given to the debts "due to the United States on any such bond or bonds." It is claimed, that the legislation of congress upon such bonds is full; and no aid is to be obtained from the act of 1797, in the interpretation of it. There is no room for the application of acts *in pari materia;* nor are the subjects of the laws the same. The sytem is complete, as applicable to commercial debtors, by the acts of 1790 and 1799; the rights of the United States in other cases rest on the act of 1797.

In *Hunter* v. *United States*, 5 Pet. 173, Mr. Justice McLean, who delivered the opinion of the court, intimates a doubt, whether, where a judgment has been obtained by the United States against assignees, after an assignment, there might *not have been some ground to question the right of priority claimed by the United States in such a case. The priority of the United States has been held to exist in the cases only which come within the statutes, on their strictest construction. Any one who has given bonds to the government may pay the debts due by him to others; although his ability to discharge the debt due to the United States may be destroyed thereby. Unless a general assignment shall be made, there has been no "insolvency," within the purposes of the statute. *Bonâ fide* securities, given to creditors by one in insolvent circumstances, are not affected by the claim to priority. *United States* v. *Hooe*, 3 Cranch 73; *Thelusson* v. *Smith*, 2 Wheat. 396; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 387; *United States* v. *Howland*, 4 Wheat. 108.

*34]

The principle derived from these decisions is, that the right of the United States to payment of its debts, does not attach to the property of the debtor, from the commencement of the obligation to pay, and infect it, so that it is not entirely disposable by him. The "insolvency" which deprives the debtor of this right, must be a legal insolvency. The evidence of this is bankruptcy, or a general assignment. What shall be considered as debts due, may be well ascertained by a reference to English authorities upon the law of set-off. *Ex parte Prescott*, 1 Atk. 229; *Rose* v. *Hart*, 8 Taunt. 503; 2 Brod. & Bing. 89; 5 Barn. & Ald. 86.

Story, Justice, delivered the opinion of the court.—This case comes before the court upon a certificate of division of opinion of the judges of the circuit court for the district of North Carolina. The suit is an information by the United States, in the nature of a bill in equity, seeking to recover against the defendant and Talcott Burr, as the assignee of William H. Lippett, the amount of custom-house bonds owing by Lippett to the United States; Lippett having become insolvent, and having made a voluntary assignment of all his property to Burr, for the benefit of his creditors, by which he has given a preference of payment to certain creditors, who are made defendants, *and, among others, to the State Bank of North Carolina, before payment to the United States. The Bank of North Carolina appeared and pleaded a demurrer to the information; and upon the argument of that demurrer, it occurred as a question, whether the priority to which the United States are entitled, in case of a general assignment made by the debtor of his estate, for the payment of debts, comprehends a bond for the payment of duties, executed anterior to the date of the assign-

*35]

ment, but payable afterwards. Upon this question, the judges were divided in opinion; and it now stands for the decision of this court.

The right of priority of payment of debts due to the government, is a perogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign perogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal perogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.

The first enactment on this subject will be found in the duty-collection act of 4th of August 1790, ch. 62, § 45, which provides, that "where any bond for the payment of duties shall not be satisfied on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognisance thereof. And in all cases of insolvency, or where the estate in the hands of the executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond shall be first satisfied." So that, in point of fact, the priority was first applied to bonds for the payment of duties, and to persons engaged in commerce; which disposes of that part of the argument of the *defendant, which has been founded upon a supposed policy of the government to favor merchant importers in preference to any other class of their debtors. [*36

Then came the act of 3d of March 1797, ch. 75, which extended the right of priority of the United States to other classes of debtors, and gave a definition of the term insolvency, in its application to the purposes of the act. It provides, "that where any revenue or other officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." This act is still in force; and unless its application to the present case is intercepted by the act of 1799, ch. 128, its terms would seem sufficiently broad to embrace it. The language is, where any person "becoming indebted to the United States, by bond or otherwise" (which clearly includes a debtor upon a custom-house bond), "shall become insolvent" (which is the predicament of Lippett), the debt due to the United States shall first be paid." What debt is here referred to? A debt which is then actually payable to the United States, or a debt then arising to the United States,

whether then payable, or payable only *in futuro?* We think, the latter is the true construction of the terms of the act.

The whole difficulty arises from the different senses in which the term "due" is used. It is sometimes used to express the mere state of indebtment, and then is an equivalent to owed, or owing; and it is sometimes used to express the fact that the debt has become payable. Thus, in the latter sense, a bill or note is often said to be due, when the time for payment of it has arrived. In the former sense, a debt is often said to be due from a person, when he is the party owing it, or primarily bound to pay,
*37] whether the time of payment has or has not arrived. This *very clause of the act furnishes an apt illustration of this latter use of the term. It declares, that the priority of the United States shall attach "where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased." Here the word "due" is plainly used as synonymous with owing. In the settlement of the estates of deceased persons, no distinction is ever taken between debts which are payable before or after their decease; the assets are equally bound for the payment of all debts. The insufficiency spoken of in the act is an insufficiency, not to pay a particular class of debts, but to pay all debts of every nature. Now, if the term "due," in reference to the debts of deceased persons, means owing, and includes all debts, whether payable *in præsenti* or not, it is difficult to perceive, how a different meaning can be given to it, in regard to the debt of the United States, considering the connection in which it stands in the sequel of the same sentence. "Where the estate, &c., shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied." The obvious meaning is, that in case of a deficiency of assests, the debt owing to the United States shall be paid, before the debts owing to the other creditors.

The only real doubt, in the present case, arises from the phraseology of the 65th section of the act of the 2d of March 1799, ch. 128, which provides, that "where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall forthwith, and without delay, cause a prosecution to be commenced for the recovery of the money due thereon, in the proper court having cognisance thereof. And in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied." The argument is, that the words "any such bond or bonds" refer to the bonds mentioned in the introductory part of the sentence, that is, to bonds for duties which have become payable, and are not paid. But we think that this construction is not necessary or unavoidable. The words "such bond or bonds," are fully satisfied, by referring them, as
*38] matter of description, to bonds for the *payment of duties, whether then payable or not. The description is of a particular class of bonds, viz., for the payment of duties, and not of the accidental circumstance of their time of payment.

No reason can be perceived, why, in cases of a deficiency of assets of deceased persons, the legislature should make a distinction between bonds which should be payable at the time of their decease, and bonds which should become payable afterwards. The same public policy, which would

secure a priority of payment to the United States, in one case, applies with equal force to the other; and an omission to provide for such priority in regard to bonds, payable *in futuro*, would amount to an abandonment of all claims, except for a *pro rata* dividend. In cases of general assignments by debtors, there would be a still stronger reason against making a distinction between bonds then payable and bonds payable *in futuro;* for the debtor might, at his option, give any preferences to other creditors, and postpone the debts of the United States, of the latter description, and even exclude them altogether. In the case before the court, the assignment expressly postpones the claims of the United States in favor of mere private creditors. It would be difficult to assign any sufficient motive for the legislature to allow the public debtors to avail themselves of such an injurious option. If, then, no reason can be perceived for such a distinction, grounded upon public policy, the language ought to be very clear, which should induce the court to adopt it. There should be no other rational means of interpreting the terms, so as to give them their full and natural meaning. This, we think, is not the predicament of the present language; every word may have a fair construction, without introducing any such restrictive construction. There is this additional consideration, which deserves notice, that, in our view, the act of 1797, ch. 74, clearly embraces all debts of the United States, whether payable at the decease of the party or afterwards. There is no reason to presume, that the legislature intended to grant any peculiar favor to merchant importers; for otherwise the priority of the United States would have been withdrawn from all bonds for duties, and not (as the argument supposes) from a particular class of such bonds. And as there is no repeal of the act of 1797, ch. 74, except such as may *arise by implication from the terms of the 65th section of the act of 1799, ch. 128, if these terms cover only cases of bonds actually become due, they leave the act of 1797 in full force with regard to all other bonds. [*39

But if this reasoning were less satisfactory to our minds than it is, there is another ground, upon which we should arrive at the same conclusion. The act of 1799, ch. 128, in the 62d section, prescribes the form of bonds for the payment of duties. It is the common form of a bond with a penalty, upon a condition underwritten. The obligatory part admits a present existing debt due to the United States, which the party holds himself firmly bound to pay to the United States. The condition, in a legal sense, constitutes no part of the obligation, but is merely a condition, by a compliance with which the party may discharge himself from the debt admitted to be due by the obligatory clause. And, accordingly, it is well known, that in declarations on bonds with a condition, no notice need be taken of the existence of the condition. If the debtor would avail himself of it, he must pray *oyer* of it, and plead it by way of discharge. In the strictest sense, then, the bond is a *debitum in præsenti*, though, looking to the condition, it may be properly said to be *solvendum in futuro;* and we think, that it is in the sense of this maxim, that the legislature is to be understood in the use of the words, "debt due to the United States." Wherever the common law would hold a debt to be *debitum in præsenti, solvendum in futuro*, the statute embraces it just as much as if it were presently payable.

It is not unimportant, to state, that the construction, which we have given to the terms of the act, is that which is understood to have been

practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction ; and could not now be disturbed, without introducing a train of serious mischiefs. We think, the practice was founded in the true exposition of the terms and intent of
*40] *the act ; but if it were susceptible of some doubt, so long an acquiescence in it, would justify us in yielding to it as a safe and reasonable exposition.[1] This opinion will be certified to the circuit court of the North Carolina district.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of North Carolina, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel : On consideration whereof, it is ordered and adjudged by the court, that it be certified to the circuit court of the United States for the district of North Carolina, upon the question upon which the judges of that court were divided, and which has been certified to this court ; that this court is of opinion, that the priority to which the United States are entitled in case of a general assignment made by a debtor, of his estate, for the payment of debts, comprehends a bond for the payment of duties, executed anterior to the date of the assignment, but payable afterwards.

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*41] *Charles A. Davis, Consul-General of the King of Saxony, Plaintiff in error, *v.* Isaac Packard, Henry Disdier and William Morphy, Defendants in error.

Jurisdiction.—Error to state court.

Motion to dismiss a writ of error to " the Court for the Correction of Errors in the state of New York." The case went up to that court upon a writ of error to the supreme court of New York, and in the court for the correction of errors, the plaintiff in error assigned for error, that he was, at the time of the commencement of the suit, and continued to be, consul-general in the United States of the King of Saxony ; and so being consul-general, he ought to have been impleaded in some district court of the United States, and that the supreme court of New York had not jurisdiction of the case ; the defendants answered, that in the record of the proceedings of the supreme court, it nowhere appeared that the plaintiff in error was ever consul of Saxony. The record stated, that the court for the correction of errors, having fully understood the causes assigned for error, and inspected the record, did order and adjudge that the judgment of the supreme court should be affirmed. Affidavits of the proceedings in the highest court of the state of New York, and the opinion of the chancellor, assigning his reasons for affirming the judgment of the supreme court, were laid before this court. " Whatever took place in the state court, which forms no part of the record sent up to this court, must be entirely laid out of view ; this is the established course of the court ; the question before this court is, whether the judgment was correct, not whether the ground on which that judgment was given was correct."

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[1] See Edwards *v.* Darby, 12 Wheat. 210 ; Grant *v.* Raymond, *post*, p. 218 ; United States *v.* McDaniel, 7 Pet. 1 ; United States *v.* Moore, 95 U. S. 763. But this rule only applies to cases of ambiguity and doubt. Swift Co. *v.* United States, 105 U. S. 695.

Davis v. Packard.

The fact that the plaintiff in error was the consul-general of the King of Saxony, is not denied by the joinder in error; the answer given is, that it nowhere appears by the record, proceedings or judgment of the supreme court, that he was such consul; the court of errors say, after having examined and fully considered the causes assigned for error, they affirm the judgment of the supreme court; this was deciding against the privilege set up under the act of congress, which declares, that the district courts of the United States shall have jurisdiction, exclusive of the courts of the several states, of all suits against consuls and vice-consuls.

It has been settled, that in order to give jurisdiction to this court, under the 25th section of the judiciary act, it is not necessary that the record should state, in terms, that an act of congress was, in point of fact, drawn in question; it is sufficient, if it appear from the record, that an act of congress was applicable to the case, and was misconstrued; or the decision of the state court was against the privilege or exemption specially set up under such statute.

Error to the Court for the Correction of Errors of the state of New York. The now defendants in error, Isaac Packard, Henry Disdier and William Morphy, brought an action of debt, on a *recognisance of bail, against the now plaintiff in error, Charles A. Davis, in the supreme court of judicature of the state of New York; the writ of *capias ad respondendum* in which action was returnable in January term 1830. The defendant, Mr. Davis appeared by attorney, and pleaded several pleas in bar, upon which issues were taken, both in fact and in law. The issues were determined against the defendant, and final judgment was rendered against him, at the May term of the said supreme court, for $4538.20 debt, and $469.09 damages and costs. Upon that judgment, a writ of error was brought to the court for the correction of errors, being the highest court of the state of New York, and the plaintiff in error assigned error in the following words: [*42

"Afterwards, to wit, on the first day of September, in the year of our Lord 1830, before the president of the senate, senators, and chancellor of the state of New York, in the court for the correction of errors, at the city-hall of the city of New York, comes the said Charles A. Davis, by Andrew S. Garr, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that he, the said Charles A. Davis, before and at the time of the commencement of the suit of the said Isaac Packard, Henry Disdier and William Morphy, against him, the said Charles A. Davis, was, and ever since hath continued to be, and yet is, consul-general of his majesty the king of Saxony, in the United States, duly admitted and approved as such by the president of the United States. That being such, he ought not, according to the constitution and laws of the United States, to have been impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognisance of the said cause; therefore, in that there is manifest error, and this he, the said Charles A. Davis, is ready to verify: wherefore, he prays that the judgment aforesaid, for the error aforesaid, may be revoked, annulled and altogether held for nothing, and that *he may be restored to all things which he hath lost by occasion of the judgment aforesaid." To the foregoing assignment, the following joinder in error was put in: [*43

"And the said Isaac Packard and others, defendants in error, before the president of the senate, senators, and chancellor of the state of New York,

in the court for the correction of errors, at the city-hall of the city of New York, by David Dudley Field, their attorney, come and say, that there is no error in the record and proceedings aforesaid, nor in the giving of the judgment aforesaid, because they say, that it nowhere appears by the said record, proceedings or judgment, that the said Charles A. Davis ever was consul of the king of Saxony ; and they pray that the said court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matters aforesaid, above assigned for error, and that the judgment aforesaid may be in all things affirmed."

The cause was argued upon the assignment and joinder, and the court for the correction of errors subsequently affirmed the judgment of the court below, with double costs, to be paid by the plaintiff in error. (6 Wend. 327.)

Sedgwick moved to dismiss the writ of error, for want of jurisdiction in this court. He stated, that the error now assigned is, that the plaintiff is a consul of the king of Saxony, and was so at the time the action was instituted against him. This allegation was not made in the supreme court, and did not appear, until the assignment of errors in the court of errors. The question is presented to this court, whether a consul who submits himself to the jurisdiction of a state court, by entering into a recognisance of bail, in an action depending in such a court, can take advantage of a want of jurisdiction, without pleading it ? can such a party plead his privilege in a court of errors, who has neglected to plead it in the court below ?

When this case came before the court of errors, the plaintiff in error here filed a plea, stating his privilege as consul, and claimed that the courts of the United States had exclusive jurisdiction in suits against ministers and consuls. No question came before the court of errors, involving either *the
*44] construction or the validity of any law of congress, or of any commission issued under the authority of such law. The court of errors had no right to receive or try such a question. This position will be established by the decisions of the courts of New York, as to the jurisdiction of the court of errors ; that court is only an appellate court.

To sustain the right of the court of errors to take cognisance of the plea of the defendant there, it must be shown, that the court has jurisdiction of errors in fact. By the provisions of the constitution of the state of New York, establishing that court, in all cases where writs of error are prosecuted to the supreme court, the judges of the supreme court are required to assign the reasons of their judgment in writing. It is only upon the judgment of the court below, the court of errors acts ; and if the questions presented to the court of errors have not been submitted below, there can be nothing for the revision or action of the highest court. And this is the construction which has been given by the legislature to the constitution. 1 Revised Laws of New York ; first section, fifth article of the Constitution of the State of New York ; Ibid. 165, § 4 ; 2 Cow. 50 ; 2 Wend. 144 ; also the opinion of Chancellor Walworth in this case, 6 Ibid. 327.

If the court of errors had no jurisdiction of the matters set forth in the plea, the validity of no part of the constitution of the United States, or of any act of congress, could have been drawn in question in its decision of the case. It never could have been intended by the constitution, to interfere with the distribution of the powers of state courts under their constitutions

and laws; and to say that a court of the last resort in a state should not be restricted to the revision and correction of errors in the inferior courts.

The error of the argument to sustain the jurisdiction of this court in the case before it, arises from inadvertence to the distinction between courts of limited and of general jurisdiction; and no case can be found in the books, where courts of the former character have properly gone out of the limits imposed by their constitution, to assume jurisdiction. The jurisdiction of the court of errors of New York is strictly limited by the constitution. It must be decided by this court, that the court of New York *erred, when it had no right to give a judgment on the suggestion of consular [*45 privilege, when the question of that privilege could not be decided by them, nor could that court direct an issue in fact to ascertain the fact asserted in the suggestion.

There is no necessity to sustain the jurisdiction of this court over the case before them, in order to give the protection to the rights of consuls, which is secured to them by the constitution of the United States. That protection should be asserted by plea or suggestion in the lower court; and if this has been omitted, a writ of error *coram vobis* in the inferior court, would enable it to ascertain the privilege, and allow it.

J. M. White, with whom was *A. S. Garr*, for the plaintiff in error, in support of the jurisdiction of this court, presented three points for the consideration of the court. 1. The defendant in the supreme court of the state of New York being a foreign consul, that court had no jurisdiction of the action. 2. The defect of jurisdiction was not cured by the defendant's appearing and pleading to the action, and omitting to take the objection in the supreme court. 3. Although the want of jurisdiction does not appear on the face of the record of the supreme court, their judgment was nevertheless erroneous; and as such want of jurisdiction appeared by the pleadings in the court for the correction of errors, the judgment ought, for that cause, to have been there reversed.

It is alleged, that this court cannot have jurisdiction of this case, because the constitution and laws of the state of New York have so regulated the powers of the court of errors of New York, that a privilege to which the plaintiff in error is entitled under the constitution of the United States, could not be maintained or asserted before that court. It cannot be, that state regulations can take away such a privilege. This would give to a state the power so to arrange the jurisdiction of her courts, as that the privilege of a consul might be excluded and destroyed. It is important for the peace of the United States, that such protection as consuls are entitled to by the laws of nations, shall be secured to them; and if the courts of the United States have not exclusively the *cognisance of cases affecting them, [*46 there will be no certain and general rules by which their privileges and rights will be maintained and protected.

The constitution of the United States, and the judiciary act of 1789, have been drawn in question before the court of errors of the state of New York, and that court has decided against a right and a privilege claimed under the second section of the third article of the constitution of the United States, which declares that "the judicial power of the United States shall entend to all cases affecting ambassadors, other public ministers and consuls: in such

cases, the supreme court shall have original jurisdiction." The ninth section of the judiciary act of 1789 gives to the district courts of the United States "jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls," except for offences of the description stated in the act. These provisions of the constitution and of the act of congress, go to the foundation of the action; and the right of a counsel to exemption from state jurisdiction need not be pleaded in abatement.

It is not a case in which concurrent jurisdiction exists in the state courts, and those of the Union. The courts of the United States have exclusive jurisdiction of suits against consuls; and the consent of the consul could not give jurisdiction to the state court. *State of Georgia* v. *Madrazo*, 1 Pet. 110; 1 Binn. 138.

The statutes of New York which regulated the proceedings of the court of errors of New York, and the constitutional provisions relative to that court, have been changed, since this suit was originally instituted. (Revised Statutes of New York 601.) Formerly, an infant and a married woman might plead their disabilities in the court of errors, and that court would direct an issue in fact to determine the truth of the plea. If, by a statute of New York, in full force when this suit was commenced in the inferior court, such were the privileges of infancy and coverture, in the court of errors, why should not the exemption claimed by a counsel be tried by an issue in the same court? This court will never admit, that a state can pass laws which will exclude the exemption from the operation of the state laws; and subject to the jurisdiction of the *courts of a state those who, by the constitution of the United States, are protected from such jurisdiction, and this by preventing the court of the state from taking notice of a plea of such exemption.

*47]

The constitution and laws of the United States do not point out how, or where, the consular exemption from state jurisdiction shall be pleaded; and it cannot be left to a state to regulate these. Cited in the argument, 2 Cranch 125; 19 Johns. 33, 40; 9 Cow. 227; *Hickie* v. *Starke*, 1 Pet. 98; *Willson* v. *Black-bird Creek Marsh Co.*, 2 Ibid. 250; 12 Johns. 493; 17 Ibid. 468; 16 Ibid. 341; 2 Cow. 31; 2 Cranch 126; 3 Caines 129.

The court held this case under advisement, until January term 1832, when—

Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error to the court for the correction of errors, in the state of New York, being the highest court of law in that state in which a decision in this suit could be had. And a motion has been here made to dismiss the writ of error, for want of jurisdiction in this court.

From the record returned to this court, it appears, that the cause went up to the court for the correction of errors in New York, upon a writ of error to the supreme court of that state; and that in the court of errors, the plaintiff assigned as error in fact, that he, Charles A. Davis, before and at the time of the commencement of the suit against him, was, and ever since hath continued to be, and yet is, consul-general in the United States of his majesty the king of Saxony, duly admitted and approved as such by the president of the United States. And being such consul, he ought not, according to the constitution and laws of the United States, to have been

impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognisance of the said cause. To this assignment of errors, the defendants in error answered, that there is no error in the record and proceedings aforesaid, nor in giving the judgment aforesaid, because they say, that it *nowhere appears by the said record, proceedings or judgment, that the [*48 said Charles A. Davis ever was consul of the king of Saxony; and they pray that the said court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matter aforesaid, above assigned for error, and that the judgment aforesaid may be in all things affirmed. The record then states, whereupon, the court for the correction of errors, after having heard the counsel for both parties, and diligently examined, and fully understood the causes assigned for error, and inspected the record and process aforesaid, did order and adjudge that the judgment of the supreme court be in all things affirmed.

The motion made in this court to dismiss the writ of error is founded and resisted upon affidavits on each side, disclosing what took place in the court of errors in New York, on a motion there made to dismiss the writ of error to the supreme court of that state; and the opinion of the chancellor delivered in the court of errors, assigning his reasons for affirming the judgment of the supreme court, has also been laid before us. We cannot enter into an examination of that question at all: whatever took place in the state court which forms no part of the record sent up to this court, must be entirely laid out of view. This is the established course of this court; and neither the opinion of the chancellor, nor the proceedings on the motion, forms a part of the record. 12 Wheat. 118.[1] The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. 6 Ibid. 603.

It has also been settled, that in order to give jurisdiction to this court under the 25th section of the judiciary act (1 U. S. Stat. 85), it is not necessary that the record should state in terms that an act of congress was, in point of fact, drawn in question. It is sufficient, if it appears from the record, that an act of congress was applicable to the case, and was misconstrued, or the decision in the state court was against the privilege or exemption specially set up under such statute. 4 Wheat. 311; 2 Pet. 250; 3 Ibid. 301; 4 Ibid. 439. How stands the record, then, in this case? Charles A. Davis alleges, that he is consul-general of the king of Saxony, in the United States, and that he is thereby privileged from being *sued in the [*49 state court, according to the constitution and laws of the United States; the fact of his being such consul is not denied by the joinder in error. The answer given is, that it nowhere appears by the record, proceedings or judgment of the supreme court, that the said Davis was such consul; and the court of errors, in giving judgment, say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of congress, which declares, that the district court

[1] Medbury v. Ohio, 24 How. 413.

of the United States shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls and vice-consuls. (1 U. S. Stat. 77, § 9.)

The question before this court is not, whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors that is to be reviewed here; that is, the final judgment in the highest court of the state; and none other can be brought into this court, under the 25th section of the judiciary act.

Whether it was competent for Davis, in the court of errors, to assign, as error in fact, his exemption from being sued in a state court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And, judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring, that no such question could have been made. For if the court of errors had entertained the opinion, that such exemption could not be assigned for error in that court, the writ of error would probably have been dismissed. Or, if the court had understood that the fact of his being consul was denied, an issue would probably have been directed to try that fact, under a provision in a statute of that state, which declares, "that whenever an issue of fact shall be joined upon any writ of error, returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ, or the proceedings thereon, the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties, to try such question of fact, at the proper circuit court or
*50] sittings, and to certify *the verdict thereupon to the said court for the correction of errors. (2 Rev. Stat. New York, 601.)

From the record, then, we are necessarily left to conclude, that the state court, assuming or admitting the fact that Davis was consul-general, as alleged in his assignment of errors, yet it did not exempt him from being sued in a state court; which brings the case within the 25th section of the judiciary act; the decision having been against the exemption set up and claimed under a statute of the United States. The motion to dismiss the writ of error is, accordingly, denied.

On consideration of the motion made in this cause by Mr. Sedgwick, of counsel for the defendants in error, at the last January term of this court, to wit, on Saturday, the fifth day of February, A. D. 1831, to dismiss the writ of error in this cause for the want of jurisdiction, and of the arguments of counsel thereupon had; it is now here considered and ordered by this court, that the said motion be and the same is hereby denied and overruled.

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[1] For the decision on the merits, see 7 Pet. 276; and for the subsequent proceedings in the state court, 10 Wend. 51; affirmed in this court, 8 Pet. 312.

*The Bank of the United States, Plaintiff in error, *v.* John O. Dunn, Defendant in error.

Witnesses.—Parol evidence.—Promissory notes.—Bank officers.

It is a well-settled principle, that no man who is a party to a negotiable instrument, shall be permitted, by his own testimony, to invalidate it; having given it the sanction of his name, and thereby added to the value of the instrument, by giving it currency, he shall not be permitted to testify, that the note was given for a gambling consideration, which would destroy its validity.[1]

Renner *v.* Bank of Columbia, 9 Wheat. 587, affirmed.

Parol evidence may be admitted, to explain a written agreement, where there is a latent ambiguity, or a want of consideration may be shown in a simple contract; or to defeat the plaintiff's action, the defendant may prove that the note was assigned to the plaintiff, in trust for the payee.

It is competent to prove by parol, that the guarantor signed his name in blank on the back of a promissory note, and authorized another to write a sufficient guarantee over it.

In Pennsylvania, there is no court of chancery; and it is known, that the courts in that state admit parol proof to affect written contracts, to a greater extent than is sanctioned in the states where a chancery jurisdiction is exercised.

The liability of parties to a bill of exchange or promissory note has been fixed on certain principles, which are essential to the credit and circulation of such paper; these principles originated in the convenience of commercial transactions, and cannot now be departed from.

An agreement by the president and cashier of the Bank of the United States, that the indorser of a promissory note shall not be liable on his indorsement, does not bind the bank; it is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper, in loaning money.[2]

Error to the Circuit Court of the District of Columbia, and county of Washington. In the circuit court, the Bank of the United States instituted an action of *assumpsit* against John O. Dunn, as indorser of a promissory note made by John Scott, in the following words:

"$1000. Sixty days after date, I promise to pay John O. Dunn, or order, one thousand dollars, for value received, negotiable and payable at the United States Branch Bank in Washington. John Scott."

Indorsed—J. O. Dunn: Overton Carr.

The signatures of the parties to the note were admitted, and notice of a demand of payment of the same at the bank, *and of the non-payment, were proved to have been regularly made and given. [*52

The defendant offered as a witness Overton Carr, the indorser of said note, who testified, that before he indorsed the same, he had a conversation with John Scott, the maker, and was informed by him, that certain bank-stock had been pledged, or was to be pledged, by Roger C. Weightman, as security for the ultimate payment of the said note, and that there would be no risk in indorsing it. That the witness then went into the room of the cashier of the plaintiffs' office of discount and deposit at Washington, and found there the cashier, and Thomas Swann, the president of the said office, to whom he communicated the conversation with Mr. Scott, and from whom

[1] But see Davis *v.* Brown, 94 U. S. 423, for a qualification of that rule.

[2] S. P. Bank of Whitehall *v.* Tisdale, 18 Hun 151; Bank of the Metropolis *v.* Jones, 8 Pet. 12.

he understood, upon his inquiry, that the names of two indorsers, residing in Washington, were required upon the said note, as a matter of form, and that he would incur no responsibility (or no risk) by indorsing the said note. He did not recollect the conversation, in terms, but such was the impression he received from it. That he went immediately to the defendant, and persuaded him to indorse the note, by representing to him that he would incur no responsibility, or no risk, in indorsing it, as the payment was secured by a pledge of stock, and to whom he repeated the conversation with Mr. Scott and the president and cashier. That no other person was present at the conversation, the terms of which he did not recollect; but that the impression he received from his conversation with the president and cashier, and with Scott, and which impression he conveyed to the defendant, was, that the indorsers of the said note would not be looked to for payment of it, until the security pledged had been first resorted to, but that the said indorsers would be liable, in case of any deficiency of the said security, to supply the same. That neither this witness, nor Mr. Dunn, was, at the time, able to pay such a sum, and that both indorsed the note as volunteers, and without any consideration; but under the belief that they incurred no responsibility (or no risk), and were only to put their names upon the instrument for form's sake. To which evidence the plaintiffs, by their counsel, objected, but the court permitted it to go to the jury.

*53] The plaintiffs then offered as a witness, Richard Smith, the *cashier of their office of discount and deposit aforesaid, who was summoned on the part of the defendant, and who testified, that he has no recollection of the conversation mentioned by the said Carr; but that no stock was ever pledged for the payment of the said note. That Roger C. Weightman had given to the said office a guarantee, that he would pay the said note, in case the parties to the same should fail to do so, after all legal and proper measures had been taken to procure the payment of it by them. That he was certain that nothing was said, either by him, or by Mr. Thomas Swann, in his presence, as to the indorsers not being held liable for the payment of the said note. That it was contrary to the practice of the said office, to take indorsers on notes, who were not to be held liable. That the president and himself conjointly, nor either of them, were authorized to give any such exemption to indorsers, nor to determine who should be taken as indorsers on notes. That this was the province of the board of directors alone; unless when they appointed a committee of the board for that purpose. That the guarantee aforesaid was given by Weightman, after the note had been made and indorsed.

Mr. Smith, upon cross-examination, having stated that he was a stockholder in the bank, the court rejected his testimony, and instructed the jury that it was not evidence. The plaintiffs' counsel then offered to swear Mr. Swann, who had been summoned as a witness on the part of the defendant; but the defendant's counsel objected to his competency, for the same reason, which objection the court sustained, to which the said plaintiffs, by their counsel, excepted; and also to the admission of the testimony of Carr, and the rejection of Smith's testimony.

The jury found a verdict for the defendant, and judgment in his favor was entered thereon. The plaintiffs prosecuted this writ of error.

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

For the *plaintiffs* in error, it was stated, that the principal question, for the decision of the court was, whether the testimony of Overton Carr was legal, and should have been admitted. *The object for which that testimony was introduced, was, to vary the contract entered into by himself and his co-indorser, and to show another contract of an entirely different character. It is a general and an important rule, that evidence of this description will not be admitted, to vary or explain a contract in writing. The propriety of the rule is deduced from the obscurity and uncertainty which would be thrown over all such contracts, from the frailty of memory, and the uncertainty of understanding the parties. This rule is sustained by a number of decisions. 2 Str. 955; 2 Camp. 205; 3 Ibid. 57; 4 Ibid. 127, 217; Skin. 454; 1 Gow 74; 8 Taunt. 92; 1 Chit. 661; 9 Wheat. 587; 7 Mass. 238; 3 Dall. 415. It is admitted, that there are exceptions to this rule; latent ambiguity is an exception; so also, as to the consideration in a deed, when the question was, whether the receipt was conclusive evidence of payment. The decisions of the courts of the different states of the Union are divided. Maine, Maryland, North Carolina on one side; Massachusetts, New York and Pennsylvania on the other. The cases are collected in a note to 3 Starkie on Evidence (Am. ed.) 1001–2. [*54

If the deed recite a particular consideration, and "other good considerations," it may be shown what they were; but, in general, considerations cannot be denied; nor a different consideration be proved. That would invalidate the contract. The question for the consideration of the court is, whether this parol evidence shall be admitted, to prove a different contract. The Pennsylvania authorities, upon which it is claimed to introduce such evidence, are to be considered as affected by the absence of a court of chancery in that state. The law of Pennsylvania as to parol evidence is peculiar, and in the case of *Hurst* v. *Kirkbride*, 1 Yeates 139, the judges express their dissatisfaction with it. See Whart. Dig. 270, for the Pennsylvania cases. The reason for the admission of such evidence does not apply to contracts by the operation of law. 4 W. C. C. 480; 5 Serg. & Rawle 353.

Coxe, for the defendant.—The object of the evidence *of Mr. Carr was not to render the note void at its inception; in such a case, the party to the note would not be a witness. Parol evidence is admissible, when it does not go to contradict or vary the original contract. There is no written contract of the indorsers of the note; the contract arises from the legal implication of his being an indorser. What is the legal effect of a blank indorsement? It is only an authority to fill it up, according to the agreement of the parties, and to the authority so given. All the cases agree, that as between the parties, a total want of consideration, or a partial failure of consideration may be shown. 1 Serg. & Rawle 663; 4 W. C. C. 480. Upon these principles, the evidence was legal. This was the case of security in trust for the benefit of the indorsers, and parol evidence to show the trust was proper. [*55

McLean, Justice, delivered the opinion of the court.—In the circuit court for the district of Columbia, from which this cause is brought by writ

of error, the plaintiffs commenced their action on the case, against the defendant, as indorser of a promissory note. The general issue was pleaded, and at the trial the plaintiffs read in evidence the following note :

$1000. Sixty days after date, I promise to pay John O. Dunn, or order, one thousand dollars, for value received, negotiable and payable at the United States Branch Bank in Washington.

JOHN SCOTT.

On the back of which was indorsed—

J. O. DUNN.
OVERTON CARR.

The signatures of the parties were admitted, and proof was given of demand at the bank, and notice to the indorsers.

The defendant then offered as a witness Overton Carr, an indorser of said note, who testified, that before he indorsed the same, he had a conversation with John Scott, the maker, and was informed by him, that certain bank-stock had been pledged, or was to be pledged, by Roger C. Weightman as security for the ultimate payment of the said note, and that there would be no risk in indorsing it. That the witness then *went into the *56] room of the cashier of the plaintiffs' office of discount and deposit at Washington, and found there the said cashier, and Thomas Swann, the president of the said office ; to whom he communicated the conversation with Mr. Scott, and from whom he understood, upon inquiry, that the names of two indorsers, residing in Washington, were required upon the said note, as a matter of form ; and that he would incur no responsibility (or no risk), by indorsing the said note. He does not recollect the conversation, in terms, but such was the impression he received from it. That he went immediately to the defendant, and persuaded him to indorse the note, by representing to him, that he would incur no responsibility (or no risk), in indorsing it, as the payment was secured by a pledge of stock ; and to whom he repeated the conversation with Mr. Scott, and the president and cashier. That no person was present at the conversation, the terms of which he does not recollect ; but that the impression he received from this conversation with the aforesaid president and cashier, and with the said Scott, and which impression he conveyed to the defendant, was, that the indorsers of said note would not be looked to for payment, until the security pledged had been first resorted to ; but that the said indorsers would be liable in case of any deficiency of the said security to supply the same. That neither this witness, nor Mr. Dunn, was, at the time, able to pay such a sum, and that both indorsed the note as volunteers, and without any consideration ; but under the belief that they incurred no responsibility (or no risk), and were only to put their names to the paper for form's sake. To which evidence, the plaintiffs, by their counsel, objected, but the court permitted it to go to the jury.

The plaintiffs examined as a witness Richard Smith, the cashier, whose testimony was overruled ; and then Thomas Swann, the president of the bank, was offered as a witness and rejected ; it appearing that they were both stockholders in the bank. To this decision of the court, a bill of exceptions was taken by the plaintiffs ; and exception was also taken to the evidence of Overton Carr. On this last exception, the plaintiffs rely

for a reversal of *the judgment of the circuit court. And first, the question as to the competency of this witness is raised. He is not incompetent, merely from the fact of his name being indorsed on the bill. To exclude his testimony, on this ground, he must have an interest in the result of the cause. Such interest is not apparent in this case; and any objection which can arise from his being a party to the bill, goes rather to his credibility than his competency. But it is a well settled principle, that no man who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it. Having given it the sanction of his name, and thereby added to the value of the instrument, by giving it currency, he shall not be permitted to testify, that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. This doctrine is clearly laid down in the case of *Walton* v. *Shelley*, 1 T. R. 296; and is still held to be law, although in 7 Ibid. 56, it is decided, that in an action for usury, the borrower of the money is a competent witness to prove the whole case.

Several authorities are cited by the plaintiff's counsel, to show that parol evidence is not admissible to vary a written agreement. In the case of *Hoare* v. *Graham*, 3 Camp. 56, the court lay down the principle, that "in an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due. This court, in the case of *Renner* v. *Bank of Columbia*, 9 Wheat. 587, in answer to the argument that the admission of proof of the custom or usage of the bank would go to alter the written contract of the parties, say, "If this is the light in which it is to be considered, there can be no doubt, that it ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement." Parol evidence may be admitted, to explain a written *agreement, where there [*58
is a latent ambiguity; or a want of consideration may be shown in a simple contract; or, to defeat the plaintiff's action, the defendant may prove that the note was assigned to the plaintiff in trust for the payer. 6 Mass. 432. It is competent to prove by parol, that a guarantor signed his name in blank on the back of a promissory note, and authorized another to write a sufficient guarantee over it. 7 Mass. 233. To show in what cases parol evidence may be received to explain a written agreement, and where it is not admissible, the following authorities have been referred to. 8 Taunt. 92; 1 Chit. 661; Peake's Cas. 40; Gilb. Rep. 154.

On the part of the defendant's counsel, it is contended, that between parties and privies to an instrument, not under seal, a want of consideration, in whole or in part, may be shown. That the indorsement in question was made in blank; and that it is competent for the defendant, to prove under what circumstances it was made. That if an assurance were given, at the time of the indorsement, that the names of the defendant and Carr were only required, as a matter of form, and that a guarantee had been given for the payment of the note, so as to save the indorsers from responsibility; it may be proved, under the rule which permits the promisor to go into the consideration of a note or bill, between the original parties. In support of

this position, authorities are read from 5 Serg. & Rawle 363, and 4 W. C. C. 480. In the latter case, Mr. Justice WASHINGTON says, "The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted." The decision in 5 Serg. & Rawle was on a question somewhat analogous to the one under consideration, except, in the present case, there is no allegation of fraud, and the decision in that case was made to turn, in part at least, on that ground. In Pennsylvania, there is no court of chancery, and it is known,
*59] that the courts in that state admit parol proof to affect *written contracts, to a greater extent than is sanctioned in the states where a chancery jurisdiction is exercised. The rule has been differently settled in this court.

The note in question was first indorsed by the defendant to Carr, and by him negotiated with the bank. It was discounted on the credit of the names indorsed upon the note. This is the legal presumption that arises from the transaction; and if the first indorser were permitted to prove, that there was a secret understanding between himself and his assignees, that he should not be held responsible for the payment of the note, would it not seriously affect the credit of this description of paper? Might it not, in many cases, operate as a fraud upon subsequent indorsers? The liability of parties to a bill of exchange or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from.

The facts stated by the witness Carr are in direct contradition to the obligations implied from the indorsement of the defendant. By his indorsement, he promised to pay the note at maturity, if the maker should fail to pay it. The only condition on which this promise was made, was, that a demand should be made of the maker when the note should become due, and a notice given to the defendant of its dishonor. But the facts stated by the witness would tend to show, that no such promise was made. Does not this contradict the instrument; and would not the precedent tend to shake, if not destroy, the credit of commercial paper?

On this ground alone, the exception would be fatal; but the most decisive objection to the evidence is, that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. If, therefore, the evidence were clear of other legal objections, it could not have the effect to release the defendant from liability. The assurances relied on,
*60] if made, *were not made by persons authorized to make them. The bank is not bound by them, nor would it be bound, if the assurances had been made in so specific and direct a manner as to create a personal responsibility on the part of the cashier and president.

Upon a full view of the case, the court are clearly of the opinion, that the evidence of Carr should have been overruled by the circuit court; or they should have instructed the jury, that the facts proved were not in law sufficient to release the defendant from liability on his indorsement. The judgment of the circuit court must, therefore, be reversed, and a *venire de novo* awarded.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this case be and the same is hereby reversed; said 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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*Henry Miller's Heirs and Devisees, Complainants and Appellants, *v.* Jacob and Isaac McIntyre, Appellees. [*61

Statute of limitations.—Adverse possession.

A bill was filed in 1808, for the purpose of obtaining the legal title to certain lands in Kentucky, and afterwards, new parties were made defendants, in an amended bill, filed in 1815. Until these parties had so become defendants, and parties to the bill, the suit cannot be considered as commenced against them; the statute of limitations will avail the new defendants, at the period when the amended bill was filed; and they are not to be affected by the proceeding during the time they were strangers to it.[1]

Where the statute of limitation is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him, in his replication, or by an amendment of his bill, to set forth the facts specially.

The adverse possession was taken, in this case, in the spring of 1788 or 1789; in the spring of 1796, the ancestor of the complainants died, and his heirs brought suit against the present defendants, in 1815; some of the complainants were not of full age in 1804. Unless the disability be shown to exist, so as to protect the right of the complainants, the effect of the statute, on that ground, cannot be avoided.

If an entry be made under a grant, and there is no adverse possession, the entry will be limited only by the grant, unless the contrary appear.

At least twenty-six years elapsed after the adverse possession was taken by the defendants, before suit was brought against them by the complainants, and nineteen years from the decease of their ancestor; the statute of limitations of Virginia was made the statute of Kentucky by adoption, in 1792; if the adverse possession which had been held for several years commenced at that time, or when the constitution formed by Kentucky was sanctioned by congress, it would give a possession of about twenty-two years; eighteen or nineteen of which were subsequent to the decease of the complainants' ancestor. Upon these facts, the statute of limitations of Kentucky is a bar to a claim of the land by the complainants.

The courts in Kentucky and elsewhere, by analogy, apply the statute of limitations in chancery, to bar an equitable right, when at law it would have operated against a grant; this principle has been well established and generally sanctioned in courts of equity.[2]

At law, the statute operates where the conflicting titles are adverse in their origin; and no reason is perceived against giving the statute the same effect in equity.

Miller *v.* McIntire, 1 McLean 85, affirmed.

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[1] Where a new party to a suit in equity is brought in by amendment, or otherwise, he is entitled to the benefit of the statute, as of the time he is actually made a party. Campbell *v.* Bowne, 5 Paige 34. And see Holmes *v.* Treat, 7 Pet. 171; s. c. 1 McLean 1; Miller *v.* Bealer, 100 Penn. St. 583.

[2] See note to Elmendorf *v.* Taylor, 11 Wheat. 152.

Miller v. McIntyre.

APPEAL from the Circuit Court of Kentucky. The facts and pleadings of the case are fully stated in the opinion of the court.

It was argued by *Doddridge* and *Denny*, for the appellants; and by *Wickliffe* and *Daniel*, for the appellees.

*62] *McLEAN, Justice, delivered the opinion of the court.—This cause was appealed from the decree of the circuit court of the United States for the district of Kentucky. The original bill was filed in May 1808, in which the complainants stated, that on the 10th of December 1782, their ancestor, Henry Miller, made an entry of 1687 acres of land, which was surveyed on the 9th of April 1804, and patented the 19th of July 1820. That the defendants were in possession of the land under said claims; and the bill prayed, that they might be compelled to disclose their titles, and surrender the possession of the premises. In June 1815, the complainants amended their bill, and among other things, stated, that on the 19th of May 1780, Nicholas McIntyre entered 1000 acres of land on the waters of the Licking, &c., and having caused the same to be surveyed, contrary to location, obtained a patent elder in date than the complainants. That this land was devised by Nicholas McIntyre to his sons Isaac and Jacob; and that Isaac conveyed to John McIntyre, who is made a defendant. Jacob McIntyre, and several others, are also made defendants.

In 1816, Jacob McIntyre filed his answer, in which he admits the entry of his ancestor, as stated by the complainants, and sets forth an amendment of the said entry, made on the 14th of December 1782. By this amendment, it seems, the entry was made to interfere with complainants' entry. An amended answer was filed by Jacob McIntyre, in May 1822, in which he claims the benefit of the statute of limitations from an occupancy of the land more than twenty years before suit was brought. Isaac McIntyre seems never to have been served with process, or made a defendant to the amended bill. This was deemed unnecessary; it is presumed, from the fact stated in the bill, that he had conveyed his interest to John McIntyre.

In his answer, filed in December 1821, John McIntyre states that the legal title to no part of the 1000 acres is vested in him; but that he holds a bond, executed by Nicholas McIntyre, for a moiety of the said tract; and that a deed for the same had been executed to him by Isaac McIntyre but that it had never been recorded. He alleges, that an adverse possession of more than twenty years, by himself and those claiming under him, is a bar to the plaintiffs' right.

*63] *The cause was twice appealed to the supreme court from the decrees of the circuit court; and on the second appeal, the decree dismissing the bill was reversed, on the ground, that, under the land law, the survey of the complainants was made in due time, and that the patent was legally issued. And the cause was remanded to the circuit court for further proceedings; and leave was given to the parties to take testimony. (2 Wheat. 316; 11 Ibid. 441.) Additional testimony was taken, chiefly with the view of proving the possession of the defendants under the McIntyre patent. As the complainants' title was sustained by the decree of this court in 1826, the defendants do not attempt to impeach it, but rely exclusively on their possession.

In April 1792, Kentucky adopted a constitution, and she was admitted into the Union as an independent state, the ensuing session of congress. By the first section of the schedule, which was adopted with the constitution, it is provided, "that all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, shall continue as if the said government had not been established."

The statute of limitations, which was passed by the legislature of Kentucky, on the 17th of December 1796, was a literal copy of the Virginia statute; which was in force before the entries now in controversy were made. This statute, therefore, operated upon the rights of the parties, while the district of Kentucky formed a part of the state of Virginia, and afterwards, by the adoption of the convention. It was not repealed by the statute of 1796, but re-enacted in all its parts. In the second section of this statute, it is provided, "that all writs, &c., upon any title heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterwards; and that no person or persons who now hath, or have, or may hereafter have, any right or title of entry, into any lands, tenements or hereditaments, shall make any entry, but within twenty years next after such right or title accrued; and such person shall be barred from any entry afterwards:" "Provided, nevertheless, that if any person or persons, entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be *under age, &c., or not within the commonwealth, at the time such right or [*64 title accrued or coming to them; every such person, and 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."

By Josiah McDowell, David Jamison, James Sonce, Michael Hornback and other witnesses, it is satisfactorily proved, that possession was taken of the land in controversy, under the McIntyre grant, by the defendants, or persons claiming under them, in the spring of the year 1788 or 1789. The weight of testimony is in favor of the former period. It is also made to appear, that the possession was adverse to the complainants' title, and co-extensive with the limits of the patent. If an entry be made, under a grant, and there is no adverse possession, the entry will be limited only by the grant, unless the contrary appear.

Various reasons are assigned against the operation of the statute in this case. It is insisted, that the amended bill, filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808; and consequently, that the statute cannot bar, as its limitation had not then run. Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them. It would be a novel and unjust principle, to make the defendants responsible for a proceeding of which they had no notice; and where a final decree in the case could not have prejudiced their rights. Where the statute is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him, in his replication, or by an amendment of his bill, to set forth the facts specially. This has not been done in

the present case; but as there are other grounds on which the decision may rest, this objection will not be further noticed.

The adverse possession was taken in this case, in the spring of 1788 or 1789. In the spring of 1796, the ancestor of the complainants died, and his heirs brought suit against the *present defendants, in June 1815. From some of the depositions, it appears, that a part of the complainants were not of full age, in April 1804; but how soon afterwards this disability ceased, is not proved. Unless the disability be shown to exist, so as to protect the rights of the complainants, the effect of the statute, on that ground, cannot be avoided. At least twenty-six years elapsed after the adverse possession was taken by the defendants, before suit was brought against them by the complainants; and nineteen years from the decease of their ancestor.

*65]

As the statute of Virginia was made the statute of Kentucky, by adoption, in 1792, if the adverse possession which had been held for several years, commenced at that time, or when the constitution formed by Kentucky was sanctioned by congress, it would give a possession of about twenty-two years; eighteen or nineteen of which were subsequent to the decease of the complainants' ancestor. Under this state of facts, it is clear, that the statute constitutes a bar, unless it shall be shown not to operate against the complainants' title.

As the limitation of the statute, both as to twenty years' adverse possession, and the ten years subsequent to the decease of the complainants' ancestor, had run since 1793, before suit was commenced, it is unnecessary to inquire, what effect the Virginia statute had upon the rights of the parties, before it was adopted by Kentucky. It is earnestly contended, that the statute does not run against an equitable title, and consequently, that it cannot operate as a bar in this case; as the legal title was not vested in the complainants, until the emanation of their patent in 1820. On this ground, the counsel seem chiefly to rely, and several authorities are referred to in support of it.

In 4 Bibb 372, the court say, it is a general rule, that a court of equity will not relieve against a possession with right, after the lapse of twenty years; but they do not determine whether this rule applies where the conflicting titles are adverse in their origin. 2 A. K. Marsh. 570; 1 Ibid. 53, 506; 3 Ibid. 146, are cited to show that the statute does not run, except against a grant. This is undoubtedly the case at law, but a different rule has been established in equity. The courts in Kentucky *and elsewhere, by analogy, apply the statute in chancery to bar an equitable right; where at law it would have operated against a grant. This principle has been so well established, and so generally sanctioned by courts of equity, that it can hardly be necessary to enter into an investigation of it.

*66]

At first, the rule was controverted, and afterwards frequently evaded, on the ground of implied trusts; but the modern decisions have uniformly sustained the principle. This doctrine is ably discussed in the case of the *Marquis of Cholmondely* v. *Lord Clinton*, reported in 2 Jac. & Walk. 81. In that case, it is said, that "at all times, courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands; where the party has slept upon his rights, and acquiesced for a great length of time." At law, the statute operates, where the con-

flicting titles are adverse in their origin; and no reason is perceived against giving the same effect to the statute in equity. In the case of *Elmendorf* v. *Taylor*, 10 Wheat. 168, the chief justice, in giving the opinion of the court, says, "from the earliest ages, courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims; especially, where the legal estate has been transferred to purchasers without notice." That "although the statutes of limitation do not, either in England, or in these states, extend to suits in chancery, yet the courts in both countries have acknowledged their obligation." In referring to the case of *Cholmondely* v. *Clinton*, he says, "it was considered and treated by the court as a case of the highest importance; and the opinion was unequivocally expressed, that, both on principle and authority, the *laches* and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been held under a claim unequivocally adverse." This case was appealed to the House of Lords, where the Lord Chancellor *considered that twenty years constituted a bar; the possession being [*67 adverse. And Lord REDESDALE declared, that "they had always considered the provision in the statute of James," which is similar to the Kentucky statute under consideration, and "which applied to rights and titles of entry in which the period of limitation was twenty years, as that by which they were bound; and it was that upon which they had constantly acted." In the conclusion of the opinion, the Chief Justice says, "in all cases, where an adverse possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity."

From the above authorities, it appears, the rule is well settled, both in England and in this country, that effect will be given to the statute of limitation, in equity, the same as at law. And as in this case there could be no doubt, if the complainants' ancestor had held by grant, at the time the adverse possession was taken, that the statute would have barred the right of entry; the same effect must be given to it in equity. The decree of the circuit court, dismissing the bill, 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 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, dismissing the bill of the complainants, be and the same is hereby affirmed, with costs.

*John Smith T., Plaintiff, *v.* Robert Bell, Defendant.

Construction of wills.

The will of B. G. contained the following clause: "Also, I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expences, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and disposal, absolutely; the remainder, after her decease, to be for the use of the said Jesse Goodwin," the son of the testator. Jesse Goodwin took a vested remainder in the personal estate, which came into possession after the death of Elizabeth Goodwin.[1]

In this case, it is impossible to mistake the intent; the testator unquestionably intended to make a present provision for his wife, and a future provision for his son; the intention can be defeated only by expunging or rendering totally inoperative the last clause of the will; in doing so, a long series of opinions, making the intention of the testator the polar star to guide in the construction of wills, must be disregarded, because we find words which indicate an intention to permit the first taker to use part of the estate bequeathed.[2]

The first and great rule in the exposition of wills, to which all rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law; this principle is generally asserted in the construction of every testamentary disposition; it is emphatically the will of the person who makes it, and is defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death;" these intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law.

In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view; the ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration, in expounding doubtful words, and ascertaining the meaning in which the testator used them.[3]

The rule that a remainder may be limited after a life-estate in personal property, is as well settled as any other principle of our law; the attempt to create such limitation is not opposed by the policy of the law, or by any of its rules; if the intention to create such limitation be manifested in a will, the courts will sustain it.

It is stated in many cases, that where there are two intents, inconsistent with each other, that which is primary will control that which is secondary.

Notwithstanding the reasonableness and good sense of the general rule, that the intention shall prevail, it has been sometimes disregarded; if the testator attempts to effect that which the law forbids, his will must yield to the rules of law; but courts have sometimes gone farther; the construction put upon words in one will, has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction, which ought to be respected. We cannot say, this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution, without violating the rules of law. It has been said truly, "that
*69] cases on wills may guide *us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

Certificate of Division from the Circuit Court of East Tennessee. In the circuit court, John Smith T. instituted an action of trover against Robert Bell, for the recovery of the value of certain negroes named and described in the declaration. The defendant pleaded not guilty; upon which plea, issue was joined. The facts of the case were agreed by the parties, and the plaintiff moved the court for judgment for $2615.62½, the

[1] See Campbell *v.* Beaumont, 91 N. Y. 468–9, where the correctness of this decision is questioned. See also, Fox's Appeal, 99 Penn. St. 382.

[2] S. P. Brant *v.* Virginia Coal & Iron Co., 93 U. S. 326.

[3] Blake *v.* Hawkins, 98 U. S. 324.

agreed value of the negroes, if the court should be of opinion, that the plaintiff was entitled to recover.

Upon the case agreed, the following questions arose, upon which the judges of the court were divided, and the division was certified to this court: Whether, by the will of Britain B. Goodwin, Elizabeth Goodwin had an absolute title to the personal estate of Britain B. Goodwin, or only a life-estate? And also whether Jesse Goodwin, the son of Britain B. Goodwin, by said will, had a vested remainder, that would come into possession on the death of said Elizabeth? or was said remainder void?

The facts of the case agreed were as follows: That Britain B. Goodwin, a citizen of the state of Tennessee, and resident in the district of East Tennessee, did, on the 17th day of October, in the year of our Lord 1810, make and execute his last will and testament, in the words and figures following, to wit:

"In the name of God, Amen! I, Britain B. Goodwin, of the state of Tennessee, and county of Roane, yeoman, being mindful of my mortality, do, this 17th day of October, in the year of our Lord 1810, and thirty-fifth year of independence of the United States of America, do make and publish this my last will and testament, in manner following: First, I desire to be decently buried in the place where I shall happen to die; also, I give and bequeath *unto my son, Jesse Goodwin, my young sorrel gelding and one feather bed, to be delivered to him by my executrix, after my decease; also, I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate, I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin: and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament. In witness whereof, I have hereunto set my hand and seal, the day and year above written. [*70

his
Britain B. + Goodwin. [L. S.]"
mark.

The foregoing will was duly witnessed, proved and recorded.

It was further agreed, that said Britain B. Goodwin departed this life in the month of October 1811; that his wife, the said Elizabeth Goodwin, named in the foregoing will, took into her possession all the personal estate of said Britain B. Goodwin, under the bequest in said will to her, and retained the same, until the month of November, in the year of our Lord 1813, when she intermarried with Robert Bell, the defendant in this suit; that she and Robert Bell kept the possession of said personal estate till the latter part of the year 1826, when the said Elizabeth Goodwin died. Said Robert Bell had kept the possession of said personal estate ever since, claiming the same as his own, under the bequest in said will to his said wife Elizabeth; among which are the following named negroes to wit, Lucy, aged about forty-five; Jack, aged about twenty-six; Sophia, aged about twenty-four; Harry, aged about twenty-one; Alexander, aged about nineteen; and Ned, aged about thirteen; which said negroes were admittted to be of the value of $2325; which sum, with interest thereon from the 1st day of September 1827, at which time said negroes were demanded of

defendant, by plaintiff's agent; and it was agreed the said sum and interest would amount *to $2615.62½; which last sum was sought by plaintiff to be recovered of defendant in this action of trover. It was further agreed, that said Jesse Goodwin, the person named in the will of Britain B. Goodwin, did, in due form, execute to John Smith T., the plaintiff, the following bill of sale, to wit:

*71]

"I have sold to John Smith T., all my right, title, interest and claim to the estate of my father, Britain B. Goodwin; and I do hereby authorize the said John Smith T. to bring whatever suit or suits may be necessary to recover all of the property I am or may be entitled to from the said estate; to act in all cases as he, the said John, may think proper, and to convert the property he may recover, to his own proper use, and give any receipts or acquittances in my name, which may be necessary, hereby vesting the before-named John Smith T. with all the power I could use in my own proper person, were I personally present; for value received. Witness my hand and seal this 31st day of March 1815.

JESSE GOODWIN. [L. S.]"

Said bill of sale has been duly proved and registered, in pursuance of the statute of the state of Tennessee in such cases made and provided.

The case was argued by *Key*, for the plaintiff, with whom also was *Grundy;* no counsel appeared for the defendant.

It was contended for the *plaintiff*, that in this, as in all cases of wills, such a construction is to be given as will carry into effect all the intentions of the testator; such as will give meaning and force to all the words of the will. A construction which will make some of the words senseless, and some of the provisions nugatory, ought to be rejected. Here, the difficulty arises from the words "to and for her own use and benefit, and disposal, absolutely." They are thought to be added to show the extent of the wife's interest, and to describe her right to the property; and that, thus giving her an absolute and entire interest in the thing, there is nothing left; no "remainder" for the son; and that the succeeding bequest to him is, therefore, void.

If these words were out of the will, the case would be a *clear one for the son; as in 12 Wheat. 568, where an absolute bequest of slaves is qualified by a subsequent limitation over. Do these words, then, necessarily purport to define the extent of the wife's interest? If any other meaning can be given to them, this should not be, because they would thus be made tautological and senseless. The term "give," used before, implies all this. It is making the testator say over again what he had already said in this word, and would make some of the words of the will useless; and to assign this meaning to them, annuls the provision immediately succeeding in favor of the son.

*72]

It has been a frequent practice, to adopt this mode of reasoning in the construction of wills; and to give another meaning to the words used by a testator, by the mere force of a succeeding provision in the instrument. This was done in the case cited from 12 Wheat. 568; so also, in case of a fee-simple limited to a fee-tail, the word "heirs" has been construed to mean

children. 2 Ves. 501; 1 Bro. C. C. 489; 8 Ves. 22. This mode of construction has been employed, in order to use all the words of a will. The previous words are to be restrained and qualified by those used subsequently; and the subsequent words are to be more regarded, if they are in conflict with the previous language of the instrument. Chief Justice PARSONS, in *Dawes* v. *Swan*, 4 Mass. 208. May not, then, another meaning be given them? If susceptible of such, they ought to have it.

The testator had given the property by positive words; and he then inserts this parenthesis—not to describe what he had done, which was not necessary, but to do something which he thought he had omitted—to point out the mode, not the extent, in which his wife was to enjoy the property. It was to be "for her own use and benefit and disposal, absolutely:" meaning that she should be uncontrolled in its enjoyment, unaccountable, not to be interfered with by him in remainder; or that it was to be her separate estate, not to be divested or affected by her future coverture. "At her disposal," makes it her separate property. *Bradley* v. *Wescott*, 13 Ves. 445; 5 Madd. 491; 7 Vin. Abr. 95, pl. 43. Or these words may mean the intention of the testator, that the legatee should have *the property for her support. "Use and benefit" are equivalent terms to "support." [*73

Here, the son is to have something, and therefore, the wife of the testator was not to have all. He is to have the "remainder;" the remainder at the decease of the wife; that would be, what she had not used or disposed of, for her support, or her benefit. During her life, the wife was to have the use of the property; at her death, he is to have that which might remain, after her full enjoyment of all the benefits of the bequest. 1 P. Wms. 655; 1 Bro. C. C. 489; 2 Ves. 501. The testator's meaning sufficiently appears from the whole will. His first purpose was, to provide for his wife, as long as she lived, so far as might be necessary, to the whole extent of his means; for this end, he uses the language, to her "use and benefit, and disposal, absolutely." His second object was, to provide for his son; and he gave him the "remainder" of the property, after the decease of his wife. What remainder? What his wife might have, after supporting herself during her life. If the use of the property should be found insufficient, she might dispose of it absolutely.

Although she had a right to dispose of the property absolutely, her marriage with the defendant, Robert Bell, was not such a disposal as was contemplated by the will. The husband took the property, as the legatee held it; subject to the remainder of the son, if not necessary to be disposed of for the use of the wife. Nor should it be urged, that as nothing is said about the subsistence of the legatee, the interpleader which is claimed for the plaintiff will not be allowed. This was plainly implied; the intention of the testator is equally clear with that in the case cited. The nature of the property was such as to furnish an income to the wife, and to produce the means of her support and maintenance.

The gift of the "remainder" clearly shows, that the testator meant there should be a remainder, after the use of the property by his wife; if there should be any remainder, consistently with his wife's support, until her decease. He intended to give his son what should then be left—what should "remain" of the property which she had enjoyed during life. He intended to give the legatee the "use," "benefit" *and disposal of the [*74

negroes, for all the purposes of the bequest, her support. She was not allowed to will the property away ; she was allowed to dispose of it, during her life ; not at her death ; because it was given to her for the support of her life. Neither did the legatee, the wife of Britain B. Goodwin, or her husband, dispose of the property. It now remains in kind, as at the decease of the testator ; and as such is claimed by the son.

The words of the will also indicate a limitation of the property, provided the use and benefit of the same should not be interfered with by such limitation. By giving the remainder, after the decease of the legatee, the testator declared, that it should not be disposed of, at her death ; thus qualifying the general words to a use, benefit and disposal during her life, which is equivalent to saying, in express terms, that the use and benefit should be during life only. If it is argued, that such property might be consumed in the use, and therefore, there can be no remainder limited in it ; it is answered, that the modern cases show that even after a life-estate or interest in consumable things, such a remainder may be given. 3 Ves. 311 ; 1 Roper, Leg. 209.

Marshall, Ch. J., delivered the opinion of the court.—This case is adjourned to this court from the court of the United States for the seventh circuit and district of East Tennessee, on a point on which the judges of that court were divided in opinion.

The plaintiff brought an action of trover and conversion against the defendant, for several slaves in his declaration mentioned. He claimed the slaves under the following clause in the will of Britain B. Goodwin : " also, I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely ; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin."

*75] *Elizabeth Goodwin took the estate of testator into her possession, and intermarried with Robert Bell, the defendant. After which, the said Jesse Goodwin sold his interest therein to the plaintiff, who, after the death of Elizabeth, instituted this suit. Upon the trial, the following questions occurred on which the judges were divided in opinion : " whether, by the will of said Britain B. Goodwin, said Elizabeth Goodwin had an absolute title to the personal estate of said Britain B. Goodwin, or only a life-estate ? and also, whether said Jesse Goodwin, by said will, had a vested remainder that would come into possession on the death of said Elizabeth ? or was said remainder void ?"

The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. 1 Doug. 322 ; 1 W. Bl. 672.[1] This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person

[1] All technical rules of construction must yield to the expressed intention of the testator, if such intent be lawful. Rick's Appeal, 78 Penn. St. 432; Wright's Appeal, 89 Id. 67; s. c. 93 Id. 82.

who makes it, and is defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death." 2 Bl. Com. 499. These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration, in expounding doubtful words, and ascertaining the meaning in which the testator used them.[1]

In the will under consideration, but two persons are mentioned—a wife and a son. The testator attempts, in express words, to make a provision for both, out of the same property. The provision for the wife is immediate, that for the son is to take effect after her death. The words of the will make both provisions, but it is doubted, whether both can have effect. In the first member of the sentence, he says, "I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, *after payment of my debts, legacies and funeral expenses; which personal estate I give and bequeath [*76 unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely." It must be admitted, that words could not have been employed, which would be better fitted to give the whole personal estate absolutely to the wife; or which would more clearly express that intention. But the testator proceeds, "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." Jesse Goodwin was his son. These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator, to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect, according to the obvious import of the words, taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same, as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole.[2] Either the last member of the sentence must be totally rejected, or it must influence the construction of the first, so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows, that, in the opinion of the testator, the previous words had given only an estate for life; this was the sense in which he used them. It is impossible to read the will, without perceiving a clear intention to give the personal estate to the son, after the death of his mother. "The remainder of the said estate, after her

[1] Postlethwaite's Appeal, 68 Penn. St. 477.

[2] Edmonson *v.* Nichols, 22 Penn. St. 74; Schott's Estate, 78 Id. 40.

decease, to be for the use of the said Jesse Goodwin." Had the testator
*77] been asked, whether he intended to give anything *by this bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords.

If we look to the situation of the parties, to the motives which might naturally operate on the testator, to the whole circumstances, so far as they appear in the case; we find every reason for supporting the intention, which the words, giving effect to all, of themselves import. The only two objects of the testator's bounty, were his wife and his son. Both must have been dear to him. The will furnishes no indication of his possessing any land. His personal estate was probably small—too small to be divided. It appears to have consisted of a negro woman and four others, probably her children. Their relative ages, which are stated in the plaintiff's declaration, would indicate that the woman was the mother of the other four. A sixth is sued for, but he was not born at the death of the testator. The value of the other articles, which constituted his personal estate, is not mentioned, but it was probably inconsiderable. Farmers and planters, having no real estate, and only five slaves—a woman and four children, have rarely much personal estate, in addition to their slaves. The testator was not in a condition to make any present provision for an only child, without lessening that he wished to make for his wife. He, therefore, gives to his son only a horse and one feather bed; the residue is given to his wife. What feelings, what wishes might be supposed to actuate a husband and a father, having so little to bestow on a wife and child he was about to leave behind him? His affections would prompt him to give something to both; he could not be insensible to the claims of either. But if his property would not, in his opinion, bear immediate division, the only practicable mode of accomplishing his object would be, to give a present interest to one, and a future interest to the other. All his feelings would prompt him to make, so far as was in his power, a comfortable provision for his wife, during her life, and for his child, after her decease. This he has attempted to do. No principle in our nature could prompt him to give his property to the future husband of his wife, to the exclusion of his only child. Every consideration, then, suggested by the
*78] relation of the parties and the circumstances of the case, comes *in aid of that construction which would give effect to the last as well as first clause in the will; which would support the bequest of the remainder to the son, as well as the bequest to the wife. It is not possible to doubt, that this was the intention of the testator.

Is this intention controverted by any positive rule of law? Has the testator attempted to do that which the law forbids? The rule that a remainder may be limited, after a life-estate in personal property, is as well settled as any other principle of our law. The attempt to create such limitation is not opposed by the policy of the law, nor by any of its rules. If the intention to create such limitation be manifested in a will, the courts will sustain it. Some other rule of law then must bear on the case, or the intention will prevail.

It is stated in many cases, that where there are two intents, inconsistent with each other, that which is primary will control that which is secondary;[1]

[1] McDonald *v.* Walgrave, 1 Sandf. Ch. 274.

but the intent to provide for the wife during life, is not inconsistent with the intent to provide for the son, by giving him the same property after her decease. The two intents stand very well together, and are consistent, as well with the probable intention, as with the words of the testator. The intention to give the personal estate absolutely to the wife, is, it is true, inconsistent with the intention to give it, after her decease, to his son; but which of them is the primary intent? which ought to control the other? If we are governed by the words, if we endeavor to give full effect to them all, or if we are influenced by the relation of the parties, and the motives which probably governed in making the will, no such inconsistent intentions exist; but if they do exist, we perceive no motive for ascribing any superior strength to that which would provide for those who might claim the estate of the wife after her decease, to that which would provide, after her decease, for the only child of the testator. To create these inconsistent intentions—this intention to do, in limiting this remainder, what the policy of the law forbids, the bequest to the wife must be construed to give her the power to sell or consume the whole personal estate during her life; which is totally incompatible with a gift of what remains at her death. The remainder, after such a bequest, is said to be void for uncertainty.

*As this construction destroys totally the legacy, obviously intended for the son, by his father, it will not be made, unless it be indispensable. No effort to explain the words in a different sense can do so much violence to the clause, as the total rejection of the whole bequest, given in express terms to an only son. The first part of the clause, which gives the personal estate to the wife, would, undoubtedly, if standing alone, give it to her absolutely. But all the cases admit, that a remainder limited on such a bequest would be valid, and that the wife would take only for life. The difficulty is produced by the subsequent words; they are, "which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit, and disposal, absolutely." The operation of these words, when standing alone, cannot be questioned. But suppose, the testator had added the words, "during her life." These words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. 13 Ves. 444. The words then are susceptible of such limitation; it may be imposed on them by other words. Even the words "disposal absolutely" may have their absolute character qualified by restraining words, connected with, and explaining them to mean, such absolute disposal as a tenant for life may make. If this would be true, provided the restraining words "for her life" had been added, why may not other equivalent words, others which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation? The words "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin," are, we think, equivalent. They manifest with equal clearness the intent to limit the estate given to her, to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life. [*79

Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to

the rules of law. But *courts have sometimes gone farther. The construction put upon words in one will, has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say, that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent; if that intent may be carried into execution, without violating the rules of law. It has been said truly (3 Wils. 141), "that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

In *Porter* v. *Tournay*, 3 Ves. 311, Lord ALVANLEY declared his opinion to be, "that a gift for life, if specific, of things *quæ ipso usu consumuntur*, is a gift of the property; and that there cannot be a limitation after a life-interest in such articles." In the case of *Randall* v. *Russell*, 3 Meriv. 190, the Master of the Rolls inclines to the same opinion. But these cases do not turn on the construction of the wills, but on the general policy of the law, in cases where the legacy is of articles, where "the use and the property can have no separate existence."

One of the strongest cases in which the court of chancery has decided that the legatee first named took absolutely, though there was a limitation in remainder, is that of *Bull* v. *Kingston*, 1 Meriv. 314. Ann Ashby, by her will, gave the sum of 1500*l.* bank annuities, to John Earl Talbot, his executors, &c., in trust for her sister, Charlotte Williams, for her separate use; and "all other sums that may be due to her," she left in trust with the said John Earl Talbot, for the use of her said sister: "what I have not otherwise disposed of, I give to my said sister the unlimited right of disposing of by will, excepting to E. P. &c.; and in case my said sister dies without a will, I give all that may remain of my fortune, at her decease, to my godson, William Ashby. The rest and residue of my fortune, I give to my sister, Charlotte Williams, making her the sole executrix of this my last will and testament." *Charlotte Williams made a will, by which she appears to have disposed of the whole of her own estate, but not to have executed the power contained in the will of Ann Ashby. What remained of her estate was claimed by the representative of the husband, who survived his wife, Charlotte Williams; and also by William Ashby, under the bequest to him of what might remain at the decease of Charlotte Williams, if she should die without a will. The Master of the Rolls, being of opinion, that the whole vested in Charlotte Williams, decided in favor of the representative of her husband, and that the bequest to William Ashby was void.

*81]

In support of this decree, it might be urged, that, as the remainder to William Ashby was limited on the event of her sister dying without a will, which event did not happen, the remainder could not take effect. Or, which is stronger ground, that the whole will manifests an intention to give everything to her sister; and that the eventual limitation in favor of William Ashby, accompanied as it is, by various explanatory provisions, does not show such an intention in his favor, as to defeat the operation of the clauses in favor of Charlotte Williams, which show a superior solicitude to provide

for her. The testatrix gives to her sister the unlimited right of disposing of whatever may not have been bequeathed by herself, thereby enabling her to defeat the contingent remainder to William Ashby; and then gives to her sister, all the rest and residue of her fortune. The sister is obviously, on the face of the whole will, taken together, the favorite legatee; and no violence is done to the intention, by giving to bequests to her their full effect, uncontrolled by the contingent remainder to William Ashby.

But the Master of the Rolls does not place his decree on this ground, and we must understand it, as he understood it himself. He says, it is impossible to make sense of the will, if the residuary clause is to be taken as distinct from what goes before it. "It is evident, the testatrix perceived a defect in her intended disposition of the entire property in favor of Mrs. Williams, and that she had only given a power, where she meant to give the absolute interest. To supply that defect, she gives the residue, by the clause in question; and then the will *is to be read, as if it stood thus:—'I give to Charlotte Williams the residue of my estate, [*82 together with the right of disposing of the same by will, except to E. P.; and if she dies without a will, then I give whatever may remain at her death to William Ashby.' She gives to Charlotte Williams, as a married woman, the right of disposing by will of the property vested in her, independently of the control of her husband, and she intended, at the same time, that if anything was left undisposed of by her, it should go to William Ashby. But this is an intention that must fail on account of its uncertainty. Charlotte, therefore, took the absolute interest in the property," &c.

This opinion is not so carefully expressed, as to remove all doubts respecting its real meaning, and to show precisely whether the uncertainty which destroyed the validity of the remainder belonged to all cases in which property was given in general terms, with a power to use it and to dispose of it; or belonged to those cases only in which analogous circumstances were found. The Master of the Rolls admits, that the testatrix intended to dispose of the entire property in favor of Mrs. Williams, but preceived that she had only given a power, where she meant to give the absolute interest. In speaking afterwards of the right given to Charlotte Williams of disposing by will, he says, it is "of the property vested in her, independent of the control of her husband." The whole opinion furnishes strong reason to believe, that the Master of the Rolls considered himself as pursuing the intention of the testatrix, in declaring the remainder void, and that Charlotte Williams took absolutely. It would be difficult, we think, to support the proposition, that a personal thing, not consumed by the use, could not be limited in remainder, after a general bequest to a person in being, with a power to use and even dispose of it; provided the whole will showed a clear intention to limit the interest of the first taker to his life.

In *Upwell* v. *Halsey*, 1 P. Wms. 651, the testator directs, "that such part of his estate as his wife should leave of her subsistence, should return to his sister and the heirs of her body." The court observed, "as to what has been insisted on, that the wife had a power over the capital or principal sum; that is true, provided it had been necessary for her *subsistence, [*83 not otherwise; so that her marriage was not a gift in law of this trust money. Let the master see how much of this personal estate has been applied for the wife's subsistence; and for the residue of that which came

to the defendant, the second husband's hands, let him account." This decree is founded on the admission, that in a case in which the first taker might expend an uncertain part of the thing given, a remainder might be limited. The uncertainty of the sum which might remain, formed no objection. The cases are numerous, in which the intent has controlled express words.

In the case of *Cowper* v. *Earl Cowper*, 2 P. Wms. 720, several questions were discussed, which arose on the will of Robert Booth; one of which was founded on a bequest of money to Mr. Samuel Powell, to be laid out in lands, to be settled "in trust for and to the use of my son and daughter, William Cowper, Esquire, and Judith his wife, for the term of their lives, and after the decease of my daughter, then to the child or children," &c. It became a question of some importance, whether the limitation over took effect, on the death of the daughter, or on the death of the husband, who survived her. The Master of the Rolls was of opinion, that it took effect on the death of the wife, being of opinion, that the express words giving the estate to both for their joint lives, though always adjudged to carry the estate to the survivor, were restained to the wife, by the subsequent words, which give the remainder "after the decease of his daughter." "If the latter words be not so taken, they must," he says, "be totally rejected." After reviewing the various decisions on the effect of such limitations, he adds, "so, in our case, the words subsequent to the limitation, 'and after the decease of my daughter to the child or children,' &c., show the testator's intent, and must determine the effects of the limitation, especially in a will, where the intent overrules the legal import of the words; be they never so express and determinate." In finding this intent, every word is to have its effect. Every word is to be taken according to the natural and common import; but whatever may be the strict grammatical construction of the
*84] words, that is not to govern, if the intention of the *testator unavoidably requires a different construction. 4 Ves. 57, 311, 329.

The court said in *Sims* v. *Doughty*, 5 Ves. 247, "and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention." Blackstone, in his Commentaries, vol. 2, p. 380, asserts the same principle. The approved doctrine, however, unquestionably, is, that they should, if possible, be reconciled, and the intention be collected from the whole will.

In the case before the court, it is, we think, impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife, and a future provision for his son. This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will. In doing so, we must disregard a long series of opinions, making the intention of the testator the polar star to guide us in the construction of wills, because we find words which indicate an intention to permit the first taker to use part of the estate bequeathed.

This suit is brought for slaves—a species of property not consumed by the use, and in which a remainder may be limited after a life-estate. They composed a part, and probably the most important part, of the personal estate given to the wife, "to and for her own use and benefit and disposal, absolutely." But in this personal estate, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as the stock on a farm, household furniture, and the crop of

the year, which would be consumed in the use; and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator, when he employed the strong words of the bequest to her. But be this as it may, we think, the limitation to the son, on the death of the wife, restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life-estate in them. This opinion is to be certified to the circuit court.

*This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of East Tennessee, 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, agreeable to the act of congress in such case made and provided, and was argued by counsel on the part of the plaintiff: On consideration whereof, this court is of opinion, that Elizabeth Goodwin took only a life-estate, by the will of Britain B. Goodwin, in the slaves belonging to the personal estate of the said Britain B. Goodwin, and that Jesse Goodwin had, by said will, a vested remainder in the said slaves, that would come into possession on the death of the said Elizabeth. All of which is hereby ordered and adjudged to be certified to the said circuit court as the opinion of this court. [*85

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*James Moore, Defendant below, now Plaintiff in error, *v.* The President, Directors and Company of the Bank of Columbia, Defendants in error. [*86

Statute of limitations.

The principle clearly to be deduced from the decisions of this court on the statute of limitations is, that in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed.

An examination and summary of the decisions of this court on the statute of limitations. The English statute of 9 May 1829, 9 Geo. IV., c. 14, relative to the limitation of actions.

Bank of Columbia *v.* Moore, 3 Cr. C. C. 663, reversed.

Error to the Circuit Court of the District of Columbia and county of Washington. This was an action on a promissory note made by James Moore, the plaintiff in error, in favor of Gilbert Docker, and by him indorsed to the Bank of Columbia. The note was for $500, dated April 25th, 1816, and payable sixty days after date.

The suit was commenced on the 14th of July 1825. It was originally instituted under the provisions of the charter granted to the Bank of Columbia, by filing a copy of the note in the office of the clerk of the circuit court for the district of Columbia, and an order to the clerk from the president of the bank; upon which a writ of *fieri facias* was issued to the marshal of the district, commanding him to levy on the goods of the maker of the note, the amount thereof, with interest and costs. On the return of the marshal, that he had levied on the goods of the defendant; he, the defendant, appeared in court, and alleged that he had a good and legal

defence to plead in bar to the claim of the plaintiffs in the execution. The case was placed on the docket for trial; and a declaration on the note having been filed, the defendant pleaded the statute of limitations, and issue was joined thereon. A verdict was rendered for the plaintiffs, and judgment entered by the court.

On the trial, the following bill of exceptions was tendered by the defendant in the circuit court; and under the special *allowance of a writ of error by Chief Justice MARSHALL, the case came before this court.

*87]

The plaintiffs, to support the issue aforesaid on their part, produced and read in evidence to the jury, the note and indorsement in the declaration mentioned, being the only cause of action produced or shown in this cause; which note and indorsement are in these words, to wit:—

$500. Washington City, April 25, 1816.

Sixty days after date, I promise to pay Gilbert Docker, or order, five hundred dollars, for value received, negotiable at the Bank of Columbia.

Credit the drawer.—G. D. JAMES MOORE.

Indorsed—Pay the contents of the within note to the President, Directors and Company of the Bank of Columbia, or order, value received.

GILBERT DOCKER.

The plaintiffs, in order to prove an acknowledgment of the defendant within three years next before the commencement of this suit, so as to take the case on the said note out of the statute of limitations, produced William A. Rind, who testified, that in the summer of 1823, he went into a tavern to read the newspapers, where he saw, in the public room, the defendant and two companions, drinking, the defendant appearing to be elevated with what he had drunk. After the witness came into the room, and while sitting there, looking at the newspapers, he overheard a conversation between the defendant and his two companions, in which they were bantering him about his independent circumstances, and his being so clear of debt or of the banks; when the defendant jumped up and danced about the room, exclaiming, "Yes, except one damned five hundred, in the Bank of Columbia, which I can pay at any time." No part of this conversation was addressed to the witness, nor did he take any part in it. The witness had been, for some time, clerk in the Bank of Columbia, in Georgetown, but was then in the prison-bounds in the city of Washington; and after his discharge from the prison-bounds, immediately returned to the bank in Georgetown; he believed the defendant, at the time of the above conversation, knew him to be a clerk in the Bank of Columbia; and the defendant, at the time he used the expressions above mentioned, turned round and looked at the witness; the witness, at the time, knew that the *note in question was lying over in bank, and knew of no other five hundred dollar note of the defendant in that bank, but what was paid. The plaintiffs further proved, that, upon examination of their books, no other discounted note of the defendant stood charged to the defendant, at the time of the said conversation.

*88]

Whereupon, the counsel for the defendant prayed the court to instruct the jury, that the evidence aforesaid did not import such an acknowledgment of the debt in question, as was sufficient to take it out of the statute of

limitations; which instruction the court refused, and permitted the said evidence to go to the jury, as evidence of an acknowledgment to repel the bar of the statute; to which decision the defendant excepted, &c.

The case was argued by *C. C. Lee* and *Jones*, for the plaintiff; and by *Lear* and *Sergeant*, for the defendants.

For the *plaintiff* in error, it was contended, that the promise upon which the maker of the note was sought to be made liable, was too vague and indefinite. It was not made with the requisite deliberation, nor to a person capable of receiving it, for the benefit of the holders of the note. No agent for the bank was present; nor were the circumstances of the case such, as that a serious purpose of reviving an extinguished liability for the note could be inferred. Nor was the promise such as was sufficient to take the case out of the statute of limitations. 1 Stark. 73; 3 Taunt. 380; 3 Bing. 329; 1 Serg. & Rawle 176; 5 Binn. 530; 11 Johns. 146; 15 Ibid. 511; 2 Pick. 368; 8 Cranch 72; 11 Wheat. 309, 314; 12 Ibid. 567; 1 Pet. 351, 362.

It was admitted, that a clear unequivocal acknowledgment of a debt, is sufficient to prevent the operation of the statute; but it must be such as amounts to a new contract. The former liability will dispense with a new consideration; but in all other respects, there must be enough to infer a new contract. Here, there was not sufficient to sustain an action on the promise.

Lear and *Sergeant*, for the defendants in error.—The decisions of this court have extended the operation of *the statute of limitations further perhaps than any other; yet this court has never said, that [*89 an unconditional acknowledgment of a specific sum would not remove the bar, without any promise to pay. On the contrary, there is a clear intimation in the case of *Bowie* v. *Henderson*, 6 Wheat. 514, that it would.

In this case, there is an unequivocal acknowledgment that five hundred is owing from the plaintiff to the bank. Five hundred what? The court must supply something, if it is to be left to the court, though it is rather the province of the jury, and should have been left to the jury, to infer what kind of money was meant. But if the inference is for the court, will they not understand by it the legal and usual currency of the country? Would they say, that a man, speaking of a debt of five hundred, to a bank dealing in dollars and cents only, meant pounds and not dollars. The fair inference then is, that he meant either dollars or cents; but it is not likely, that he would owe the bank a debt so small as five hundred cents, and if he did, he would not call it five hundred cents, but five dollars. It is only to an amount less than one dollar that we apply the denomination of cents, as fifty cents or seventy-five cents, but no one, in common parlance, speaks of five hundred cents. The only fair inference is, therefore, that he spoke of dollars, and must have meant a note of five hundred dollars which he owed the Bank of Columbia. This is corroborated, by our showing that he actually did owe a note of five hundred dollars to that bank, for which he had been sued, before he made the acknowledgment.

The acknowledgment, then, is, in itself, sufficient, according to the case of *Bowie* v. *Henderson*. Is it necessary, that it should be made to the plaintiff

himself? Many, if not most of the cases, show that the acknowledgment is made to the person who is called as a witness to prove it. It was so in the case of *Wetzell* v. *Bussard*, 11 Wheat. 309; and is decided to be binding by the case of *Oliver* v. *Gray*, 1 Har. & Gill 218, to whomsoever made. This case of *Oliver* v. *Gray* is decided by the highest court of the state of Maryland, upon the construction of a statute of that state, which is the very statute pleaded in the case at bar; and this court has repeatedly said, that it would adopt the rule of construction of the highest tribunal of a state, as to their statutes and practice. If it be *contended, that this is now, by
*90] adoption, a statute of this district, and that the case of *Oliver* v. *Gray* has been decided lately, and since the adoption of the statute here, the case of *Goldsborough* v. *Orr*, 8 Wheat. 217, is relied upon; in which this court decided a point of practice, under the attachment law of this district, upon the authority of a decision of the court of appeals of Maryland, so recent that it had not been reported, and was procured in manuscript from Annapolis, by one of the counsel in the cause.

If the acknowledgment is, in itself, sufficient, I cannot for a moment suppose, that it is the less binding, because made in a tavern, or while the man was drunk. The cases of *Clementson* v. *Williams*, 8 Cranch 72; of *Wetzell* v. *Bussard*, 11 Wheat. 309; and *Bell* v. *Morrison*, 1 Pet. 352, have gone as far, probably, in extending the operation of the statute of limitations, as this court will go. This being such an unqualified acknowledgment of a specific debt, as those cases seem to require, it is considered sufficient to remove the bar of the statute.

Thompson, Justice, delivered the opinion of the court.—The only question in this case is, whether the evidence offered upon the trial, was sufficient to prevent the statute of limitations from barring the action?

The suit was founded upon a promissory note made by the plaintiff in error, bearing date the 25th of April 1816, by which, sixty days after date, he promised to pay Gilbert Docker, or order, $500, value received, at the Bank of Columbia. The note was duly indorsed to the Bank of Columbia, and in July 1825, a suit was commenced in the circuit court of the United States for the district of Columbia, upon that note. The statute of limitations, among other pleas, was interposed; and the plaintiff in the court below, to take the case out of the statute, proved by William A. Rind, that in the summer of 1823, he went into a tavern, to read the newspapers, when he saw in the public room, the defendant, James Moore, and two companions, drinking, Moore appearing to be elevated with what he had drunk; and whilst there, looking at the newspapers, he overheard a conversation between the defendant and his *two companions, in which they were
*91] bantering him about his independent circumstances, and of his being so clear of debt, or of the banks, when the defendant jumped up and danced about the room, exclaiming, "Yes, except one damned five hundred, in the Bank of Columbia, which I can pay at any time." No part of this conversation was addressed to the witness. The witness had been a clerk in the bank, but was then in the prison-bounds in the city of Washington, and after his discharge from prison, he immediately returned to the bank in Georgetown. The witness believed, the defendant knew him to be a clerk in the bank. At this time, he, the witness, knew the note in question was

lying over in bank, and he knows of no other five hundred dollar note of the defendant in that bank, but what is paid. The plaintiffs further prove, that upon examination of their books, no other discounted note of the defendant stood charged to him, at the time of the conversation referred to by the witness. Upon this evidence, the defendant prayed the court to instruct the jury, that the evidence aforesaid did not import such an acknowledgment of the debt in question, as was sufficient to take it out of the statute of limitations; which instruction the court refused, and permitted the evidence to go to the jury, as evidence of an acknowledgment to repel the bar of the statute. The jury found a verdict for the plaintiff. A bill of exceptions was taken to the decision of the court, and the case is brought here by writ of error.

The question as to what shall be a sufficient acknowledgment or promise to take a case out of the statute, has frequently received the attention and examination of this court, and the cases both in England and in this country have been critically reviewed. It is deemed unnecessary again to travel over this ground, but it is sufficient barely to apply some of the rules and principles to be extracted from these cases, to the facts in the one now before us.

This court, in the case of *Clementson* v. *Williams*, 8 Cranch 72, nearly twenty years since, expressed a very decided opinion, that courts had gone quite far enough in admitting acknowledgments and confessions to bar the operation of the statute of limitations, and that this court was not inclined to *extend them; that the statute was entitled to the same respect as other statutes, and ought not to be explained away. And from [*92 the course of decisions in the state courts, as well as in England, such seems to have been the general impression; and they have been gradually returning to a construction more in accordance with the letter, as well as the spirit and intention of the statute. In the case referred to, it was laid down as a rule applicable to this question, that an acknowledgment of the original justice of a claim, was not sufficient to take the case out of the statute; but the acknowledgment must go to the fact that it was still due. And in *Wetsell* v. *Bussard*, 11 Wheat. 310, it is held, that the acknowledgment must be unqualified and unconditional, amounting to an admission that the original debt was justly demandable. If the acknowledgments are conditional, they cannot be construed into a revival of the original cause of action; unless that be done on which the revival was made to depend. It may be considered a new promise, for which the old debt is a sufficient consideration; and the plaintiff ought to prove a performance, or a readiness to perform the condition on which the promise was made. This is the doctrine which prevails in the state courts generally. In New York, it is held, that an acknowledgment, to take a case out of the statute of limitations, must be of a present subsisting debt. If the acknowledgment be qualified, so as to repel the presumption of a promise to pay, it is not sufficient evidence of a promise to pay, so as to prevent the operation of the statute. 15 Johns. 511; 6 Johns. Ch. 266, 290.

This question, again, recently (1828), came under the consideration of this court, in the case of *Bell* v. *Morrison*, 1 Pet. 352, and underwent a very elaborate examination; and the leading cases in the English and American courts were reviewed, and the court say, "we adhere to the doc-

trine in *Wetzell* v. *Bussard*, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed, by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate." *If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise, to revive the cause of action. Any other course would open all the mischiefs, against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations.

*93]

The principle clearly to be deduced from these cases is, that, in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed. And this is the conclusion to which the English courts, after a most vacillating course of decisions, had come, before the late act of parliament of 9 Geo. IV., c. 14. This act shows, in a very striking point of view, the sense of that country, of the great mischiefs which had resulted from admitting vague and loose declarations, in a great measure, to set aside and make void the statute of limitations. That act (9th May 1829) recites, that whereas, various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operations of said enactments, and to make provision for giving effect to the said enactments, and to the intention thereof: be it enacted, &c., that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or to deprive any party of the benefit thereof; unless such acknowledgment or promise shall be made, or contained by or in *some writing to be signed by the party chargeable thereby.[1] Martin's Treatise on Act 9 Geo. IV. Although this act can have no direct bearing upon the question here, it serves to illustrate and confirm the fitness and policy of the course pursued by our courts, in cautiously admitting loose verbal declarations and promises to take a case out of the statute of limitations.

*94]

If the doctrine of this court, as laid down in the cases I have referred to, is to govern the one now before us, the facts and circumstances given in evidence fall very far short of taking the case out of the statute of limitations. There is no direct acknowledgment of a present subsisting debt; no express promise to pay; nor any circumstances from which an implied promise may fairly be presumed. The declarations of the defendant below

[1] The same provision is contained in the New York code, § 395.

were vague and indeterminate, leading to no certain conclusion, and at best, to probable inference only; and indeed, if unexplained by any other evidence, they were senseless. It is left uncertain, even whether the conversation referred to the note in question. The evidence that this was the only five hundred dollar note of his lying over in the bank, might afford a plausible conjecture that this was the one alluded to. But that is not enough, according to the rule laid down in *Bell* v. *Morrison;* nor is there any direct admission of a present subsisting debt due. The epithet which accompanied the declaration, would well admit of a contrary conclusion; and that there were some circumstances attending it, that would lead him to resist payment. The assertion of his ability to pay, is no promise to pay. The whole declarations, taken together, do not amount either to an explicit promise to pay, made in terms unequivocal and determinate, or disclose circumstances from which an implied promise may fairly be presumed; one or the other of which this court has said is necessary to take the case out of the statute.

The court below, therefore, erred in not given the instructions prayed for by the defendant. The judgment must accordingly be reversed, and the cause sent back, with directions to issue a *venire de novo.*

Judgment reversed.

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*William Peirsoll and others, Appellants, *v.* James Elliott and others, Appellees. [*95

Cancellation of deed.—Decree.—Costs.

The complainants filed a bill for a perpetual injunction, and to oblige the appellees to deliver up a deed of conveyance of lands, and which deed, in a suit between the parties, had been declared by the court void on its face. "The court is well satisfied, that this would be a proper case for a decree, according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony;" but where the defectiveness is so apparent, the court will not order the deed to be delivered up.[1]

The defendants, in their answer, insist on their title, both at law and in equity, and on being left free to assert that title, if they shall choose so to do; a general dismissal of the bill, with costs, the court assigning no reason for that dismissal, may be considered as a decree affirming the principles asserted in the answer, as leaving the defendants at full liberty to assert their title in another ejectment, and as giving some countenance to that title. The decree of the circuit court dismissing the complainants' bill ought to be so modified, as to express the principles on which the bill is dismissed, so as not to prejudice the complainants.

In addition to the fact shown by the bill and answer, that the controversy between the parties as to the title to the lands, was not abandoned by the defendants, a fact which is entitled to some influence on the question of costs; the bill prays that the defendants might be enjoined from committing waste, while they retained possession of the premises; that a receiver might be appointed, and that an account of rents be taken; these are proper objects of equity jurisdiction; if they had been accomplished, when the decree was pronounced, the bill might have been dismissed, but not, so far as is disclosed by the record, with costs; the defendants were not entitled to costs.

Elliott *v.* Peirsoll, 1 McLean 11, reversed.

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[1] A court of equity will not order an instrument to be delivered up and cancelled, except in a very clear case; if the defendant may possibly have any rights under it, the parties will be left to their remedies at law. Stewart's Appeal, 78 Penn. St. 88. And see Noah *v.* Webb, 1 Edw. Ch. 604. But a void instrument, in which no other person can have an interest, will be ordered to be surrendered and cancelled. McEvers *v.* Lawrence, Hoffm. Ch. 172. See Jones *v.* Bolles, 9 Wall. 364.

Peirsoll v. Elliott.

APPEAL from the Circuit Court of Kentucky. The case was argued by *Wickliffe*, for the appellants; and by *Loughborough*, for the appellees. The facts and pleadings are fully stated in the opinion of the court.

MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the court of the United States for the seventh circuit and district of Kentucky, dismissing the plaintiffs' bill filed in that court, with costs.

The bill states, that the plaintiffs are the heirs and representatives of *96] Sarah G. Elliott, deceased, who departed this life, *intestate, seised of a valuable estate in the county of Woodford, which descended to them. That in her lifetime, in the year 1813, James Elliott, her husband, caused a deed to be made and recorded, purporting to be executed by the said Sarah G. and himself, for the purpose of conveying the said land to Benjamin Elliott, who immediately reconveyed the same to the said James Elliott. The complainants allege, that this deed was never properly executed by their ancestor; that she was induced by the said James to believe, that it conveyed only an estate for her life; that she was prevailed on, under this belief, to accompany him to the clerk's office, where she acknowledged the said deed, without any privy examination, which is required by law. The deed was recorded, on her acknowledgment, without any certificate of privy examination. The said Sarah G. departed this life, in the year 182–, soon after which, her heirs brought an ejectment in the circuit court, for the recovery of the land. While it was depending, in November 1823, the said James Elliott, having failed in an attempt to induce the clerk to alter the record, prevailed on the county court of Woodford, on the motion, of Benjamin Elliott, to make the following order.

"Woodford county, sct. November County Court, 1823.

On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court, by the indorsement on the deed from James Elliott and wife to him, under date of the 12th of June 1813, and by parol proof, that the said deed was acknowledged in due form of law, by Sarah Elliott, before the clerk of this court, on the 11th day of September 1813, but that the certificate thereof was defectively made out, it is ordered, that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded; whereupon, the said certificate was directed to be amended to read in the words and figures following, to wit:

"Woodford county, sct. September 11, 1813.

This day the within named James Elliott, and Sarah his wife, appeared before me, the clerk of the court for the county aforesaid, and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined, privily and apart from her said husband, did declare, *97] that she freely and *willingly sealed and delivered said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded." The said deed, order of court, and certificate, as directed to be amended, is all duly recorded in my office.

Teste—JOHN MCKENNEY, JR., C. W. C. C.

Indorsements on the back of the foregoing deed, to wit:—James Elliott *et ux.*, to Benjamin Elliott—Deed.

Acknowledged by James Elliott and Sarah G. Elliott, September 11th, 1813.

Att.—J. McKenney, Jr., C. W. C.

R. B. F. page 199. Recorded deed-book K. page 56, 57.

Att.—C. H. Mc., D. Clk.

The said James Elliott departed this life, during the pendency of the ejectment; it was revived against James Elliott, his son, as *terre tenant*, and determined in favor of the plaintiffs, in November 1823. The bill, which was filed during the term at which the judgment in ejectment was rendered, alleges, that the defendants retain possession of the premises, by themselves and their tenants, who are doing great waste, by cutting and destroying the timber, and who threaten to continue their possession, by suing out a writ of error to the judgment of the court. It charges, that the defendants are receiving the rents, which some of them will be unable to repay; prays for an injunction to stay waste; that a receiver may be appointed; that the rents, from the death of Sarah G. Elliott, may be accounted for; that the deed may be surrended up to be cancelled; and for further relief. The injunction was awarded.

The writ of error to the judgment of the circuit court came on to be heard in this court, at January term 1828 (1 Pet. 328), when the judgment was affirmed; this court being of opinion, that the deed from James Elliott and Sarah G., his wife, was totally incompetent to convey the title of the said Sarah G., to the tract of land therein mentioned.

In November 1828, the defendants filed their answer, in which they claim the land in controversy, as heirs of James Elliott, deceased. They insist, that the deed from James Elliott and Sarah G., his wife, recorded in the court of Woodford county, was fairly and legally executed, and conveyed the *land it purports to convey. That Sarah G. Elliott was privily examined, according to law, and that the omission to record her [*98 privy examination was the error of the clerk, which was afterwards corrected, by order of the court, so as to conform to the truth of the case. They deny, that the deed from Sarah G. Elliott was obtained by any misrepresentation; and say, they have heard, that the judgment of the circuit court has been affirmed in the supreme court, and that they have not determined to prosecute any other suit, but hope they will be left free on that subject. In May term 1829, the cause came on to be heard, when the bill of the plaintiffs was dismissed, with costs. They appeal from the decree to this court.

The principal object of the bill was, to quiet the title, by removing the cloud hanging over it, in consequence of the outstanding deed executed by James Elliott and Sarah G., his wife. This application is resisted in the argument, upon the principle, that the deed, having been declared by this court to be void on its face, can do no injury to the plaintiffs; who ought not, therefore, to be countenanced by a court of equity in an application to obtain the surrender of a paper from which they can have nothing to apprehend; by which application the defendants are exposed, without reasonable cause, to unnecessary expense. That under such circumstances, a court of equity can have no jurisdiction over the cause.

The court is well satisfied, that this would be a proper case for a decree

according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony. The doubt respecting the propriety of the interference of a court of equity, is produced by the facts that the deed is void upon its face; and has been declared to be void by this court. It is, therefore, an unimportant paper, which cannot avail its possessor. The question whether a court of equity ought, in any case, to decree the possessor of such a paper to surrender it, is involved in considerable doubt; and is one on which the chancellors of England seem to have entertained different opinions. Lord THURLOW was rather opposed to the exercise of this jurisdiction (3 Bro. C. C. 15, 18); and Lord LOUGHBOROUGH appears to have concurred with him (3 Ves. 368); and

*99] in *Gray* v. *Mathias*, 5 Ves. 286, the *court of exchequer refused to decree, that a bond which was void upon its face, should be delivered up; principally on account of the expense of such a remedy in equity, when the defence at law was unquestionable. In this case, Chief Baron MCDONALD said, that the defendant should have demurred to the action upon that bond. Instead of that, he comes here, professing that it is a piece of waste paper; he goes through a whole course of equitable litigation, at the expense of two or three hundred pounds. In such a case, though equity may have concurrent jurisdiction, it is not fit, in the particular case, that equity should entertain the bill. Lord ELDON inclined to favor the jurisdiction, 7 Ves. 3; 13 Ibid. 581. He thought the power to make vexatious demands upon an instrument, as often as the purpose of vexation may urge the party to make them, furnished a reason for decreeing its surrender.

In 1 Johns. Ch. 517, Chancellor KENT concludes a very able review of the cases on this subject, with observing, "I am inclined to think, that the weight of authority, and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded." The opinion of this learned Chancellor is greatly respected by this court. He modifies it, in some degree, by afterwards saying, "but, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications, where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps, the cases may all be reconciled, on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature; or because the defence, not arising on its face, may be difficult or uncertain at law, or from some other special circumstance peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense or litigation. If, however, the defect

*100] appears *on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction."[1]

The court forbears to analyze and compare the various decisions which have been made on this subject in England; because, after onsidering

[1] See Field *v.* Holbrook, 6 Duer 597.

them, much contrariety of opinion still prevails, both on the general question of jurisdiction, where the instrument is void at law, on its face, and on the expediency, in this particular case, of ganting a perpetual injunction, or decreeing the deed to be delivered up and cancelled; and because we think that, although the prayer of the bill be rejected, the decree of dismissal ought to be modified. The defendants, in their answer, insist upon their title both at law and in equity, and on being left free to assert that title, if they shall choose so to do: "a general dismissal of the bill, with costs, the court assigning no reason for that dismission, may be considered as a decree affirming the principles asserted in the answer; as leaving the defendants at full liberty to assert their title, in another ejectment, and as giving some countenance to that title."

We also think, that the bill ought not to have been dismissed with costs. In addition to the fact, that the controversy respecting the title was not abandoned by the defendants, a fact which is entitled to some influence on the question of costs, other considerations bear on this point. The bill prays that the defendants might be enjoined from committing waste, whilst they retained possession of the premises; that a receiver might be appointed, and that an account of rents might be taken. These are proper objects of equity jurisdiction. If they had been accomplished, when the decree was pronounced, the bill might have been dismissed, but not, so far as is disclosed by the record, with costs. The defendants were not, we think, entitled to costs. We are, therefore, of opinion, that the decree of the circuit court ought to be so modified, as to express the principles on which the bill of the plaintiffs is to be dismissed, and ought to be reversed, as respects costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district *of Kentucky, and [*101
was argued by counsel: On consideration whereof, this court is of opinion, that the decree of the circuit court ought to have shown that the bill was dismissed, because the deed therein mentioned, being void at law, for matter apparent on its face, the plaintiff had not shown any circumstances which disclosed a case proper for the interference of a court of equity to relieve against such void deed. And this court is further of opinion, that so much of the said decree as dismisses the bill, with costs, is erroneous and ought to be reversed. This court doth, therefore, reverse and annul the said decree, and direct that the case be remanded to the said circuit court, with directions to modify the same according to the principles of this decree; and the parties are to bear their own costs in this court.

*The Lessee of Mordecai Levy, Elizabeth Levy, Chapman Levy and Rosina his wife, Bella Hart, Bella Cohen, Rhina Mordecai, Flora Levy and Jacob Henry *v.* Peter McCartee.

Descent.—Alien ancestor.

Under the laws of New York, one citizen of the state cannot inherit in the collateral line to the other, when he must take his pedigree or title through a deceased alien ancestor;[1] the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context; "the common law" is constantly used in contradistinction to the statute law.

Descents are, as is well known, of two sorts, lineal, as from father to son, or grandfather to son or grandson; and collateral, as from brother to brother, and cousin to cousin, &c.; they are also distinguished into mediate and immediate. But here, the terms are susceptible of different interpretations, which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses; a descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Thus, a descent from the grandfather, who dies in possession, to the grandchild, the father being then dead, or from the uncle to the nephew, the brother being dead, is, in law, an immediate descent, although the one is collateral and the other lineal; for the heir is in the *per*, and not in the *per* and *cui*. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, when the ancestor from whom the party derives his blood is immediate, and without any intervening link or degree; and mediate, when the kindred is derived from him, *mediante altero*, another ancestort intervening between them.

That an alien has no inheritable blood, and can neither take land himself by descent, nor transmi land from himself to others by descent, is common learning.

The case of Collingwood *v.* Pace, 1 Vent. 413, furnishes conclusive evidence that, by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party makes his pedigree as heir, is an alien, that is a bar to his title as heir.

Certificate of Division from the Circuit Court for the Southern District of New York. In that court, the lessee of the plaintiffs instituted an action of ejectment, for the recovery of certain real estate in the city of New York. The jury found the following special verdict:

*103] And the jurors aforesaid, upon their oaths aforesaid, do further find, that, at the time of the commencement of this suit, to *wit, on the 22d day of April, in the year 1828, the said defendant, Peter McCartee, was

[1] Under the revised statutes of New York, a person may take lands by descent, though he derive title through a collateral relation, who was an alien. McCarthy *v.* Marsh, 5 N. Y. 263. The alienage of a common grandfather, does not impede the descent between cousins, the children of brothers and sisters, who were citizens; the descent between brothers and their descendants is immediate. McGregor *v.* Comstock, 3 N. Y. 408. But the statute does not enable a person to take an estate of inheritance by descent, who deduces title through a living alien relative, who would himself inherit, but for his alienage. McLean *v.* Swanton, 13 N. Y. 535. Thus, where an alien purchases lands, and after being naturalized, dies intestate, the lands cannot descend to nephews and nieces, claiming through a living alien mother, but will rather pass to a second cousin, who is a naturalized citizen. Larreau *v.* Davignon, 1 Sheld. 128. So, the children of a surviving alien sister cannot inherit, though themselves citizens. Renner *v.* Mueller, 12 J. &. Sp. 535. Alienism is an impediment to taking lands by descent, only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs, are incapable of taking, by reason of alienage, they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien. Luhrs *v.* Eimer, 80 N. Y. 171; s. p. Leary *v.* Leary, 50 How Pr. 122.

in the possession of the lands and premises in question in this suit, known and described as a house and lot No. 47, fronting on Murray street, in the city of New York. And the jurors aforesaid, upon their oaths aforesaid, do further find, that Philip Jacobs, late of the city of New York, on the 6th day of October, in the year 1818, was seised in fee-simple of the said premises in question, and on that day, the said Philip Jacobs died, being so seised thereof, and leaving no child born to him, the said Philip Jacobs, but his wife Elizabeth was then pregnant of a female child, which was born alive, on the 23d day of January, in the year 1819, which female child continued to live, until the 5th day of April, in the year 1821, and then the said child died, without issue. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said Philip Jacobs was born in Germany, and that he came to the city of New York, before the year 1772, where he resided in that year, and that he continued to reside there, until his death. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said Philip Jacobs had one brother only, and his name was Simon Jacobs, who was also born in Germany, but who went to England, and resided in London, from the year 1765 till his death, in the year 1807; that said Simon Jacobs never came to America; that said Simon Jacobs had two sons, to wit, Jacob and Abraham; that the said son Jacob came from London to New York, in the year 1808, and remained at New York a short time, and then went to Canada, where he soon after died, having never been married; and the other son of said Simon Jacobs never was in America, and now resides in England; and the said Philip Jacobs also had a sister, who was born in Germany, and lived and died there, leaving several children, born and residing there. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the father and mother of the said Philip Jacobs were born in Germany, and they both died, before the death of said Philip Jacobs. And the jurors aforesaid, upon their oaths aforesaid, do further find, that Leipman Cohen was brother of the mother of the said Philip Jacobs; that the said Leipman Cohen and his wife, *were also born in Germany; that they had children, three sons, to wit, Philip, Moses and Elias; and [*104 three daughters, Jane, Mary and Catharine; that all the said children of Leipman Cohen were born in Germany; that said Leipman Cohen, with his said children, removed to England, many years before the year 1822, and continued to reside in England until his death. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said Philip, son of Leipman Cohen, came from London to America, and resided in South Carolina, from the year 1772 until the year 1786, when he died, without issue, having never been married. And the jurors aforesaid, on the oaths aforesaid, do further find, that Moses Cohen, son of the said Leipman Cohen, came from London to the city of New York, in the year 1772; that in the same year, the said Moses Cohen went to Charleston, South Carolina, where he married Judith de Lyon; that he soon after removed to Savannah, in Georgia, and resided there, from the year 1774 until his death, which occurred in the year 1791; that the said Moses Cohen had two daughters of his said marriage, to wit, Rhina and Bella, who were born in Charleston or Savannah aforesaid, and the said Rhina is now forty-one years of age, and is the widow of Mordecai, and was such widow, at the commencement of this suit; the said Bella Cohen is now forty years of age; and the said Rhina and Bella have

resided within the United States of America, ever since their birth. The said Bella Cohen has never been married. The said Rhina and Bella are now alive, and reside in Charleston aforesaid, and are the only children of said Moses Cohen, and are two lessors of the plaintiff in this suit. And the jurors aforesaid, upon their oaths aforesaid, do further find, that Mary, one of the daughters of said Leipman Cohen, was lawfully married to Mordecai Levy, in London aforesaid, where she and her said husband continued to reside, until their death; and they had of such marriage five children, to wit, one son named Emanuel, and four daughters, to wit, Jane, Bella, Hannah and Flora, which children were all born in London aforesaid; and they all came to Charleston, in South Carolina, between the year 1788 and the year 1792. The said Bella Levy afterwards married Daniel Hart, and is now his widow, and resides in Charleston aforesaid. The said Hannah Levy is now the wife *of Moses Davis, and resides in the city of New *105] York. Said Flora Levy married Michael Emanuel, before she came from London to Charleston; and she and her said husband both died in Charleston, in South Carolina, leaving their children there, to wit, Michael, Nathan, Simon, Joel, Charlotte, and another daughter, whose name is unknown. The children of said Flora, by her said husband, Michael Emanuel, were all born in England. The said Charlotte, and the other daughter of Flora Emanuel, whose name is unknown, were never married, and they are both death. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said Emanuel Levy, the son of Mary and Mordecai Levy, died in the year 1816, leaving lawful issue, to wit, a son named Mordecai Levy, one of the lessors of the plaintiff, now living in the state of South Carolina; a daughter, Flora, who married Chapman Levy, of South Carolina, and died in the year 1823, leaving a daughter named Flora, one of the lessors of the plaintiff, now living in South Carolina aforesaid, and six years old. Said Emanuel Levy also left another daughter, named Rosina, who was married to the said Chapman Levy, after the death of her said sister Flora. The said Chapman Levy and Rosina his wife, are two of the lessors of the plaintiff, and reside in the state of South Carolina aforesaid, and the said Rosina has died since the commencement of this suit, leaving an infant son of her said marriage, named Edward Anderson Levy; and the said Emanuel Levy also left a daughter named Elizabeth, who is now living, aged fifteen years, and is one of the lessors of the plaintiff, and resides in South Carolina aforesaid. All the said children of the said Emanuel Levy were born in Charleston aforesaid, and the said Chapman and all his children were born in South Carolina. And the jurors aforesaid, upon their oaths aforesaid, do further find, that Catharine, one of the said daughters of Leipman Cohen, died unmarried and while an infant; that the son of said Leipman Cohen, named Elias, had children and is dead; and that the said Elias and his children were born in Germany, and have never been in America. And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said Leipman Cohen and his wife, and their children, and the said Philip Jacobs and his said brother Simon Jacobs, and their father and mother, were all natives of Germany, and *were all Jews. *106] And the jurors aforesaid, upon their oaths aforesaid, do further find, that the said land and premises in question in this suit are of the value of more than two thousand dollars. And the jurors aforesaid, upon their oaths

aforesaid, do further find, that, on the 7th day of September, in the year 1818, the said Philip Jacobs, being seised in fee-simple of the said lands and premises, made his last will and testament in writing, and signed, sealed and published, and declared the same as and for his last will and testament, in the presence of three credible witnesses, who, at his request, and in his presence, and in the presence of each other, severally subscribed their names as witnesses thereto; that the said will remained unrevoked and uncancelled at the time of the death of the said Philip Jacobs; and which will and testament is in the words and figures following, to wit: After giving certain legacies, and making provision for his wife, the testator proceeds to dispose of his real estate as follows:

It is my will, that if, at the time of my decease, there shall be any child of mine alive, that then all the rents and profits of my real estate shall be received by my executors hereinafter named, or the survivor or survivors of them, and be applied by him or them to the support, maintenance and education of such child, until such child attain the age of twenty-one years, or intermarry; and if, from the yearly application of such rents and profits to the purposes aforesaid, there should be a surplus remaining, the said executors, or the survivor or survivors of them, shall, from time to time, in his or their discretion, invest the same in some safe stock, for the benefit of said child, to be paid over to such child, at the age of twenty-one years, or on marriage, whichever event shall first take place; and that my said executors, or the survivor or survivors of them, receive for such their trouble and attention such sums as the law may allow. Item: After the payment of all legacies and other bequests contained in this my last will, I do hereby give, devised and bequeath all the rest, residue and remainder of my estate, real and personal, to the Orphan Asylum society in the city of New York, to be applied to the charitable purposes for which said association was established; this bequest to take effect immediately after all other debts and legacies are paid, *if I should leave no child at the time of my death, or, if I should leave a child, then upon the death, intermarriage, or the [*107 attaining the age of twenty-one years by such child. Item: I do hereby devise and bequeath unto my said executors, or the survivor or the survivors of them, or such of them as may act in the premises, all my real estate, of whatsoever nature or kind the same may be, subject to the trusts aforesaid; and it is my will, that whenever such child shall attain the age of twenty-one years, or marry, that my real estate be sold by my said executors, or the survivor or survivors of them, or such of them as may act herein, and the one-half of the proceeds thereof paid to my said child, if the said child shall attain the age of twenty-one years or marry. And lastly, I do nominate and appoint my worthy friends, Peter McCartee, Richard Cunningham and John Anthon, all of the city of New York, Esq's, to be the executors of this my last will and testament. In witness whereof, I, the said Philip Jacobs, have hereunto set my hand and seal, the 7th day of September 1818.

[L. S.] PHILIP JACOBS."

But whether or not, upon the whole matters aforesaid, by the jurors aforesaid, in form aforesaid found, the said Peter McCartee, is guilty of the trespass and ejectment above mentioned, the jurors aforesaid are ignorant;

and therefore, they pray the advice of the said circuit court of the United States of America for the southern district of New York, in the second circuit; and if, upon the whole matter aforesaid, it shall seem to the said court that the said plaintiff is entitled to the possession of the said land and premises claimed by the plaintiff in this suit, or of any part thereof, then the jurors aforesaid, upon their oaths, aforesaid, say, that the said Peter McCartee is guilty of the trespass and ejectment aforesaid, in manner and form as the said James Jackson hath above thereof complained against him; and in that case, they assess the damages of the said James Jackson, on occasion of the trespass and ejectment aforesaid, besides his costs and charges by him about his suit in that behalf expended, to six cents, and for his costs and charges to six cents. But if, upon the whole matter aforesaid, it shall seem to the said court that the plaintiff is not entitled to the possession of the said land and premises so claimed by the plaintiffs as aforesaid, *nor
*108] of any part thereof, then the jurors aforesaid, upon their oaths aforesaid, say, that the said Peter McCartee is not guilty of the trespass and ejectment aforesaid, in manner and form as the said James Jackson hath above thereof complained against him.

And at the October term of the court, 1829, the cause came on for argument upon the said special verdict. And at the said argument, before the said judges, it was contended by the plaintiff's counsel, on his part, that the said lessors, Bella Cohen and Rhina Mordecai, were capable of taking the premises described in said special verdict, whereof the said Philip Jacobs died seised, as therein stated, as heirs-at-law of the said Jacobs, and his said child; and that the said estate descended and came to the said Bella and Rhina, notwithstanding the alienism of the mother of the said Philip Jacobs, and his maternal uncle, Leipman Cohen, and their father; but on the part of the defendant, it was contended by his counsel, that, by reason of the said alienism of the said mother of the said Philip Jacobs, and his said maternal uncle, the said estate did not descend and come to Bella Cohen and Rhina Mordecai; and upon this question, which thus occurred before the said court, the opinions of the said judges were opposed; and upon request of the counsel for the plaintiff, the point on which said disagreement happened is stated as above set forth, under the direction of the said judges, in order to be certified to the supreme court of the United States.

The case was argued by *Hoffman*, for the lessors of the plaintiffs; and by *Wirt*, for the defendants.

Story, Justice, delivered the opinion of the court.—This case comes before the court upon a certificate of division of opinion of the judges of the circuit court for the southern district of New York, in a case stated in a special verdict.

Philip Jacobs, an American citizen, died in 1818, seised of certain real estate, in the state of New York, having made his last will and testatment; but the land in controversy in the present suit (which is an ejectment) is supposed by the plaintiff to be intestate estate. Two of the lessors of the plaintiffs, Bella Cohen and Rhina Mordecai, are citizens of South Carolina,
*109] and claim to be the heirs-at-law of the testator and of his *posthumous child, and as such are entitled to the premises. They are the children

of Moses Cohen, who was the son of Leipman Cohen, an alien, and the maternal uncle of the testator, and as such claim to be his next of kin. The mother of the testator (who was also an alien), and the said Leipman Cohen and Moses Cohen are dead. The testator died, leaving his wife pregnant, who was afterwards delivered of a posthumous child, who died in infancy, in 1821, and who took certain estates under the will, not now material to be mentioned. Under these circumstances, the question arises, whether the said lessors of the plaintiffs, notwithstanding the alienage of the intermediate ancestors through whom they make their pedigree, are capable of taking the premises, by descent from the testator or his posthumous child, as heirs-at-law, under the laws of New York; and this is the question upon which the judges in the court below were divided in opinion. It resolves itself into this; whether one citizen can inherit, in the collateral line, to another, when he must make his pedigree of title through a deceased alien ancestor.

The question is one of purely local law, and as such, must be decided by this court. By the 35th article of the constitution of New York, of 1777, it was ordained and declared, "that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the 19th of April 1775, shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same." By the statute of 11 & 12 Wm. III., c. 6, it is enacted, "that all and every person or persons, being the king's natural-born subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit, and be inheritable, as heir or heirs, &c., and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers and mothers, or other ancestor of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be, born out of the king's allegiance, &c., as freely, &c., as if such father, &c., or *other ancestor, &c., had been naturalized or natural-born subjects, &c. [*110

It has been argued at the bar, that this statute of William III. extending to all his subjects, within all his dominions, constituted a part of the statute law of England which was in force, and formed a part of the law of New York, in the year 1775; and as such was recognised by the constitution of New York. But assuming, for the sake of the argument, that this is so, still the inquiry will remain, whether it was in force in New York, at the time of the present descent cast; for if it was at that time repealed, it has no bearing on the present case. By an act of the legislature of New York, passed on the 27th of February 1788, ch. 90, § 38, it is enacted, "that none of the statutes of England or Great Britain shall be considered as laws of this state." And by the statute of descents of New York, of the 23d of February 1786, ch. 12, it is enacted, "that in all cases of descents, not particularly provided for by this act, the common law shall govern." These statutes were in full force, at the time of the descent cast in the present case; and of course, govern the rights of the parties.

It has been argued, that the reference to the common law, in the statute of descents of 1786 includes not only the common law, properly so called,

but the alterations and amendments which have been made in it by British statutes, antecedent to the American revolution ; and that the repeal of the British statutes, by the act of 1778, repealed them only as statutes, but left them in full vigor and operation, so far as they then constituted a part of the law of New York ; thus making them, in some sort, a part of its common law. We cannot yield to the argument in either respect. The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context. The common law is constantly and generally used in contradistinction to statute law. This very distinction is pointed out in the clause of the constitution of New York, already cited, "such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts, &c., which did from the law of the said colony on the 19th of April 1775, shall continue he law of the state." It is too plain for argument, that the common law is here spoken of, in its appropriate sense, as the *unwritten law of the land, independent of statutable enactments. The same meaning must be applied to it, in the act respecting descents of 1786. That act propounds a scheme of descents, varying in many respects from the common law ; and then provides, that in all cases of descent, not provided for by the act, the common law shall govern. If it had been intended to recognise any statute enactments of England, we should naturally expect to find some clear expression of such an intention, by some appropriate words. None such are given ; and it is, therefore, not to be doubted, that the common-law canons of descent were referred to, and made the basis of descent, in all cases not otherwise positively provided for. In England, the canons of descent, by the common law, are never confounded with descents specially authorized by statute, and the statute of New York refers, not to any peculiar law of that state, then existing, but to the common origin of our jurisprudence, the common law of England.

*111]

There is still less reason for giving the meaning contended for to the repealing clause of the act of 1788 ; for that would be a plain departure from the very words of the act, without any necessity for such a construction. The words are, "that none of the statutes of England, &c., shall be considered as laws of this state." The "statutes of England" can mean nothing else but the acts of parliament. The object was not to repeal some existing laws, but to repeal laws then in force in New York. It would be almost absurd, to suppose that the act meant to repeal the statutes of England, which had no operation whatever in that state. What were the British statutes then in force ? Plainly, those referred to, and continued in force by the 35th article of the constitution already quoted. The repeal, then, was co-extensive with the original adoption of them. In any other view of the matter, this extraordinary consequence would follow, that the legislature would solemnly perform the vain act of repealing, as statutes, what, in the same breath, it confirmed as the common law of the state ; that it would propose a useless ceremony ; and by words of repeal, would intend to preserve all the existing laws in full force. And this, it may be added, it would be doing, at the same time, that by contemporaneous legislation, at the same session, as well as in the same act, it was revising, and incorporating into the text *of its own laws, many of the old English statutes, which had previously been, by adoption, a part of its

*112]

jurisprudence. Such a course of proceeding would be consistent and intelligible, and in harmony with a design to repeal all the English statutes which were not revised and re-enacted; but it would be unintelligible and inconsistent with a design to retain them all as a part of its own common law.

We think, then, that the statute of William III. constituted no part of the law of New York, at the time when the present descent was cast; and that the case must rest for its decision exclusively upon the principles of the common law. The residue of this opinion will, therefore, be exclusively confined to the consideration of the common law applicable to it.

In order to clear the way for a more exact consideration of the subject, it may be proper to take notice of some few distinctions in regard to descents, which are of frequent occurrence in the authorities. Descents are, as is well known, of two sorts; lineal, as from father or grandfather to son or grandson, and collateral, as from brother to brother, and cousin to cousin, &c. They are also distinguished into mediate and immediate descents; but here, the terms are susceptible of different interpretations; which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses. A descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate of right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigee, or degrees of consanguinity. Thus, a descent from a grandfather, who dies in possession, to the grandchild (the father being then dead), or from the uncle to the nephew (the brother being dead), is, in the former sense, in law, an immediate descent, although the one is collateral and the other lineal, for the heir is in the *per*, and not in the *per* and *cui*. And this, in the opinion of Lord Chief Justice Bridgman, *Collingwood* v. *Pace*, Bannister's Rep. of Sir O. Bridgman 410, 418, is the true meaning and application of the terms. So they are used by Lord Coke in his first Institute, Co. Litt. 10 *b*. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, *when the ancestor from whom the party derives his blood, is immediate, and without any intervening link or degrees, and mediate, [*113 when the kindred is derived from him, *mediante altero*, another ancestor intervening between them. Thus, a descent in lineals, from father to son, is, in this sense, immediate; but a descent from grandfather to grandson (the father being dead), or from uncle to nephew (the brother being dead), is deemed mediate; the father and the brother being, in these latter cases, the *medium deferens*, as it is called, of the descent or consanguinity. And this is the sense in which Lord Hale uses the words, assigning as a reason, that he calls it a mediate descent, because the father or brother is the medium, through or by whom the son or nephew derives his title to the grandfather or uncle. *Collingwood* v. *Pace*, 1 Vent. 413, 415; s. c. 1 Keb. 671. And in this sense, the words are equivalent to the mediate and immediate ancestors. In the great case of *Collingwood* v. *Pace*, upon which we shall hereafter comment at large, these distinctions were insisted on by the learned judges already referred to, with much particularity; and they will help us to understand the reasoning of the court with more readiness and accuracy. We shall constantly use the words in the sense adopted by Lord Hale.

That an alien has no inheritable blood, and can neither take land himself by descent, nor transmit land from himself to others by descent, is common learning, and requires no reasoning to support it. If we were to trust to the doctrines promulgated by elementary writers, it is no less true, that alienage in any mediate ancestor will interrupt the descent between persons, who are capable of taking and transmitting land by descent. It is so laid down in Comyn's Digest, Alien, C, 1, a work of rare excellence and accuracy; and in Bac. Abr. Alien, C: and it is implied in the text of Blackstone's Commentaries (2 Bl. Com. 250), where the only exception admitted is of a descent from brother to brother. Lord COKE, in his first Institute (Co. Litt. 8 *a*), says, that "If an alien cometh into England, and hath issued two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm; and yet if one of them purchase lands in fee, and dieth without issue, his brother shall not be his heir, for there was never any inheritable
*114] blood between the father and them; and *where the sons, by no possibility, can be heirs to the father, the one of them shall not be heir to the other." The case put by Lord COKE of a descent from brother to brother, afterwards became an exceedingly vexed question, and was finally resolved in the case of *Collingwood* v. *Pace*, in favor of the descent from brother to brother, by seven judges against three, on deliberate argument before all the judges in the exchequer chamber, upon an adjournment of the cause from the common pleas. All the judges gave opinions *seriatim;* but the whole case turned upon the point, whether the descent was to be considered as mediate or immediate. Three judges (Lord Chief Justice BRIDGMAN, TYRRELL, J., and KELYNG, J.) were of opinion, that the descent from brother to brother was not immediate, but mediate through the father (*mediante patre*); the other judges were of opinion, that by the common law, the descent from brother to brother was immediate, and not through the father as a *medium deferens.* The case is reported in various books, and in all of them, considering its magnitude and importance, in a very imperfect and unsatisfactory manner. The original arguments and opinions in the common pleas are given in 1 Keb. 65; and in the exchequer chamber in 1 Keb. 174, *et seq.*, 216, 265, 538, 579, 585, 603, 670, 699; in 2 Sid. 193; and very briefly in 1 Lev. 59, s. c. Hardr. 224. The opinion of Lord HALE is reported at large in 1 Vent. 413; and Mr. Bannister, in his excellent edition of the judgments of Lord Chief Justice BRIDGMAN (p. 410, 414), has recently, and for the first time, given us the opinion of this eminent judge from his own manuscript. It is a most luminous and profound argument, and contains a large survey of the whole doctrine of alienage. In this opinion, the special verdict is set forth and thus rids us of some of the obscurities thrown upon it in the former reports.

The substance of the facts is as follows: Robert Ramsay, an alien, born in Scotland, before the accession of the crown of England to King James, had issue four sons, aliens, viz., Robert, Nicholas, John, afterwards Earl of Itchderness, and naturalized by an act of parliament in 1 Jac. I., and George, naturalized by an act of parliament, 7 Jac. I., who afterwards had issue John, the plaintiff's lessor, born in England. Nicholas had issue
*115] Patrick, born in England, in *1618, who had issue William, born in England, who was then living. John, the earl, having purchased the rectory of Kingston, in question in the case, died seised thereof, without

issue, in January, 1 Car. I. (1625). Afterwards, in July 1636, George died leaving issue the said John, the lessor of the plaintiff; afterwards, in May 1638, Nicholas died, leaving the said Patrick his only son living. It did not appear, when Robert, the eldest son, died; but he left three daughters, all aliens born, then living. The question was, whether John, the lessor of the plaintiff, the son of George, would take the premises, as heir by descent, to the earl, his uncle, or for want of an heir, the rectory should escheat to the crown. In the argument of the case by the judges, we are informed, both by Lord HALE and Lord BRIDGMAN, that three things were agreed to, as unquestionable, by all of them. 1. That neither the daughters of Robert, the son of Robert, being aliens, nor Patrick, the son of Nicholas, though born in England, can inherit, because his father, through whom he must convey his pedigree, was an alien. 2. That as the estate cannot descend to them, so neither do any of them stand in the way to hinder the descent to George. The difference has been often put between the case of a son or brother, aliens, who are in law as *non existentes*, and the brother or son of a person attainted, as to this point. 3. That there is no difference between the descent to George and the descent to John, his son, the lessor of the plaintiff, who, *jure representationis*, is the same with the father. If George, having survived John, the earl, might have inherited the estate, so will John, the son, who represents him. So that the point of the case came to this, whether, if two brothers of alien parents, both naturalized by acts of parliament, and the one purchaseth lands and dies, the lands shall descend to the other. And so it is put by Lord BRIDGMAN and Lord HALE. In regard to Patrick, the son of Nicholas, it is material to observe, that as Nicholas survived John, the earl, he would, except for his being an alien, have been capable to inherit the latter. But, being alive, he would intercept the descent to Patrick, who was a native-born subject, according to the principles of common law stated by this court in *McCreery* v. *Somerville*, 9 Wheat. 354. The learned judge, however, in *Collingwood* v. *Pace* takes no particular notice of the *fact, that Nicholas was living at the death of John, the earl; but treats the case exactly in the same manner as if he had been then dead; and apparently, relies on no distinction as arising from that fact. But George, the brother of John, the earl, survived him, and being a naturalized subject, was capable of taking by descent from him, unless the alienage of his father Robert (whether dead or living) interrupted the descent; and John, the lessor of the plaintiff, *jure representationis*, derived his title directly from his father. [*116

Having stated these preliminaries, which are necessary for a more clear understanding of the case, it may be added, that the case furnishes conclusive evidence, that by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party makes his pedigree, as heir, is an alien, that is a bar to his title as heir, for the reasons stated by Lord COKE, that such an alien ancestor can communicate no inheritable blood. This was admitted by all the judges, as well as by those who were in favor of the lessor of the plaintiff, as by those who argued the other way. It was necessarily the doctrine of the latter, for they held the alienage of the father a good bar to the descent, deeming a descent from brother to brother to be a mediate descent only, *mediante patre*. On the other hand, the seven judges, who were for the lessor of the plaintiff, admitted the general doctrine, but contended,

that it did not apply to the case of a descent from brother to brother, because it was an immediate descent. And this constituted the whole controversy between them; that is, whether the descent was mediate or immediate. It will be our business to demonstrate this, by passages from the opinions of Lord BRIDGMAN and Lord HALE, who took opposite sides in the argument. Their opinions are given at large, and in an authentic form. Those of the other judges, who agreed with them respectively, are given by the reporters in a very abridged and loose manner. But all of them manifestly assume the same general basis of reasoning on this point, as will appear by referring to their opinions in 2 Sid. 193, and 1 Keb. 579, 585, 603, 670, 699.

In the first place, we will begin with Lord HALE. He says, "In immediate descents, there can be no impediment but what arises in the parties themselves. For instance, the father *seised of lands, the impedi- *117] ment that hinders the descent must be either in the father or the son; as if the father or the son be attaint or an alien. In mediate (printed, immediate, by mistake, as the context shows) descents, a disability of being an alien, or attaint in him that I call a *medius* ancestor, will disable a person to take by descent, though he himself hath no such disability. For instance, in lineal descents; if the father be attaint, or be an alien, and hath issue, a denizen born, and dies in the life of the grandfather, the grandfather dies seised; the son shall not take, but the land shall escheat. In collateral descents, A. and B. brothers; A. is an alien or attainted, and hath issue, a denizen born;(*a*) B. purchaseth lands and dies without issue, C. shall not inherit; for A., which was the *medius* ancestor, or *medium deferens* of this descent, was incapable. And this is very apparent, in this very case; for by this means, Patrick, though a denizen born, and the son of an elder brother, is disabled to inherit the earl. A. and B. brothers; A. is an alien or person attainted, and hath issue C., and dies, and C. purchaseth lands, and dies without issue; B., his uncle, shall not inherit, for the reason beforegoing; for A. is a *medius* which was disabled. And if, in our case, Patrick, the son of Nicholas, although a denizen born, had purchased lands, and died without issue, John, his uncle, should not have inherited him, by reason of the disability of Nicholas; and yet Nicholas himself, had he not been an alien, could not immediately have inherited to his son, but yet he is a block in the way of John." *Collingwood* v. *Pace*, 1 Vent. 415–6; s. p. Ibid. 419, 423. See also s. c. 1 Keb. 671, &c. These passages distinctly establish the doctrine contended for in all cases of mediate descents, in the sense given to these terms by Lord HALE; that is, that an alien mediate ancestor, through whom the party must claim, is a bar to the descent. The cases put of a descent from grandfather to grandson, the father being an alien and dead, and of a descent from an uncle to a nephew, the brother being an alien and dead, are direct to the point, and are put as unquestionable. Lord HALE also cites, in illustration *of this doctrine, *Grey's Case*, Dyer 274, *118] and *Courtney's Case*, cited 1 Vent. 425, Bannister's O. Bridg. 452. Both of these were cases of attaint in the mediate ancestor, creating an incapacity to inherit; and although, in some cases there is a difference

(*a*) The word "denizen" is used in the common law, in a double sense; it sometimes means a natural-born subject; and sometimes, a person who, being an alien, has been denizenized by letters-patent of the crown. Co. Litt. 129 *a*; Id. 8 *a*; Com. Dig. Alien, D; Bannister 433.

between alienage and attaint, where the claim is not through the ancestor, yet where the claim is through him, there is no difference. The disability equally applies to each, and breaks the inheritance. Lord HALE takes notice of this distinction, in another part of his argument, in speaking of the disability of an alien, which is general or original to himself, in reference to inheritance; and where it is consequential or consecutive disability, that reflects to an alien from one that must derive by or through him, though he perchance be a natural-born subject. Thus, he says, "in respect to this incapacity (personal), he doth resemble a personal attaint, yet with this difference. The law looks upon a person attaint as one that it takes notice of; and therefore, the eldest son attaint, overliving his father, though he shall not take by descent, in respect of his disability, yet he shall hinder the descent of the younger son. But if the eldest son be an alien, the law takes no notice of him, and therefore, as he shall not take by descent, so he shall not impede the descent in his younger brother. A consequential consecutive disability, that reflects to an alien from one, that must derive by or through him, though he perchance be a natural-born subject (doth impede).(*a*) As in our case, though Patrick, the son of Nicholas, be a natural-born subject, yet, because Nicholas his father was an alien, there is a consecutive impediment derived upon Patrick, whereby he is consequentially disabled to inherit John his uncle; and this consecutive disability is parallel to that which we call corruption of blood, which is a consequent of attainder. If the father be attained, the blood of the grandfather is not corrupted; no, nor the blood of his son; though he could not inherit him, but only the blood of the father. But that corruption of blood in the father draws a consequential impediment upon the son to inherit the grandfather; because the father's corruption of blood obstructs the transmission of the hereditary descent between the grandfather and the son." 1 Vent. 417–8. *Lord HALE afterwards proceeds to state the reasons, why, notwithstanding the general rule, he was of opinion, that in the case at bar, [*119 George, and by parity of reasoning, his son John, the lessor of the plaintiff, could inherit to the earl. "My first reason," says he, "is, because the descent from brother to brother, though it be a collateral descent, yet it is an immediate descent; and consequently, upon what has been premised at first, unless we can find a disability or impediment in them, no impediment in another ancestor will hinder the descent between them." 1 Vent. 423. He then proceeds to establish his doctrine, that it is an immediate descent, and that in this respect, it differs from all other collateral descents whatsoever. He then adds, "If the father, in case of a descent between brothers, were such an ancestor as the law looks upon as a medium, that derives the one descent from the other, then the attainder of the father would hinder the descent between the brothers. But the attainder of the father doth not hinder the descent between the brothers: therefore, the father is not such a medium or *nexus* as is looked upon by law as the means deriving such descent between the two brothers." 1 Vent. 425.

These passages from Lord HALE's opinion have been cited the more at large, because they afford a satisfactory answer to the argument at the bar,

(*a*) These words are not found in Vent. 417; but the immediate context shows that they are omitted by mistake, and the sentence is left imperfect.

as to the incongruity and inconclusiveness of his reasoning; and establish beyond controversy, that in his opinion, the common law interrupted the descent, wherever a mediate ancestor was either an alien or attaint; and that the case of a descent from brother to brother was excepted, because the descent was immediate.

Let us now proceed, in the next place, to the opinion of Lord BRIDGMAN. He begins, by stating the very same proposition as Lord HALE. "It hath been inferred," says he, "that in immediate descents, there can be no impediment but what ariseth in the parties themselves. But in mediate descents, it is agreed, the disability of being an alien, or attainted in him, that is the *medius antecessor*, will disable the other, though he have no such disability. And therefore, Patrick, here, though born in England, cannot inherit John, his uncle, nor John to him, by reason of the disability of Nicholas, the *medius antecessor*. But it is said, that the descent from brother to brother, *120] *though it be a collateral descent, yet it is an immediate descent, and so no impediment could hinder a descent between them." Bannister 418, 436. And the whole of his argument is then employed in an attempt to disprove that the descent between brothers is, by the common law, immediate, and in affirming the doctrine of Lord COKE in Co. Litt. 8 *a*, for the same reason, viz., there is no inheritable blood between them, otherwise than *mediate patre*. Bannister 437, 442, 443, 445, 460. It is unnecessary to go over that reasoning, because it proceeds upon the ground, as conceded and clearly established in the common law, that there can be no title made by descent, where there is a mediate alien ancestor, unless it be the case of a descent from brother to brother.

The case of *Collingwood* v. *Pace*, then, does conclusively establish the doctrine of the common law to be, by the admission of all the judges, that if the pedigree must be traced through a mediate alien ancestor, the party cannot take by descent, for the inheritable blood is stopped, and there is a flat bar to the assertion of any title derived through the alien. So that the elementary writers are fully borne out in their assertions on this subject. See Com. Dig. Alien, C; Bac. Abr. Alien, C; Cruise's Dig. tit. 29, ch. 2, § 20; York on Forfeiture 72; 3 Salk. 129; *Duroure* v. *Jones*, 4 T. R. 300.

The preamble to the statute of 11 & 12 William III., c. 6, also affords strong evidence of the antecedent state of the law on this point; and that the statute is remedial; and not, as has been argued at the bar, in any respect declaratory. It is in the following words: "Whereas, divers persons born within the king's dominions are disabled to inherit, and make their titles by descent from their ancestors, by reason that their father or mother, or some other ancestor by whom they are to derive their descent, was an alien, and not born within the king's dominions, for remedy whereof," &c. Here, the disability to inherit and make title is plainly stated to exist, not that there is a doubt upon the subject; and the disability is stated to arise from the fact, that the ancestor by whom they are to derive the descent is an alien, not that the ancestor from whom they derive their title to the estate is an *121] alien; and a remedy is, therefore, provided, to meet that which *was deemed the only inconvenience, a descent through a mediate alien ancestor.

Upon the clear result, then, of the English authorities, we should be of opinion, even if there were no further lights on the subject, that the alienage

of the mediate ancestors, in the present case, would be a bar to the recovery of the plaintiff. But the same doctrine will be found fully recognised by Mr. Chancellor KENT in his learned Commentaries, with the additional declaration, that the statute of William III. had never been adopted in New York; though he very properly admits, that the enlarged policy of the present day would naturally incline us to a benignant interpretation of the law of descents, in favor of natural-born citizens, who were obliged to deduce a title to land from a pure and legitimate source, through an alien ancestor. 2 Kent's Com. 47–9. See also *Jackson* v. *Lunn*, 3 Johns. Cas. 109, 121. The case of *Jackson* v. *Wood*, 7 Johns. 290, 297, has not the slightest bearing on the subject. It decided no more than that an Indian was incapable of passing a title to lands in New York, without the consent of the legislature, nor in any other manner than is provided for by the laws of the state. The case of *Jackson* v. *Jackson*, 7 Johns. 213, turned upon the known distinction, that an alien, who cannot inherit, shall not prevent the descent to a citizen, who can make title as heir, not through the alien, but aside from him; as in the common case in England, of a younger brother inheriting from his father, though he has an elder brother living, who is an alien. But there is a very recent decision in the state of New York, not yet in print, which is direct to the point now before us. It is the case of *Jackson* v. *Green*, decided by the supreme court of that state, in 1831. (7 Wend. 333.) We have been favored with a manuscript copy of the opinion delivered by the court on that occasion. The question in that case was, whether one naturalized citizen could take by descent from another naturalized citizen, who was his cousin; the pedigree being to be made through alien ancestors: it was held, that he could not. The court fully recognised the distinction already adverted to between mediate and immediate descents, holding that an alien ancestor, through whom the pedigree must be traced, intercepted the descent, and produced a fatal bar to the recovery.

*A certificate will be sent to the circuit court, that the lessors of the plaintiff, Bella Cohen, and Rhina Mordecai, were not capable of taking by descent, the premises described in the special verdict of the case, whereof the said Philip Jacobs died seised, as therein stated, as heirs-at-law of the said Philip Jacobs; by reason of the alienage of the mother of the said Philip Jacobs, and his maternal uncle, Leipman Cohen, and their father; the lessors of the plaintiff deriving their pedigree and title by descent through mediate alien ancestors.(*a*) Certificate accordingly. [*122

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the point and question on which the judges of the said cir-

(*a*) It may not be useless to state, that the title of the parties in Collingwood *v.* Pace underwent judicial examination and decision, at three different periods. The first was in Foster *v.* Ramsay, in the upper bench, during the commonwealth, 1657–59, reported in 1 Sid. 23, 51, 148, and cited in Bannister 447. The second was Collingwood *v.* Pace, brought in 1656, but not finally decided, until many years afterwards. The third was Crane *v.* Ramsay, in 21 & 22 Car. II. (1670), reported in 2 Vent. 1; Vaugh. 274; T. Jones 10; Carth. 188. In the first two cases, John, the son of George, was lessor of the plaintiff; in the last, the lessors of the plaintiff claimed by grant from Patrick, the son of Nicholas, and John was defendant.

cuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such cases made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the lessors of the plaintiff, Bella Cohen and Rhina Mordecai, were not capable of taking by descent, the premises described in the special verdict in the case, whereof the said Philip Jacobs died seised, as therein stated, as heirs-at-law of the said Philip Jacobs, by reason of the alienage of the mother of the said Philip Jacobs, and his maternal uncle, Leipman Cohen, and his father; the lessors of the plaintiff deriving their pedigree and title by descent through mediate alien ancestors. Whereupon, it is ordered and adjudged by this court, that it be certified to the judges of the said circuit court, that the lessors of the plaintiff, Bella Cohen
*123] and Rhina Mordecai, were not capable of taking by descent, *the premises described in the special verdict in the case, whereof the said Philip Jacobs died seised, as therein stated, as heirs-at-law of the said Philip Jacobs, by reason of the alienage of the mother of the said Philip Jacobs, and his maternal uncle, Leipman Cohen, and their father; the lessors of the plaintiff deriving their pedigree and title by descent through mediate alien ancestors.

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*124] *The Lessee of Stephen Sicard *et al.*, Plaintiff in error, *v.* Nancy Davis *et al.*, Defendants in error.

The Same *v.* John Cecil and Robert Smithers.

Deed. — Recording. — Proof of lost deed. — Subsequent purchasers. Interference.—Statute of limitations.

The act of the legislature of Kentucky, passed in 1796, respecting conveyances, reduces into one all the laws previously existing on the subject of recording conveyances of land; that act does not create a right to convey property which any individual may possess; but restrains that right by certain rules, which it prescribes, and which are deemed necessary for public security; the original right to convey property remains unimpaired, except so far as it is abridged by that statute.

Under that statute, the only requisites to a valid conveyance of lands are, that it shall be in writing, and shall be sealed and delivered.

The acknowledgment, and the proof which may authorize the admission of the deed to record and the recording thereof, are provisions which the law makes for the security of creditors and purchasers; they are essential to the validity of the deed, as to persons of that description, not as to the grantor; his estate passes out of him and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged, or attested and proved by three subscribing witnesses and recorded in the proper court. In a suit between them, such a deed is completely executed, and would be conclusive although never admitted to record, nor attested by any subscribing witness; proof of sealing and delivering would alone be required; and the acknowledgment of the fact by the party, would be sufficient proof of it.

If the original deed remained in existence, proof of the handwriting, added to its being in possession of the grantee, would it is presumed, be *primâ facie* evidence, that it was seale dand delivered; no reason is perceived why such evidence should not be as satisfactory in the case of a deed, as in the case of a bond. Where the deed is lost, positive proof of the handwriting is not to be expected; the grantee must depend on other proof.[1]

The words of the first section of the statute, declaring, "that no estate of inheritance in lands &c., shall be conveyed from one to another, unless the conveyance be declared by writing,

[1] See De Lane *v.* Moore, 14 How. 253; United States *v.* Sutter, 21 Id. 170.

sealed and delivered, nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged," &c., can apply only to purchasers of the title asserted by virtue of the conveyance, and to creditors of the party who has made it: they protect such purchasers from a conveyance of which they had no notice, and which, if known, would have prevented their making the purchase; because it would have informed them, that the title was bad—that the vendor had nothing to sell. But a purchaser from a different person, of a different title, claimed under a different patent, would be entirely unconcerned in the conveyance; to him it would be entirely unimportant, whether this distinct conflicting title was asserted by the original patentee, or by his vendor; the same general terms are applied to creditors and to purchasers; and the word creditors, can mean only the creditors of the vendor.[1]

*What should be considered sufficient proof of the loss of a deed, to entitle the person holding under it to read a copy of it in evidence? and what is sufficient proof of the execution of the original deed, to entitle it to be read in evidence to the jury? [*125

A possession taken under a junior patent, which interferes with a senior patent, the lands covered by which are totally unoccupied by any person holding or claiming under it, is not limited to the actual inclosure, but is co-extensive with the boundaries claimed under such junior patent.

A count in the declaration, in an ejectment on a demise from a different party, asserting a different title, is not distinguishable, so far as respects the act of limitation, from a new action.[2]

The construction of the act of limitations, that if adverse possession be taken in the lifetime of the ancestor, and be continued for twenty years, and for ten years after the death of the ancestor, no entry having been made by the ancestor or those claiming under him, the entry is barred; is established by the decisions of this court, as well as of the courts of Kentucky.

ERROR to the Circuit Court of Kentucky. On the 8th day of March 1825, Stephen Sicard, a citizen of Pennsylvania, commenced his actions of ejectment in the circuit court for the district of Kentucky, against Jesse Davis and others, and against John Cecil, Robert Smithers and others, for the recovery of 6680 acres of land, or parts of the same. Those who were in possession of the lands were admitted as defendants, each for himself; and pleaded not guilty. In the progress of the case, the plaintiff was twice nonsuited, and the nonsuits were set aside. Nancy Davis, after the death of her husband, became, on motion, a party to the suit.

The demise in the declaration was stated to have been made by Stephen Sicard, on the 30th of January 1815. Afterwards, at November term 1821, upon motion of the plaintiff, leave was given to amend the declaration, by laying a demise in the name of the heirs of original grantee of land, Joseph Phillips, and from others to whom the land had been conveyed, before the execution of the deed under which Stephen Sicard acquired his title.

The cause was tried at the October term 1824, of the circuit court, and judgments were rendered for the defendants. The plaintiff, on the trial

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[1] The recording acts are intended for the protection of persons claiming under the same title; they have no operation upon a hostile claimant. Embury *v.* Conner, 2 Sandf. 98; Henry *v.* Morgan, 2 Binn. 497; Lightner *v.* Mooney, 10 Watts 407; Pierce *v.* Turner, 5 Cranch 154; s. c. 1 Cr. C. C. 462. In Henry *v.* Morgan, it is said by Chief Justice TILGHMAN, that, "where a man purchases under a title totally unconnected with the first deed, he is entitled to no protection, because he has placed no faith in the title to which the unrecorded deed relates. It would be unjust, that one who purchased under a bad title, should have his estate confirmed, by the mere accident of a deed between two persons, with whom he had no privity or connection, being unrecorded." And BRACKENRIDGE, J., says, the act respects purchasers under the same bargainor or grantor, and no other.

[2] Wilkes *v.* Elliott, 5 Cr. C. C. 611.

tendered a bill of exceptions in each case; and the cases were brought up to this court on writs of error prosecuted by him.

*126] *The bills of exception stated the evidence given by the plaintiff to maintain the suits, to have been a patent, dated 6th of June 1786, from the state of Virginia to Joseph Phillips, for 6680 acres of land, under a survey dated 4th of May 1784; and proof that the patent covered the land in controversy; and that the defendants were in adverse possession at the commencement of the suit. Also, copies of deeds from Joseph Phillips to Benjamin Stephens, and from Stephens to Samuel R. Marshall, and from Marshall to Stephen Sicard. The first deed from Joseph Phillips to Benjamin Stephens, was dated the 16th of October 1797; the second deed from Stephens to Marshall, was dated the 25th of December 1797; the deed from Marshall to Sicard was dated the 25th of May 1798; and these deeds covered the land in suit. The plaintiff also proved, that Phillips, Stephens, Marshall and Sicard, always resided in Pennsylvania, New York and New Jersey. It was proved, that Phillips and Stephens died in the year 1798 or 1799.

The deed of Joseph Phillips to Benjamin Stephens was dated the 16th of October 1797. On the 8th of June 1798, it appeared, that Joseph Spencer, of Philadelphia, appeared before Hilary Baker, mayor of Philadelphia, and deposed, that he saw Joseph Phillips sign, seal and deliver the said deed; that he saw Samuel R. Marshall and John Phillips severally subscribe their respective names thereunto, as witnesses to the signing, sealing and delivering the said deed. This deed, thus proved, was recorded, together with the deeds from Stephens to Marshall, and from Marshall to Sicard, and were, on the 23d of April 1803, certified by the clerk of the court of appeals to have been recorded in his office in Frankfort, in the state of Kentucky.

The plaintiff, in order to introduce the copies of the deeds in evidence, and to prove the execution of the original deeds, produced a paper, signed by Alexander Parker, stating that he had received, February 9th, 1803, of Mr. Stephen Sicard, three deeds for a certain tract of land, lying in Nelson county, and state of Kentucky, on Chaplin's fork; the first, Joseph Phillips

*127] to Benjamin Stephens, for 6680 *acres of land; the second, Benjamin Stephens to Samuel R. Marshall, for said land; the third, Samuel R. Marshall to Stephen Sicard, for same; also a certificate of Ralph Phillips concerning the same; all to be recorded in the office at Frankfort, in Kentucky. The plaintiff also read the deposition of Thomas Wallace, who testified, that in the summer of 1803, Parker told him, that he had left at deponent's store, or with a Mr. Scott, his clerk, three deeds, the property of Sicard, to be carried from Lexington to Philadelphia, by the deponent. He knew nothing of the papers, nor did he recollect ever to have seen them; he had searched for them among his papers, but was unable to find them. Alexander Parker proved the receipt, and that he got the deeds recorded in the court of appeals of Kentucky; that he inclosed said deeds, directed to Mr. Sicard, Philadelphia, and left them with Mr. Wallace's clerk, to be taken by Wallace to Sicard. These deeds he believed were originals; he had never seen them since; he believed Scott was dead; that for several years he paid the taxes for said land, and saw the entry of said land for taxes in the auditor's office.

Mary Powell, a witness, resident in Philadelphia, testified, she was the

widow of Benjamin Powell, and that she was fully satisfied, from what her husband told her, that he did witness a deed to which Benjamin Stephens and Robert Marshall were parties, or, at least, the said Stephens was the seller therein ; her husband died in 1820 ; and that some time before his death, he went out with Stephen Sicard to attest the fact of his, the said Powell's having subscribed the said deed, as a witness to the execution thereof, before a magistrate or alderman. Joseph Spencer, in his deposition, stated, that he had some recollection of having witnessed an instrument of writing, supposed by him to be a conveyance of land (but it was not known to him to whom granted thereby), at the house of John Phillips, which he did some twenty years before the date of his deposition (1822); and his meeting again one or more of the family, he believed Dr. Joseph Phillips, in the city of Philadelphia, at the office of Hilary Baker, to authenticate the handwriting of the instrument, as a witness to both ; but he had no certain date in his memory.

*And also the deposition of George Heyl, of the city of Philadelphia, notary-public, who testified, that on the 17th day of January [*128 1803, at the request of Stephen Sicard, he made correct copies of the deeds from Phillips to Stephens, and Stephens to Marshall, and from Marshall to Sicard ; that the copies made by him were from the original deeds, and that he had certified the copies under his seal of office. Sicard told him, at the time, he was going to send the originals to Kentucky to be recorded ; and assigned this as the motive to have the copies made. The deeds had every appearance of originals. That he had a knowledge of the signature of Hilary Baker, the mayor of the city, before whom they were proved, and of the seal of the city, and believed them genuine ; that in the spring of the year 1818, the said Stephen Sicard again called on him, and took his deposition before Alderman Douglass, at his (the alderman's) office in this city, to the above fact ; to which deposition were annexed the said three notarial certified copies, and a mandate from the seventh circuit court of the United States for the Kentucky district, to the said Douglass, to take the same—all of which this deponent understood were transmitted to the said court ; and that the annexed two copies of deeds, so certified by the clerk of said court, to the best of his knowledge and belief, were copies of his said notarial copies of his said originals.

The deposition of George Rozell, to prove the death of Joseph Phillips, in 1798, and who were his heirs-at-law ; and also the decease of Stephens, in the same or the following year, was exhibited.

The defendants gave in evidence patents from the commonwealth of Kentucky, of junior date to that read by the plaintiff ; proved the boundaries of those junior grants, and that they included the defendants ; and gave evidence that they had settled under the faith of those junior patents, and held adversely to the patent offered in evidence by the plaintiff.

On motion of the defendants, the court rejected the copies of the deeds aforesaid from Phillips to Stephens, and from Stephens to Marshall, and from Marshall to Sicard ; because there was no proof of the execution of the deeds from Phillips to Stephens, or from Stephens to Marshall, so as to let in copies of the original deeds.

*The defendants then proved, that in the year 1794, they had [*129 adverse possession of the land in controversy, and had continued ever

since to hold it adversely accordingly. Whereupon, the defendants moved the court to instruct the jury as follows :

1. That the plaintiff has given no evidence to support the first count, upon the demise of Sicard, and none to support the demise from any of the other lessors, except from such as are heirs of Joseph Phillips, the patentee.

2. That if the jury find from the evidence, that the patents of Joseph Phillips and William Loving do interfere and lap, as represented on the connected plat, and that the defendants, and those under whom they hold, did enter, claiming under said Loving's survey, and took the first possession within the said interference, the said patent of Joseph Phillips being (at the date of such entry and possession taken under Loving's patent) unoccupied by any person holding or claiming under said Phillip's patent ; then and in that case, the possession of the defendants, so taken, was not limited to their actual inclosure, but was co-extensive with the boundaries by which they claimed.

3. That if the jury find from the evidence, that the possession of the lands in controversy was taken in the lifetime of Joseph Phillips, the ancestor of the lessor of the plaintiff, and adversely to said Phillips, and that the defendants, and those under whom they hold, have continued to hold adversely to said Phillips, the ancestor, and his heirs, ever since, and for more than twenty years before the 17th of January 1822, when the second count in the declaration was filed, and shall moreover find, that said ancestor Joseph Phillips, died more than ten years before the said 17th day of January 1822, when the second count was filed, then the said lessors, the heirs of Joseph Phillips, are barred by the statute of limitations. The circuit court gave these instructions to the jury, on the prayer of the defendants.

The case was argued by *Sergeant*, for the plaintiff in error ; and by *Wickliffe*, for the defendants.

For the *plaintiff*, it was contended :—That the court erred, 1. In rejecting the copies of the deeds *from Phillips to Stephens, from Stephens
*130] to Marshall, and from Marshall to Sicard. 2. In charging that the possession taken by the defendants, under Loving's survey, was not limited to their actual inclosure, but was co-extensive with the boundaries by which they claimed. 3. In charging that the statute of limitations barred, if there had been adverse possession for more than twenty years before the 17th of January 1822, when the second count in the declaration was filed.

Wickliffe, for the defendants, argued :—1. The plaintiff failed to show any title in Sicard, at the date of the demise. 2. The copies of deeds from Phillips, &c., were correctly excluded, because the same were not legally proved in court, upon the trial ; nor had the same been proved and recorded in accordance with, or within the time prescribed by, the laws then inforce in Kentucky. 3. If recorded or proved, the deeds conveyed no title, were inoperative and against law ; the land conveyed being, at the date of the said deeds, in the adverse legal possession of the defendants. 4. If the plaintiff showed title in the heirs of the patentee Joseph, Phillips, that title was not asserted by the heirs of Phillips, against the defendants, until the January term 1822, when the amended declaration was filed ; conse-

quently, their right was barred by the statute of limitations, both of twenty years' adverse possession, and seven years' adverse possession with title.

Marshall, Ch., J., delivered the opinion of the court.—This is a writ of error to a judgment in ejectment, brought by the plaintiffs in error against the defendants, in the court of the United States for the seventh circuit and district of Kentucky. The declaration was delivered to the defendants in March 1815. The declaration contains a single count on the demise of Stephen Sicard. In November term 1821, the plaintiff obtained leave to *amend his declaration, by laying a demise in the names of the heirs of the original grantee of the commonwealth, or intermediate grantees; which amended declaration was filed. The issues were joined in the usual form, and a jury sworn, who found a verdict for the defendants, on which judgment was rendered by the court. [*131

At the trial, the plaintiff gave in evidence to the jury, the patent to Joseph Phillips, and proved that it covered the land in controversy, and that the defendants were in adverse possession, at the time of the commencement of this suit. He also offered in evidence, copies of deeds which purported to convey the title from the patentee to Benjamin Stephens, from Stephens to Samuel Robert Marshall, and from Marshall to the plaintiff. The deed from Phillips to Stephens, dated the 16th day of October 1797, is attested by three subscribing witnesses, and the deed from Stephens to Marshall, dated the 25th day of December 1797, is attested by two subscribing witnesses. Each deed was proved by one of the subscribing witnesses thereto, in June 1798, before Hilary Baker, mayor of the city of Philadelphia, who gave his official certificate thereof, in the usual form. The deed from Marshall to the plaintiff, Sicard, dated the 25th day of May 1798, is attested by two subscribing witnesses, and is acknowledged by the grantor, before the mayor of Philadelphia, in July 1798, who has given his official certificate thereof. These deeds were admitted to record, on this testimony, in April 1803, in the court of appeals in Kentucky.

To prove the loss of the originals, the plaintiff produced the receipt of Alexander Parker, dated the 9th of February 1803, acknowledging the receipt of the said deeds, for the purpose of being recorded in the office, at Frankfort, in Kentucky; also the affidavit of the said Parker, stating his receipt, and the purpose for which the deeds were delivered to him; as also that he had caused them to be recorded. Some time after this, being admitted to record, he was directed by Sicard to send them to him in Philadelphia. Some time before August 1804, he applied to Thomas Wallace to carry them, who undertook to do so, and directed him to leave them with the clerk of the said Wallace that evening. The affiant inclosed the three deeds in a sheet of paper, directed to the said Sicard, *which he delivered that evening to the said Wallace's clerk, he believes William Scott, who promised to deliver them to the said Wallace. The affiant has never seen them since, but has heard that they were lost. He believes the deeds to have been originals. He paid the taxes on said 6680 acres of land, for several years, and saw it entered for taxation in the auditor's office. He believes that the said William Scott departed this life, twelve or fifteen years ago. The plaintiff also produced the affidavit or deposition of Thomas Wallace, who proved, that Mr. Alexander Parker did say, that in the sum- [*132

mer of 1803, he left at the store, or delivered to a young man (probably Mr. Scott), then living with the deponent, sundry papers, said to be deeds, the property of the said Sicard, to be carried from Lexington to Philadelphia by the deponent. He knows nothing of the papers, nor does he recollect ever to have seen them; he has searched for them among his papers, but cannot find them; he verily believes they were not delivered to him.

The plaintiff also produced the deposition of Mary Powell, widow of Benjamin Powell, one of the subscribing witnesses to the deed from Benjamin Stephens to Samuel Robert Marshall, who deposed, that she understood from her husband, that he had witnessed a deed from Stephens to Marshall; that he had been dead about two years. Some time previous to his death, he accompanied the plaintiff, Sicard, for the purpose of attesting the fact of his having subscribed the said deed as a witness; and from several conversations which passed between the said Sicard and her husband, in her presence, she is convinced, her husband had a perfect recollection of having subscribed his name as a witness to the said deed. Also the deposition of Joseph Spencer, the subscribing witness to the deed from Phillips to Stephens who proved the same before the mayor of Philadelphia, in June 1798, who says, that he has some recollection of having witnessed an instrument of writing, supposed by him to be a conveyance of land, he knew not to whom granted, at the house of Jonathan Phillips, deceased, of Maidenhead, now Lawrence township, Hunterdon county, state of New Jersey, some twenty years ago or more (this deposition was taken in April 1822); and of his meeting again one or more of the family, he believes Dr. Joseph
*133] Phillips, of that place or neighborhood; *was one, in the city of Philadelphia, at the office of Hilary Baker, who was then mayor of the said city, to authenticate the handwriting to the said instrument of conveyance, as party or witness, or both; but has no certain date in his memory, whereby he can be more particular. Also, the deposition of George Heyl, notary-public of Philadelphia, who says, that he was called on, in his official capacity, on the 17th of January 1803, to certify and attest to three several copies of original deeds, one from Joseph Phillips to Benjamin Stephens, one from Stephens to Samuel Robert Marshall, and the third, from Marshall to Stephen Sicard, dated the 25th of May 1798, all for a tract of land lying and being, &c., containing 6680 acres; and that he did, at the request of Stephen Sicard, examine and compare the said three several copies with the original deeds submitted to him by the said Stephen Sicard for that purpose, and found them to be true and faithful copies of the same; that the said deeds appeared to him, in every respect, originals, fair and genuine papers, the parchment, ink, signatures, &c., wearing that aspect. That the said Stephen Sicard told him, at the time, that his motive for requiring notarial copies of said originals, was, that he was going to send said originals to Kentucky to be recorded. That the said deponent had a knowledge of the signature of Hilary Baker, the mayor of the city, before whom they were proved, and of the seal of the city, and believed them genuine; that in the spring of the year 1818, the said Stephen Sicard again called on him, and took his deposition before alderman Douglass to the above fact, to which deposition were annexed the said three notarial copies. The notarial copies mentioned in the foregoing deposition agree with the copies from the record of the court of appeals of Kentucky.

The plaintiff also offered as a witness, the clerk of the court of appeals, who deposed, that the deeds had been recorded by Thomas S. Hinde, his deputy, now living beyond the reach of the process of this court; but he recollected to have noticed them, at the time, and they had, so far as he recollected, every appearance of genuine documents. The plaintiff also introduced Ralph Phillips, who stated, that he was long acquainted with Joseph Phillips, and Stephens and Marshall, and he *heard them speak of the conveyance of the tract of land in controversy, as made [*134 by Phillips to Stephens, and by Stephens to Marshall, many years ago; but he does not recollect to have seen the deeds.

The defendants gave in evidence patents of the commonwealth, of junior date to that of the plaintiff; proved the boundaries of those junior grants, and that they included the defendants: and gave evidence, that they had settled under the faith of those junior grants, and held adversely to the patent offered in evidence by the plaintiff.

On motion of the defendants, the court rejected the copies of the deeds aforesaid from Phillips to Stephens, and from Stephens to Marshall, and from Marshall to Sicard; because there was no proof of the execution of deeds from Phillips to Stephens, or from Stephens to Marshall, so as to let in copies of the original deeds.

The defendants then proved, that in the year 1794, they had adverse possession of the lands in controversy, and had continued ever since to hold it adversely. Whereupon, the defendants moved the court to instruct the jury:

1. That the plaintiff has given no evidence to support the first count, on the demise of Sicard; and none to support the demise from any of the other lessors, except such as are heirs of Joseph Phillips, the patentee.

2. That if the jury find from the evidence, that the patents of Joseph Phillips and William Loving do interfere and lap, as represented in the connected plat, and that the defendants, and those under whom they hold, did enter, claiming under said Loving's survey, and took the first possession, within the said interference, the said patent of Joseph Phillips, being (at the date of such patent and possession taken under Loving's patent) unoccupied by any person holding or claiming under said Phillips's patent, then and in that case, the possession of the defendants, so taken, was not limited to their actual inclosure, but was co-extensive with the boundaries by which they claimed.

3. That if the jury find from the evidence, that the possession of the lands in controversy was taken in the lifetime of Joseph Phillips, the ancestor of the lessors of the plaintiff, and adversely to said Phillips, and that the *defendants, and those under whom they hold, have continued [*135 to hold adversely to said Phillips, the ancestor, and his heirs, ever since, and for more than twenty years before the 17th of January 1822, when the second count in the declaration was filed; and shall moreover find, that said ancestor, Joseph Phillips, died more than ten years before the said 17th of January 1822, when the second count was filed; then the said lessors, the heirs of Joseph Phillips, are barred by the statute of limitations. Which instructions were given accordingly; to each of which instructions, as well in excluding the deeds, as in instructing the jury, the plaintiffs excepted.

The first exception is to the refusal of the court to permit the copies of deeds offered by the plaintiff to be given in evidence to the jury. These copies were rejected, "because there was no proof of the execution of the deeds from Phillips to Stephens, or from Stephens to Marshall." This objection would have applied to the originals, as strongly as to the copies; consequently, we must inquire, whether the plaintiff offered such evidence of the execution of the originals as is required by law?

In 1796, the legislature of Kentucky passed a law respecting conveyances, the first section of which enacts, "that no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her or their act, in the office of the clerk of the court of appeals, of a district court, or in a court of quarter sessions, or county court, in the manner prescribed by law, or in the manner hereinafter directed, within eight months after the time of sealing and delivering, and be lodged with the clerk of such court to be there recorded." The third section enacts, that "if the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing, before any court of law, or the mayor or other chief *magistrate of the city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded, within eight months after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court." This act reduces into one the laws previously existing on the subject. It does not create a right to convey property which any individual may possess, but restrains the right, by certain rules which it prescribes, and which are deemed necessary for the public security. The original right to transfer property remains unimpaired, except so far as it is abridged by the statute.

*136]

How far does the statute restrain an individual in the exercise of this general original right? The words are, "that no estate of inheritance, &c., in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered." The only requisites, then, to a valid conveyance of an estate of inheritance in lands, are, that it shall be in writing, and shall be sealed and delivered. The statute proceeds, "nor shall such conveyance be good against a purchaser of a valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged," &c. The acknowledgment or the proof which may authorize the admission of the deed to record, and the recording thereof, are provisions which the law makes for the security of creditors and purchasers. They are essential to the validity of the deed, as to persons of that description, not as to the grantor. His estate passes out of him, and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged, or attested and proved by three subscribing witnesses, and recorded in the proper court. In a suit

between them, such a deed is completely executed, and would be conclusive, although never admitted to record, nor attested by any subscribing witness. Proof of sealing and delivery would alone be required, and the acknowledgment of the fact by the party, would be sufficient proof of it.

*If the original deed remained in existence, proof of the handwriting, added to its being in possession of the grantee, would, it is [*137 presumed, be *primâ facie* evidence that it was sealed and delivered. No reason is perceived, why such evidence should not be as satisfactory, in the case of a deed, as in the case of a bond. But the deed is lost, and positive proof of the handwriting is not to be expected or required; the grantee must depend on other proof.

The deed purports to have been executed, more than thirty years past. The mayor of Philadelphia, the person intrusted by law with receiving and certifying the acknowledgment or proof of the deed, has certified, in legal form, that it was proved to him, by one of the subscribing witnesses. Had it been also proved by the other two, the probate would have been sufficient; not only as against the party, but as against purchasers and creditors. It has remained, from the time of its execution until its loss, in the possession of those claiming title under it; and in the long course of time which has elapsed since its alleged execution, the grantor has never controverted its existence, nor set up any title to the property it purported to convey. Parker, the agent of the plaintiff, respecting this transaction, as is presumed, though not averred in terms, from the facts that he brought the deeds from Philadelphia, procured them to be recorded, and took measures for returning them to him, says, that he saw them entered for taxation in the auditor's office, and paid the taxes on them for several years. Samuel Robert Marshall, the grantee of Stephens, and who conveyed the land afterwards to Sicard, by a deed regularly authenticated and recorded, which recites the deed from Phillips, and conveys the land with general warranty, is a subscribing witness to that executed by Phillips. The notary, who, at the instance of Sicard, took notarial copies before the deeds were transmitted to Kentucky to be recorded, deposes, that the appearance of the originals was perfectly fair.

Add to these strong circumstances, the testimony which, after the long lapse of time, the plaintiff has been enabled to procure. Phillips and Stephens have been long dead; Marshall has conveyed the land to Sicard, with a general warranty, by a deed regularly authenticated and recorded, and is, of course, if alive, disqualified as a witness. One witness deposes, that he was *long acquainted with Joseph Phillips, and Stephens and [*138 Marshall, that he heard them speak of the conveyance of the tract of land in controversy, as made by Phillips to Stephens, and by Stephens to Marshall. Joseph Spencer, the subscribing witness to the deed made by Phillips, who proved its execution before the mayor of Philadelphia, has some recollection of having witnessed an instrument of writing, supposed by him to be a conveyance of land, at the house of Jonathan Phillips, deceased, twenty years or more before giving his deposition, and of meeting again one or more of the family, he believes Doctor Joseph Phillips was one, in the city of Philadelphia, at the office of Hilary Baker, mayor of the city, to authenticate the handwriting to the said instrument of conveyance, as party or witness, or both. Although he does not recollect the transaction with

that precision which might be expected from an interested party, he remembers as much as could be expected, after so long an interval, from an unconcerned person, and enough, we think, to satisfy a court, in connection with other circumstances, that the deed to which he subscribed his name as a witness, was executed, and is the deed, a copy of which was offered by the plaintiff. He remembers attesting an instrument of writing, at the house of Jonathan Phillips, which he believed to be a conveyance of land; he remembers meeting some of the family, one of whom was Joseph Phillips, at the office of Hilary Baker, mayor of Philadelphia, for the purpose of authenticating the same instrument. This instrument was authenticated by him, before the mayor, as appears by this certificate. The deposition of the widow of Benjamin Powell, too, is entitled to consideration.

We think, that in a contest between Joseph Phillips and Stephen Sicard, this testimony, and these circumstances, would have been held sufficient to prove the execution of his deed, and would have proved that his title was conveyed by it.

If the title of Phillips was conveyed to Sicard, then Sicard could assert that title in a court of justice, as effectually as Phillips might assert it; unless the defendants were protected from his claim by some provision of the statute. The first section, after declaring, that no estate of inheritance, &c., "in lands or tenements, shall be conveyed from one to another, *unless the conveyance be declared by writing, sealed and delivered," adds, "nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged," &c. These words, we think, can apply only to purchasers of the title asserted by virtue of the conveyance, and to creditors of the party who has made it. They protect such purchasers from a conveyance of which they had no notice, and which, if known, would have prevented their making the purchase; because it would have informed them that the title was bad—that the vendor had nothing to sell. But the purchaser from a different person, of a different title, claimed under a different patent, would be entirely unconcerned in the conveyance. To him it would be entirely unimportant, whether this distinct conflicting title was asserted by the original patentee or by his vendee. The same general terms are applied to creditors and to purchasers; and surely the word creditors can mean only creditors of the vendor. This construction of this part of the statute has, we believe, been uniformly made.

*139]

A conveyance, then, in writing, sealed and delivered by the vendor, in each case, was sufficient to pass the title from Phillips to Stephens, and from Stephens to Marshall. The conveyance from Marshall to Sicard is unexceptionable. If the original deeds had been produced, their execution was, we think, so proved, that they ought to have been submitted to the jury. If this be correct, it cannot be doubted, that the copies were admissible. The loss of the originals is proved incontestibly, and the truth of the copies is beyond question. We think, therefore, that the court erred, "in rejecting the copies of the deeds from Phillips to Stephens, and from Stephens to Marshall, and from Marshall to Sicard." Consequently, the first instruction to the jury, "that the plaintiff has given no evidence to support the first count on the demise of Sicard," ought not to have been given.

The second instruction, that a possession taken under a junior patent,

which interferes with a senior patent, the lands covered by which are totally unoccupied by any person holding or claiming under it, is not limited by the actual inclosure, *but is co-extensive with the boundaries claimed under such junior patent, is entirely correct, and conforms to the decisions of this court. [*140

The third instruction is also correct. The second count in the declaration, being a demise from a different party asserting a different title, is not distinguishable, so far as respects the bar of the act of limitations, from a new action. See *Miller's Heirs* v. *McIntyre*, at this term (*ante*, p. 61).

The construction of the act of limitations, that if adverse possession be taken in the lifetime of the ancestor, and be continued for twenty years, and for ten years after the death of the ancestor, no entry being made by the ancestor, or those claiming under him, the title is barred, is established by the decisions of this court as well as of the courts of Kentucky. 4 Wheat. 213. This point may perhaps determine the cause ultimately in favor of the defendants. But as this court cannot know judicially that the verdict of the jury was founded on the bar created by the adverse possession of the defendants, and not on the want of title in the plaintiffs, whose title deeds were excluded by the circuit court; the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of 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 court in this, that the said court rejected the copies of the deeds offered by the plaintiffs as evidence, being of opinion that there was no proof of the execution of two of them. Therefore, it is considered by the court, that the judgment of the said circuit court be reversed and annulled, and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*United States *v.* James Paul. [*141

Criminal law.

The third section of the act of congress, entitled "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3d, 1825, is to be limited to the laws of the several states in force at the time of its enactment.

Certificate of Division from the Circuit Court of the Southern District of New York. The defendant, James Paul, was indicted, at October term 1830, of the circuit court. The indictment found by the grand jury was as follows:

Southern District of New York, ss.

The jurors for the United States of America, within and for the circuit and district aforesaid, on their oaths present, that James Paul, late of West Point, on the 10th day of September, in the year of our Lord, 1830, about the hour of ten in the night, of the same day, with force and arms, at West Point, in the county of Orange, within the state of New York, under the sole jurisdiction of the United States of America, and within the jurisdic-

tion of this court (the store of John H. Lane, in which said store, goods and merchandise, the property of the said John H. Lane, was kept for use and sale), there situate, feloniously and burglariously did break and enter, with intent the goods and merchandise of the said John H. Lane, in the said store then and there being found, then and there, feloniously and burglariously, to steal, take and carry away, against the peace of the people of the United States and their dignity.

To which indictment, the prisoner pleaded not guilty, and by his counsel, moved that the said indictment be quashed, upon the following grounds: That the third section of the act of congress, entitled, "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3d, 1825 (4 U. S. Stat. 115), is to be limited to the laws of the several states in force at the time of its enactment.

*142] *By the revised statutes of the state of New York, passed in 1829 (2 Rev. Stat. p. 669, part 4, ch. 1, title 3, art. 1, § 17), a burglary in the third degree is enacted a breaking and entering, in the day or night, any shop, store, &c., in which any goods, &c., are kept for use, sale or deposit, with intent to steal therein, or commit any felony; and by the 21st of the same act, this offence is punishable by imprisonment in the state prison, for a term not exceeding five years.

Upon the said question thus occurring before the said court, the opinions of the said two judges were divided, and upon request of counsel, the point upon which the said division of opinion occurred was stated in manner aforesaid, under the direction of the said judges, and certified under the seal of the said court, to the supreme court of the United States, at their next session, to be held at the city of Washington on the second Monday of January, A. D. 1831.

The prisoner was arrested on a charge of breaking, with an intention to steal, into a store, situated at West Point, in the state of New York, and within the sole and exclusive jurisdiction of the United States. The store was not in any way identified with a dwelling; and the offence, therefore, was not a burglary at common law, nor by the laws of New York as existing in 1825; but was created a burglary in the third degree, by the Revised Statutes of New York, going into operation in 1829.

The case was submitted to the court, without argument, by *Taney*, Attorney-General of the United States; and by *Washington Quincy Morton*, for the defendant.

Marshall, Ch. J., stated it to be the opinion of the court, that the third section of the act of congress, entitled "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3d, 1825, is to be limited to the laws of the several states in force at the time of its enactment. This was ordered to be certified to the circuit court for the southern district of New York.

*Robert Oliver, The Bank of the United States, and The Union Bank of Maryland, Assignees of Smith & Buchanan, Hollins & McBlair and John S. Styles, Executor of George Styles, Appellants, *v.* James Alexander and seventy-seven others, seamen of the Ship Warren, Appellees.

Seamen's wages.—Right of appeal.

On proceedings under libels in the district and circuit courts of the United States of the district of Maryland, claiming seamen's wages from the ship Warren and her freight, upon which, in the circuit court, a general decree, *pro formâ*, against the libellants was entered, for the purpose of an appeal to this court, a decree was here made, by which $32,872.30 were adjudged to be due to the libellants, from the respondents, as part of their wages, to be paid to them *pro rata ;* and by the mandate of this court, the circuit court was ordered to ascertain the sums due, respectively, to each of the libellants; this was done; and on the report of a commissioner, fixing the several sums so due, a separate decree was entered in the circuit court for the sum so found due to each libellant respectively; none of the sums decreed to be due amounted to $1000. The amount of the several sums adjudged to be due, by the several separate decrees was $32,000 and upwards; from these separate decrees, the respondents in the circuit court prayed an appeal to this court; and gave a several appeal bond, upon the appeal from each decree, as well as a joint appeal bond for the whole. The appeal was dismissed, upon the ground, that the sum in controversy in each case was less than $2000.[1]

This is a case of wages, in which there is necessarily a several and distinct contract with each seaman, for the voyage, at his own rate of wages, and though he may sign the same shipping paper, no one is understood to contract jointly with, or to incur responsibility for, any other.

The shipping articles constitute a several contract with each seaman, to all intents and purposes, and are so contemplated by the act of congress for the government and regulation of seamen in the merchant service; and have been so practically interpreted in courts of justice, as well as by merchants and mariners, in all commercial nations, in modern times.

It is well known, that every seaman has a right to sue severally for his own wages, in the courts of common law, and that a joint action cannot be maintained in such courts by any number of seamen, for wages accruing under the same shipping articles, for the same voyage; the reason is, that the common law will not tolerate a joint action, except by persons who have a joint interest; if the cause of action be several, the suit must be several.

But a different course of practice has prevailed for ages in the court of admiralty, in regard to suits for seamen's wages; it is a special favor, and a peculiar privilege allowed to them, and to them only; and is confined strictly to demands for wages.

Although the libel is, in its form, joint, the contract is always treated in the admiralty according to the truth of the case, as a several distinct contract with each *seaman; each is to stand or fall by the merits of his own claim, and is unaffected by that of his co-libellants. [*144

The defence which is good against one seaman may be wholly inapplicable to another; one may have been paid; another may not have performed the service; and another may have forfeited, in whole or in part, his claim to wages. But no decree whatever, which is made in regard to such claims, can possibly avail to the prejudice of the merits of others, which do not fall within the same predicament; and wherever, from the nature of the defence, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim, according to its own peculiar circumstances.

The decree follows the same rule, and assigns to each seaman, severally, the amount to which he is entitled, and dismisses the libel as to those, and those only, who have maintained no right to the interposition of the court in their favor.

The whole proceeding, though it assumes the form of a joint suit, is, in reality, a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract; and bears some analogy to the known practice, at common law, of consolidating actions founded on the same policy of insurance; the act of congress adopts and sanctions the practice.

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[1] Spear *v.* Place, 11 How. 522; Rich *v.* Lambert, 12 Id. 347.

Oliver v. Alexander.

One seaman cannot appeal from a decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it.

It is very clear, that no seaman can appeal from the district to the circuit court, unless his own claim exceeds $50; nor from the circuit to the supreme court unless his claim exceeds $2000. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute.[1]

APPEAL from the Circuit Court of Maryland.

Hoffman, for the appellees, moved to dismiss the appeal, for want of jurisdiction; the sum in controversy between the appellants and the individual appellees not being sufficient to sustain the appeal.

The motion was argued by *Wirt* and *Taney*, for the appellants; and by *Hoffman*, for the appellees.

STORY, Justice, delivered the opinion of the court.—This is an appeal from certain decrees of the circuit court of the district of Maryland, rendered in pursuance of the mandate of this court, when the same cause was formerly before us, the report of which will be found in 5 Pet. 675, *et seq.*

*145] *After the cause was remanded, the circuit court referred it to a commissioner to ascertain and report to the court the sums respectively due to each of the officers and seamen, who were libellants, for their wages, and interest thereon. In conformity with this order of reference, the commissioner made report of the amount so due to each of the libellants then before the court; and thereupon, the court, after confirming the second and final report of the commissioner, proceeded to enter a separate decree for each libellant for the amount so found due to him; and to apportion, *pro rata*, the payment of the same out of the funds in the hands of Robert Oliver and others, the assignees in whose hands the funds were attached, and to decree the deficit to be paid by the owners of the ship Warren. The sums so decreed to the libellants, respectively, in no case exceeded $900, and most of them fell short of $500. From the separate decrees so rendered, the assignees prayed an appeal to this court, and gave several appeal bonds, upon the appeal from each decree, as well as a joint appeal bond for the whole. Under these circumstances, a motion has been made to dismiss the appeal, upon the ground, that the sum in controversy in each decree is less than $2000, and as such is insufficient to give this court appellate jurisdiction. The motion is resisted upon the other side, upon the ground, that the aggregate in controversy, under the whole of the decrees taken together, greatly exceeds that value.

The question is one of great practical importance; but in our judgment, not of any intrinsic difficulty. The present is a case of seamen's wages, in which there is necessarily a several and distinct contract with each seaman, for the voyage, at his own rate of wages; and though all may sign the same shipping paper, no one is understood to contract jointly with, or to incur responsibility for, any of the others. The shipping articles constitute a several contract with each seaman, to all intents and proposes; and are so contemplated by the act of congress for the government and regulation of seamen in the merchants service (Act of 1790, ch. 29), and have been so

[1] See Stratton *v.* Jarvis, 8 Pet. 4; Russell *v.* Stansell, 105 U. S. 303–4.

practically interpreted by courts of justice, as well as by merchants and mariners, in all commercial nations, in modern times. It is well known, that every seaman has a right to sue severally *for his own wages, in the courts of common law; and that a joint action cannot be maintained [*146 in such courts, by any number of seamen, for wages accruing under the same shipping articles, for the same voyage. The reason is, that the common law will not tolerate a joint action, except by persons who have a joint interest, and upon a joint contract. If the cause of action be several, the suit must be several also. But a different course of practice has prevailed for ages, in the court of admiralty, in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them, and to them only, and is confined strictly to demands for wages. The reason upon which the privilege is founded, is equally wise and humane: it is, to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament; in the expressive language of the maritime law, *velis levatis*. And the benefit is equally as great to the ship-owner as to the seamen; though the burden would otherwise fall upon the latter, from their general improvidence and poverty, with a far heavier weight. A joint libel may, therefore, always be filed in the admiralty, by all the seamen who claim wages for services rendered in the same voyage, under the same shipping articles. But althongh the libel is thus, in form, joint, the contract is always treated in the admiralty, according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his co-libellants. The defence, which is good against one seaman, map be wholly inapplicable to another. One may have been paid; another may not have performed the service; and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever, which is made in regard to such claim, can possibly avail to the prejudice of the merits of others, which do not fall within the same predicament. And wherever, from the nature of the defence, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim, according to its own peculiar circumstances. The decree follows the same rule, and assigns to each seaman, severally, the amount to which he is entitled, and dismisses the libel as to those, and those only, who have maintained no right to the interposition of the *court in their [*147 favor. The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is, in reality, a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract, and bears some analogy to the known practice at the common law of consolidating actions against different underwriters, founded upon the same policy of insurance. Be this as it may, it is the established practice of the admiralty. The act of congress, already referred to, adopts and sanctions the practice; and it enacts, that in proceedings *in rem* against the ship for mariners' wages, "all the seamen or mariners having cause of complaint of the like kind against the same ship or vessel, shall be joined as complainants." Act of 1790, ch. 29, § 6. It thus converts what, by the admiralty law, is a privilege, into a positive obligation, where the seamen commence a suit, at the same time, in the same court, by a proceeding *in rem* for their wages. And it further directs, that "the suit shall be pro-

ceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used." Act of 1790, ch. 29, § 6.

From this summary view of the nature and operation of the proceedings in the admiralty, in cases of joint libels for wages, it is obvious, that the claim of each seaman is distinct and several; and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the district court to the circuit court, unless his own claim exceeds $50; nor from the circuit court to the supreme court unless his own claim exceeds $2000. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole, the matter in dispute; but they can appeal only in regard to the demand of a seaman, which exceeds the sum required
*148] by law for that purpose, as a distinct *matter in dispute. If the law were otherwise, it would operate in a most unjust and oppressive manner; for then the seamen would be compellable to file a joint libel; and if any controversy existed as to the claim of a single seaman, all the others would be compellable to be dragged before the appellate tribunals, and incur enormous expenses, even when their own rights and claims were beyond all controversy, and, in truth, were not controverted. The form of proceeding would thus be made an instrument to subvert the very object for which it was instituted.

But it has been argued, that this court formerly entertained jurisdiction of this very cause, upon an appeal by the seamen, and passed a decree in their favor; and that the present appeal is to the erroneous proceedings of the circuit court in carrying into effect that decree; and if the seamen may appeal, the original respondents may appeal also. It is true, that the appeal was taken by the seamen, and jurisdiction entertained by this court, in the manner stated at the bar; but a moment's attention to the state of facts and posture of the case at that time will show, that the conclusion now attempted to be drawn from them is wholly unsupported. There was nothing then upon the record, to show what were the amounts respectively claimed by, and due to, the seamen. The decrees, both in the district court and in the circuit court, were, by the consent of the parties, *pro formâ*, dismissing the libel as to all the libellants, without any inquiry into or ascertainment of the claim of any one of them; and this dismissal was for the avowed purpose of taking an appeal to this court, in order to settle the only real controversy between the parties to the appeal, viz., whether the funds in the hands of the assignees were liable to the claims of the seamen, in point of law. Such a proceeding, assented to by all the parties in interest, necessarily admitted, that the sums in controversy between the parties were sufficient to found the appellate jurisdiction of this court. The argument at the bar proceeded upon this implied admission; and there was nothing in the record before the court, that contradicted the admission. It was not

possible for the court, therefore, to know what was due or claimed by each seaman; and though consent cannot give jurisdiction to this court, by way of appeal, where the matter in dispute is less than $2000; *yet an admission of a sufficient value by the parties, is presumed to be correct, where the record does not establish the contrary. 5 Pet. 675. [*149

In looking into the original proceedings, which are not, indeed, now before us, except for incidental purposes, but only such as have been consequent upon the mandate, it appears, that the original libel was by Sheppard alone; that by subsequent amendments, other libellants were added; that in the year 1819, another amended libel was filed, embracing all the libellants, and asserting claims on their part to wages in the aggregate to the amount of $31,000; and that subsequently, in December 1825, another amended libel or petition was filed in behalf of the libellants, making the assignees parties, and making a positive claim for interest also upon the amount of their wages. It was upon the libels, thus amended and filed, that the decree of this court, as well as those of the courts below, were founded. And the last asserts, on the part of one of the libellants (Stephen Cassin), a claim for $3476.51, leaving the claims of the others, in the most general form, with no averments ascertaining the amounts, which were then respectively demanded by them. Indeed, the very loose and inartificial structure of all the libels could not escape observation; and might, in earlier stages of the cause, have been open to objection for the want of due certainty and precision, if any exceptions had been specially promoted on behalf of the respondents; but as none were made, there was an implied waiver of all imperfections of this sort. This court, in its decree, affirmed the right of the seamen to their wages, and directed a separate and several decree to be entered for the amount due to each libellant, respectively, as soon as the same should be ascertained by a commissioner. So that the decree itself severed the claims of the libellants, in all future proceedings in the cause; as, in truth, these claims ought to have been severally propounded in the original libel. It is manifest, then, that each libellant has no joint interest in the claim of any other; and that each is in its nature and character, distinct and independent; and the amount in controversy being now ascertained by a several decree, that constitutes, in regard to the respondents, the sole matter in dispute *between them, and the respective libellants. Neither party can, then, claim an appeal to this court, in regard to the claim of any libellant, unless that claim exceeds $2000. The case is not distinguishable, in principle, from that of an information of seizure, or a libel on a capture as prize, where various claims are interposed for different portions of the property, by persons claiming the same by distinct and independent titles. In such a case, though the original libel is against the whole property jointly, yet it is severed by several claims; and no appeal lies by either party, unless in regard to a claim exceeding the sum of $2000 in value. This has been the long and settled practice in the admiralty courts of our country. [*150

Upon the whole, it is the opinion of this court, that for the want of jurisdiction, the present appeal must be dismissed; no one of the decrees in the circuit court involving a matter in dispute sufficient in value to justify the exercise of the appellate authority of this court.

Spring v. Gray.

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 the opinion of this court, that for the want of jurisdiction, the present appeal must be dismissed; none of the decrees in the circuit court involving a matter in dispute sufficient in value to justify the exercise of the appellate authority of this court. Whereupon, it is ordered and adjudged by this court, that this appeal be and the same is hereby dismissed, for want of jurisdiction as aforesaid.

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*151] *Seth Spring and others, Plaintiffs in error, *v.* The Executors of William Gray, Defendants in error.

Statute of limitations.—Merchants' accounts.

The master of a ship, who, with the other members of a mercantile house, were owners of the vessel which he commanded, with the approbation of the firm, signed a bill of lading to deliver certain articles of merchandise, the property of the shipper, at the port of destination of the vessel, "freight to be paid for the goods as *per* agreement indorsed;" the agreement indorsed was, that the owners of the ship should have, as the freight of the ship, one-half of the net profit, on the proceeds of the goods, which were to be invested in a return-cargo, to be consigned to and sold by the shipper; the proceeds of the outward cargo were received by the shipper, part in goods, and part in money; a portion of the cargo having been left unsold by the vessel, where they were delivered. The transaction was made the subject of an account-current, by the owners of the vessel with the shipper of the goods, and a large balance was claimed to be due to them on the said account; the shipment was made in May 1810, and in May 1829, a suit was instituted for the recovery of the balance, stated to be due on an account-current; the defendants, the executors of the shipper, pleaded the statute of limitations of the state of Maine; the defendants replied, that the accounts and promises arose "from such accounts as concern the trade of merchandise, between merchant and merchant, their factors and servants." The plaintiffs admitted, they had no other cause of action than such as arose from the bill of lading, and the contract indorsed thereon: *Held*, that the bill of lading and the contract were not sufficient to maintain the issue joined on the part of the plaintiffs, in respect to the replication of merchants' accounts.[1]

The statute of limitations of Maine is copied from the 21 of James I., and its words are, "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants, &c., shall be commenced." It would seem to be the necessary construction of these words, that the action on the case, to which the exception applies, must be founded on an account: the language of the act conveys the same meaning as if it had been, "all actions of account, and all actions on the case, other than such as are founded on such accounts as concern the trade of merchandise," &c. The foundation of the action must be an account, not a contract.

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[1] To bring a case within the exception of merchants' accounts, the account must be an open one. Toland *v.* Sprague, 12 Pet. 300; Bispham *v.* Price, 15 How. 162. Accounts, when stated, cease to be merchants' accounts, within the statute. Bevan *v.* Cullen, 7 Penn. St. 281; Thompson *v.* Fisher, 13 Pet. 310. To constitute a merchant's account, there must be reciprocal demands. Atwater *v.* Fowler, 1 Edw. Ch. 417; Chew *v.* Baker, 4 Cr. C. C. 696; Hussey *v.* Burgwyn, 6 Jones (N. C.) 385; Ingram *v.* Sherard, 17 S. & R. 347; Lowber *v.* Smith, 7 Penn. St. 381. The accounts must be between merchants, at the time the cause of action accrues, unsettled and mutual, and consisting of debts and credits for merchandise. Fox *v.* Fisk, 7 Miss. 328. The exception in the British statute 21 Jac. I., was confined to cases where an action of account would lie, or an action upon the case, for not accounting. Cottam *v.* Partridge, 4 Scott N. R. 819; 4 M. & G. 271. It did not apply to the action of *indebitatus assumpsit*. Inglis *v.* Haigh, 8 M. & W. 769; 9 Dow P. C. 817.

Spring v. Gray.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases, it may reasonably be conceived, that the legislature had in contemplation to except those actions only for which account would lie; the words certainly imply, that the action should be founded on an account; the account must be one which concerns the trade of merchandise.

The case presented by the exception is not every transaction between merchant and merchant; not every account which might exist between them; but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant, merely as a personal privilege; but an exemption which is conferred on the business as well as on the persons between whom that business is carried on; the accounts must concern the trade of merchandise; * and the trade must be, not an ordinary traffic between a merchant and any ordinary customer, but between merchant and merchant. [*152

The "trade of merchandise which can present an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant; the account—the business of merchandise which produces it—must be between them.

A charter-party, a contract by which the owner lets his vessel to another for freight, does not change its character, because the parties happen to be merchants; it is still a special contract, whereby a compensation is stipulated for a service to be performed; and not an "account concerning the trade of merchandise;" it is no more "an account;" and no more connected with "the trade of merchandise," than a bill of exchange, or contract for the rent of a house, or hire of a carriage, or other single transaction which might take place between individuals who happen to be merchants. An entry of it in the books of either, could not change its nature, and convert it from an insulated transaction between individuals, into an account concerning the trade of merchandise between merchant and merchant; this must depend on the nature and character of the transaction, not on the books in which either party may choose to enter a memorandum or statement of it.

The English cases certainly do not oppose the construction given by the court to the words of the statute; the American cases, so far as they go, are in favor of it

On a commercial question, especially, on one deeply interesting to merchants, and to merchants only, the settled law of New York is entitled to great respect.

Spring *v.* Gray, 5 Mason 505, affirmed.

Error to the Circuit Court of Maine. This action was originally instituted in March 1829, by the plaintiffs in error, who survived Andrew M. Spring, their copartner, in the court of common pleas of the county of York, in the state of Maine, by process of attachment; and was removed to the circuit court of the United States, upon the petition of the defendants.

The action was *assumpsit;* and in the declaration, the first count was for the balance of an account-current, which account was annexed to the writ; the second count was for money had and received. The defendants pleaded the general issue, which was joined; and also the statute of limitations. The plaintiffs, to their pleas of the statute, replied that "the accounts and promises arose from such accounts as concern the trade of merchandise, between merchant and merchant, their factors and servants; and issue was taken on the replication. The declaration described the plaintiffs as copartners on the 1st day of July 1821, "transacting business as merchants, in the name of Seth Spring & Company." The defendants' intestate was described as "William Gray, late of Boston, deceased." The account annexed to the writ was as follows:

Spring v. Gray.

Dr. William Gray, Esq., of Boston, Mass., in account with Seth Spring & Sons. *Cr.

1810, Sept. For loss sustained on the sloop Fanny, Capt. Ebenezer Jordan, master, which said Gray insured	2,500 00	1811. By amount of the outward cargo of the barque Morning Star, as per original invoice and bills of lading	35,202 83
1811, Oct. For 35,000 gals. olive oil, in casks, delivered from barque Morning Star, Wm. Nason, master, in Boston, at $1.25 per gal.	43,750 00	By his half the profits of said Morning Star's voyage	14,469 03
For 127 cases do., delivered by same	1,270 00	1829. By balance now due from estate of said William Gray	34,477 45
For 53,803 lbs. cotton, left with Mr. Lear, in Algiers, and afterwards paid for by the Dey of Algiers to Com. Stephen Decatur, and received by said Gray, 30 cents per lb.	16,140 90		
For cash paid by Andrew M. Spring to Bainbridge & Brown, merchants, England, and by them placed to credit of William Gray	2,000 00		
For cash paid Andrew M. Spring's commissions 2½ per cent, on said barque's outward cargo, as per agreement	880 00		
1829. For interest, on loss on Fanny, 19 years	2,850 00		
For interest on one-half the profits of Morning Star's voyage, as per agreement	14,758 41		

JOHN MUSSEY, Clerk.

*154] *This account grew out of a special contract between the parties; and the evidence and instructions of the court to the jury were set forth in a bill of exceptions; which stated, that the plaintiffs, to maintain the issues on their part, offered in evidence and read to the jury: A bill of lading of the outward chargo of the Morning Star, signed by Andrew M. Spring, with the agreement or contract on the back of it, signed by William Gray and Seth Spring & Sons. The bill of lading was in the usual form, and stipulated, that the cargo should be delivered at Algiers, to Andrew M. Spring, the freight to be paid as *per* agreement indorsed on the same. The agreement was as follows:

The proceeds of the within cargo, amounting to $35,202.83, as per invoice, costs and charges, is to be invested in Algiers, or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last-mentioned charges are to be made on the goods), and returned in the said barque Morning Star, to Boston, when Seth Spring & Sons (owners of said barque), are to recover one-half of the net profits thereon, in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half per cent. on the sales of the within cargo; and no commissions to be charged in Boston, except what is paid an auctioneer.

SETH SPRING & SONS,
WILLIAM GRAY.

$35,202.83.

Also, letters of instruction addressed by William Gray to Andrew M. Spring, relative to the voyage of the Morning Star; and also the correspondence on the accounts of Andrew M. Spring, and of the consignees and others, relative to the transaction. The plaintiffs' counsel, having closed their evidence, were inquired of by the court, whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the barque Morning Star, and the contract indorsed thereon; answered, that they had not.

And thereupon, the defendants' counsel moved the court to instruct the jury, that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading *and contract indorsed thereon ; [*155 the said bill of lading and contract, with the other papers, documents and testimony aforesaid were not sufficient evidence, in point of law, to maintain the issue joined on the part of the plaintiffs in respect to their replication of merchants' accounts. The plaintiffs' counsel objected to such instructions, and prayed the court to instruct the jury, that the evidence introduced was sufficient to prove, and did prove, the issue last aforesaid on the part of the plaintiffs. But the court instructed the jury, that inasmuch as the plaintiffs had admitted, that their whole cause of action arose from said last-mentioned bill of lading, and contract indorsed thereon ; the said bill of lading and contract, with the other papers, documents and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue last aforesaid on the part of the plaintiffs.

And thereupon, the jury returned their verdict for the defendants on this issue ; and upon the general issue, they found no verdict. The court gave a judgment for the defendants ; and the plaintiffs prosecuted this writ of error.

The case was argued by *Evans*, for the plaintiffs ; and by *Webster*, for the defendants.

The plaintiffs contended : 1. That the question whether the accounts in suit were such as concerned the trade of merchandise, was a question for the jury solely ; which they should have been at liberty to consider. 2. That the accounts in suit are within the exception of the statute.

For the plaintiffs, it was argued, by Mr. *Evans*, that the direction of the court to return a verdict for the defendants, was erroneous ; as the question whether the accounts between the plaintiffs and the defendants' testator were, or were not, "merchants' accounts" was one of fact and not of law ; and therefore, proper for the jury exclusively. *Bass* v. *Bass*, 8 Pick. 187.

The main question in the case is, whether the account and the agreement, taken together, do not amount to an account between merchant and merchant, within the exception in the statute of limitations, of merchants' accounts? An exception always operates to take a case which comes *within it, [*156 out of the operation of the enacting clause ; and whatever is within the exception is exempted from the effects of the law. The exemption of merchants' accounts has reference to the character of the parties ; and not to the nature of their dealing, or the subject-matter of the account between them. The account on which this action is founded, is fully within this principle.

The statute of limitations has sustained various fortunes, since its enactment. The dispositions of courts towards its objects have differed, and have frequently changed ; and the cases in which it has been permitted to operate, have been diminished or increased, according to the opinion entertained of the policy of the system. At the present period, the course of decisions is to restore the law to its full force ; and to give all its provisions their full influence. The exception of merchants' accounts, is in clear and express terms, and if relieved from the pressure of decided cases, there would be no

difficulty in its application to the case before the court. The accounts between the parties, or, at least, the plaintiffs' account, is one growing out of dealings between them and the defendants' intestate, of a mercantile nature. It has reference to the transportation of merchandise, its sale, and to the reinvestment of the proceeds. The account is not yet closed.

Without going back to the history and progress of the various conflicts which this exception has sustained, it may be proper to state, that in the first instance, it was limited to actions of account. At length, it was extended to every form of proceeding, at law or in equity, where accounts were sought to be recovered; various other questions succeeded, some of which, having a bearing upon that now before the court, are still debatable. The question, how far the exception applies to closed or stated accounts? or whether only to those which are open or current? Is it required, that some one item shall be within six years? Several cases maintain the last ground; they are chiefly from the courts of chancery. 2 Ves. 400; 6 Ibid. 580; 15 Ibid. 199; 19 Ibid. 148, 180; 15 Ibid. 286; Gilb. Eq. Rep. 224; Bunbury 217;
*157] 5 Johns. Ch. 522; 2 Eden 169. There *is nothing in the language of the exception, to authorize the construction adopted in these cases; Merchants' accounts are excepted, without any limitation as to the period of the items which compose them, or as to the date of the first or last of those items. On the other hand, there are decisions which maintain the exception, and give it operation; although there is no item in the account within six years. 6 T. R. 119; 2 Saund. 127, 12, 6, 7; 6 Pick. 362; 1 Dall. 264; 2 Yeates 105; 4 Greenl. 339; 5 Cranch 15; 3 Wils. 94.

Thus, between the common-law decisions and those by the courts of chancery, the exception is entirely annihilated. Both cannot be law; and by some of the authorities, merchants' accounts are no more favored than other accounts, against the plain intent of the statute. It is admitted, that closed or stated accounts are not within the exception. The cases to this principle are, 2 Saund. 124; 2 Johns. 200; 20 Ibid. 533.

Another question was discussed in the circuit court, which may have its influence in this court. How far accounts, to entitle them to the protection of the exception, should be mutual? It is said, accounts must exist on both sides. The doctrine of mutuality of accounts is found in Bull. N. P. 149; 20 Johns. 583. This doctrine has been engrafted, very strangely, on the exception under consideration. An accurate examination of the authorities will satisfy the court, that to uphold this exception, mutuality is not requisite. The words of the law are not, accounts "between merchant and merchant," but "trade between merchant and merchant." And the case before the court shows mutual accounts. The transactions to which the account refers, are those of mutual dealing, requiring that accounts should have been kept, and that the results of those dealings should be stated in that form. The books of the plaintiffs show an account, and so do the books of the defendants' testator—not with the plaintiffs, in their name, but of the business in which they were concerned, and in the profits in which both parties were interested. It is said, however, that there was in these transactions nothing but a contract—no trade—no merchandise.

*158] *The parties were merchants; the subject of their transactions was merchandise; and it was to be transported to a foreign place, to be sold there; the proceeds to purchase other merchandise, which was to be

brought back to be sold here; and after the original cost of the merchandise should be repaid, the residue was to be divided between the parties. In all this, accounts were required. Do they not concern the trade of merchandise?

Does the agreement alter the nature of these transactions? In every trade, there is an agreement, written or otherwise: as to factors, it is generally a written contract; and this case may well be considered as one between merchant and factor. The contract was made with the partnership, and they appointed one of themselves to see it executed. In doing this, the person appointed acts under the agreement, and the advantages which accrue to him, accrue to the plaintiffs. It was, without doubt, one of the inducements to the contract, that a partner of the firm should execute it. Courts look at the substance of agreements, not to the mere form. The bill of lading must necessarily have been signed by the master of the Morning Star. It would have been so signed, if they had appointed any other person to execute the agreement. The instructions of the shipper were, for the same reason, addressed to him. The whole transaction is but one contract; and the signature of the bill of lading, by the master, did not separate him from his copartners. He became the agent of the firm, to keep the accounts for them; and these accounts, so kept, were the accounts of all the partners.

Webster, contrà.—The case is one of contract, depending on a special agreement between the owners of the Morning Star and the shippers of the cargo. The vessel was to carry the property shipped, for a proportion of the profits on the sales; and there were no profits. The whole transaction is contained in the bill of lading and the agreement, and the account is a bill of particulars growing out of the agreement. The plaintiffs, on being called upon, stated that their demand was founded entirely on the agreement.

It is said, that the question was one of fact, and not of law; *and that it was not properly taken from the jury by the court. Had this been so, yet, as, on the trial, neither party requested the facts to be left to the jury, &c., and both were willing to consider the whole as matter of law, the objection is now out of place. [*159

Story, Justice, stated, that at the trial, neither party requested the facts to be left to the jury.

But it is contended, that this is purely a question of law. The counsel for the plaintiffs in error have so treated it, by a reference to numerous cases. All the facts are admitted—the contract, and all the matters given or offered in evidence, are in writing; and they give rise to the only questions, which are legal ones, as to the construction of this written evidence. It is denied, that the case in Pickering's reports applies; there, many facts were controverted.

This is not a matter of account, within the exception of the statute of limitations. There is no item within six years; and this is necessary, although the case in Cranch is considered as giving a sanction to another principle. In some of the states, it has been held, that it is necessary that the account should have an item within the limitation, but not in all. All

the English decisions are otherwise. But the principle is not material in this case.

The account must be current; existing on a running mutual account between merchants: it must be an open, and not a settled transaction. The statute has no relation to written books; the words apply to such a state of things as will require a party to account; and as are analogous to trusts. The relations between the parties determine the nature of the cases. The mere fact that there is an account between the parties, is not sufficient. An account settled and stated, it is allowed, is not within the statute, and the reason is, that the matters of the account are no longer open, and the account has become a debt.

The evidence to maintain the action shows no matter of account. The consignee was bound to account, but the ship-owners, who signed the agreement, had no accounts to keep. The consignee was not bailiff and receiver; and the old action of account would not lie.

*160] *The case does not exhibit anything from which a claim to account could be made upon the defendants' testator. He had received nothing. The manner of paying the freight did not make the transaction one of account; it was the same as a charter-party of affreightment, and was a special agreement for a special purpose. It is not enough, that a party is liable to pay money; to make it an account, he must have received something for which he is liable to account. Carth. 226. There must be mutual accounts; debts and credits on both sides, mutual dealings; a debt or claim on one side, could not be an account, in the view of the exception. The ground on which the exception rests is, that the merchant looks to remittances, and a cause of dealing between the parties, at a distance, and the law regards the inconvenience of having settlements made within a short time. Some transactions between merchants are not, and cannot be closed within the period of six years; and for such cases the law intends to provide. Accounts between merchants are often kept open for a long time, in the expectation of remittances.

The statute must have a full and reasonable construction. The account, to bring it within the exception, must relate to the trade of merchandise. The pleadings in this case exhibit the question in this form; but in this case, there are no such relations. The cargo is placed in the hands of the master for certain purposes only. Because the parties are merchants, and the goods shipped by the defendant's testator were articles of merchandise, there is no application of the law. The demand must be one in a transaction, which being between merchant and merchant, the party called upon is bound to account.

Marshall, Ch. J., delivered the opinion of the court.—This cause depends entirely on the question, whether the plaintiffs are within the exception of the statute of limitations, made in favor of "such accounts as concern the trade of merchandise between merchant and merchant?"

The plaintiffs in error brought an action on the case against the defend-

*161] ants, in the proper court of the state of Maine, *which was removed by the defendants into the circuit court of the United States for the district of Maine. The first count was for balance of accounts annexed to the writ; the second was for money had and received. The defendants

pleaded *non assumpsit*, and the statute of limitations. Issue was joined on the first plea. To the second, the plaintiffs replied, that the accounts and promises mentioned in the declaration are, and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants ; and issue was joined on this replication.

At the trial, the plaintiffs produced the bill of lading of the outward cargo of the barque Morning Star, signed by Andrew M. Spring, the master of said barque, with the contract on the back of it, signed by William Gray, the testator of the defendants, and by Seth Spring & Sons, the plaintiffs and owners of the barque Morning Star ; which bill of lading and contract are in these words :

Shipped, in good order and well conditioned, by William Gray, of Boston, a native citizen of the United States of America, for his sole account and risk, in and upon the barque called the Morning Star, whereof is master for this present voyage, Andrew M. Spring, now in the harbor of Boston, and bound for Algiers ; to say [The merchandise is here described by marks, numbers and quantities], being marked and numbered as in the margin, and are to be delivered, in like good order and well conditioned, at the aforesaid port of Algiers (the dangers of the seas only excepted), unto Andrew M. Spring, or to his assigns, he or they paying freight for the said goods, as per agreement indorsed hereon, without primage or average. In witness whereof, the said master of the said barque hath affirmed to four bills of lading, of this tenor and date, one of which being accomplished, the other three then to stand void. Dated in Boston, May 26th, 1810.

ANDREW M. SPRING.

The proceeds of the within cargo, amounting to $35,202.83, as per invoice costs and charges, is to be invested in Algiers, or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last-mentioned charges are to be made *on the goods), and returned in the said barque Morning Star, to Boston, when Seth Spring & Sons (owners [*162 of said barque) are to recover one-half of the net profits thereon, in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half per cent. on the sales of the within cargo ; and no commissions to be charged in Boston, except what is paid an auctioneer.

$35,202.83. SETH SPRING & SONS.
WILLIAM GRAY.

The plaintiffs also produced several letters and papers from William Gray, the master of the Morning Star, and others, respecting the outward voyage of the barque ; together with the bills of lading and invoices of her inward cargo, which was delivered to the defendants. They also produced an account from the books of Seth Spring & Sons, as follows :

Spring v. Gray.

Dr. William Gray, Esq., of Boston, Mass., in account with Seth Spring & Sons. Cr.

1810, Sept. For loss sustained on the sloop Fanny, captain Ebenezer Jordan, master, which said Gray insured	2,500 00	1811. By amount of the outward cargo of the barque Morning Star, as per original invoice and bill of lading.	35,202 83
1811, Oct. For 35,000 gallons oil in casks, delivered him from barque Morning Star, William Nason, master, at Boston, at 7s. 6d. per gal.	43,750 00	His half the profits of said Morning Star's voyage	14,469 03
127 cases oil delivered, by same, at $10 per case	1,270 00	1829. Balance now due from estate of said William Gray	34,477 45
53,803 lbs. cotton, left with Mr. Lear, and afterwards paid for by the Dey of Algiers to Com. Stephen Decatur, at 30 cents per lb.	16,140 90		
Cash paid by A. M. Spring to Bainbridge & Co., merchants, England, and by them passed to the credit of said Gray	2,000 00		
Paid A. M. Spring his commissions, at 2½ per cent., on said barque's outward cargo as per agreement	880 00		
1829. Interest on loss on sloop Fanny, 19 years	2,850 00		
Interest on one-half the profits of Morning Star's voyage, per agreement	14,758 41		

When the plaintiffs had closed their evidence, the court asked whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the barque *Morning Star, and the contract indorsed thereon; and they answered, that they had not.

*163]

The counsel for the defendants then moved the court to instruct the jury, that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue joined on the part of the plaintiffs, in respect to their replication of merchants' accounts. The plaintiffs' counsel objected to such instructions, and prayed the court to instruct the jury, that the evidence introduced was sufficient to prove, and did prove, the issue joined on the part of the plaintiffs. The court instructed the jury, that inasmuch as the plaintiffs had admitted, that their whole cause of action arose from said last-mentioned bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue last aforesaid on the part of the plaintiffs. To this instruction, an exception was taken. A verdict was found for the defendants; and this writ of error brings up the judgment which was rendered thereon.

The statute of Maine is copied from the 21 James I., and its words are, "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants, &c., shall be commenced," &c. It would seem to be the necessary construction of these words, that the actions on the case, to which the exception applies, must be founded on an account. The language of the act conveys the same meaning as if it had been, "all actions of account, and all actions on the case, other than such as are founded on such account as concerns the trade of merchandise," &c. The foundation of the action must be an account, not a contract.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract, not under seal, with actions *of account, which lie only in a few special cases, it may reasonably be conceived, that the legislature [*164 had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require, that the action should be founded on an account. The account must be one "which concerns the trade of merchandise." The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant, merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customer, but between merchant and merchant. This "trade of merchandise," which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account—the business of merchandise which produces it—must be between them. If these propositions be well founded, and we believe they are, let us apply them to the case.

The defendants were, undoubtedly, merchants. The plaintiffs, Seth Spring & Sons, were also merchants; but they were likewise ship-owners. They were the proprietors of vessels which they hired to others for freight. A charter-party, a contract by which the owner lets his vessel to another for freight, does not change its character, because the parties happen to be merchants. It is still a special contract, whereby a compensation is stipulated for a service to be performed; and not an account concerning the trade of merchandise. It is no more "an account," and no more connected with "the trade of merchandise," than a bill of exchange, or a contract for the rent of a house, or the hire of a carriage, or any other single transaction which might take place between individuals who happened to be merchants. An entry of it on the books of either, could not change its nature, and convert it from an insulated transaction between individuals, into an account concerning the trade of merchandise, between merchant and merchant. This must depend on the nature and character of the *transaction, not on [*165 the book in which either party may choose to enter a memorandum or statement of it.

Had the freight contracted for been a sum in gross, or a sum dependent on the space occupied by the cargo, or on its weight, or on any estimate of its value, it would have been perceived at once, to be a claim founded on contract, and not on account. Is the nature of the transaction varied, by the fact, that the freight to be paid by the charterer, instead of being a specific sum, or a sum to be ascertained by some given rule, is dependent on the profits of the adventure? That the sales of the outward and inward cargo, and all the expenses attendant on the enterprise, must be examined, in order to ascertain the amount of freight? This process must, undoubtedly, be gone through, in an action on the contract, but does its necessity convert the action, which ought to be on the contract, into one founded on an account concerning the trade of merchandise, between merchant and

merchant? The account of the sales of the outward cargo is to be adjusted between the shipper and his consignee, not between the shipper and the ship-owner, in his adventitious character of a merchant. So, the sales of the return-cargo must be examined, in order to ascertain whether any, and how much, profit has been made, and whether the ship-owner is entitled to any, and how much, freight. But this account is not founded on trade and merchandise between the owner and affreighter of the vessel. It is founded on the trade of the affreighter alone, to which reference must be made, in order to ascertain the amount of freight. Mr. Gray could not be considered as the factor of Seth Spring & Sons, selling their goods. He was selling his own; and the relation between them was not that of merchant and factor, but of charterer and charteree of a vessel, by special contract.

If we were to decide this case on the words of the statute, we should not think that the plaintiffs had brought themselves within the exception. We should not consider the action as founded on "such an account as concerns the trade of merchandise between merchant and merchant." This opinion is not changed by cases which are to be found in the books.

In *Webber* v. *Tivill*, 2 Saund. 121, the plaintiff's declaration contained two counts, one in *indebitatus assumpsit*, for *money had and received *166] by the defendant for the plaintiff's use, and for goods, wares and merchandise sold and delivered, and the other on an *insimul computassent*. To the plea of the act of limitations, the plaintiff replied, that the money in the several provisions mentioned became due and payable on trade between the plaintiff and defendant, as merchants, and wholly concerned merchandise. The defendant demurred, and the whole court gave judgment in his favor. Morton, Justice, was of opinion, that only actions of account were within the exception. The report does not contain the reasons assigned by the other judges, otherwise than by stating that they were the reasons given by Jones in his argument. These were, that the statute intends to except nothing concerning merchandise between merchants, but only accounts-current between them, whereas, the declaration in the second count was on an account stated and agreed. He also contended, that the first count did not make a case to be brought within the exception, it being only a bargain for wares sold, and for money lent; and although it concerned merchandise, and was between merchants, yet that was no reason why it should be excepted out of the statute; for if it should be excepted, by the same reason, every contract made between merchants would also be excepted; which was not the intention of the statute; for in the statute, accounts between merchants only are excepted, and not contracts likewise. He also contended, that actions of account only were within the exception. This point has been since overruled, though it seems to have been long considered as settled law. This case having been decided, as the report informs us, for the reasons assigned by Jones, his argument must be taken as the opinion of the court. It decides, that only accounts, not contracts, between merchants, even although they may concern the trade of merchandise, are within the exception, and that the accounts must be current.

In *Cotes* v. *Harris*, at Guildhall, Denison, Justice, held, that the clause in the statute of limitations about merchants' accounts, extended only to cases where there were mutual accounts, and reciprocal demands between two persons. This was only the decision of a single judge; but

Mr. Justice BULLER seems to have given it his sanction also, by introducing it into his work. *Bull. N. P. 149. And Lord KENYON quoted it with approbation, in *Cranch* v. *Kirkman*, Peake's Cas. 121, adding that he had furnished his note of the case to Mr. Justice BULLER. [*167

The distinction between an account-current and an account stated, has been often taken: 1 Ves. 456; 4 Mod. 105; 2 Ves. 400; 1 Mod. 270; and is now admitted. The English cases certainly do not oppose the opinion we have formed on the words of the statute. The American cases, so far as they go, are in favor of it.

In *Mandeville* v. *Wilson*, 5 Cranch 15, this court said, that the exception extended to all accounts-current, which concerned the trade of merchandise, between merchant and merchant. The only addition made in this part of the opinion, to the words used in the statute, is the introduction of the word "current." The statute saves "accounts-current." The opinion proceeds to say, that an account closed, by the cessation of dealing between the parties, is not an account stated, and that it is not necessary that any of the items should be within five years. This decision maintains the distinction between accounts-current and accounts stated.

In *Ramchander* v. *Hammond*, 2 Johns. 200, the court determined, that the statute of New York, though slightly varying in its language from the English statute, was to be construed in the same manner, and "must be confined to actions on open or current accounts." "It must be a direct concern of trade; liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description."

In the case of *Coster* v. *Murray*, 5 Johns. Ch. 522, a purchase of goods was made by the agents of the parties, at Copenhagen, and shipped to the defendants, merchants in New York, on joint account, under an agreement made by the agents, that the goods should be sold by the defendants, free from commission, and one-third of the proceeds paid to the plaintiffs, who were insurers. The goods were received and sold by the defendants, who mingled the money with their own, and refused to pay any part of it to the plaintiffs, unless on terms to which the plaintiffs would not accede. To a bill filed by the plaintiffs, the defendants pleaded the act of limitations. The plaintiffs contended, that the claim was within *the exception of the statute, in favor of accounts between merchants, and also, that it related to the execution of a trust, and was, therefore, not within the statute. [*168 On the first point, Chancellor KENT said, "to bring a case within the exception of the statute, there must be mutual accounts and reciprocal demands between two persons. In the present case, there was no account-current between the parties. There are no mutual and reciprocal demands." "The defendants took charge of and agreed to be accountable for some goods, or the proceeds thereof, in which the parties had a joint interest; and as concerns the parties, and as between them, this hardly seems to be a trade of merchandise, between merchant and merchant." The chancellor took a very elaborate view of all the English cases in which this exception had been discussed. Many of them went off on other points, many were indecisive, and some of them seem to be opposed to each other, though not on the precise question which has been argued in this case. He concluded this review, by observing, "assuming the case before me to be one that concerned the

trade of merchandise, between merchant and merchant, I should rather be inclined to think, the statute was well pleaded, and that the case did not fall within the exception."

A decree was made in favor of the plaintiff, on the other point, from which the defendant appealed to the court of errors. The cause was argued on several points, the first of which was, "whether it came within the exception of the statute concerning the trade of merchandise, between merchant and merchant, their factors or servants." Chief Justice SPENCER, said, the chancellor had examined the case very elaborately, and had come to the conclusion, that the statute was well pleaded; and that the case does not fall within the exception. He added, "whether the statute is at all applicable to a case of mutual dealing and mutual credits between merchant and merchant, is a question not now necessary to be decided, because the present is not a case of that kind. On the part of the respondents, this is no account at all. This is a case of an account merely on the part of the appellants; there is no selling or trading. It is a case of a joint purchase of *goods, *169] where one of the purchasers takes the whole goods, and is to account for one-third of the proceeds. In such a case, where the items of an account are all on one side, in my judgment, it is not within the reason or principle of the exception; which must have intended open and current accounts, where there was mutual dealing and mutual credits." Judges PLATT and WOODWORTH concurred. There was some division in the court of errors; but the decree of the chancellor was affirmed.

This case is stronger than that under consideration, and turns on principles which decide it. No doubt is expressed in it, on the necessity of accounts being mutual, and being open and current, to bring them within the exception of the statute. On a commercial question, especially, on a question deeply interesting to merchants and to merchants only, the settled law of New York is entitled to great respect elsewhere. We have found no conflicting decisions in any of the states.

The account from the books of the plaintiffs contains one item not founded on the contract for the freight of the barque Morning Star, the loss on the sloop Francis, insured by said Gray. But this item itself is not within the exception, and was abandoned by the plaintiffs, who declared that their whole cause of action arose from the contract. The claim, to bring the case within the exception, rests entirely on the sale of the inward cargo. This single transaction has not equal (certainly not superior) pretensions to being an account-current between merchant and merchant, a case of mutual accounts between them, with the sale made by the Murrays, in *Coster* v. *Murray*, of goods purchased on joint account, shipped to the defendants on joint account, and sold by the defendants on joint account.

We are of opinion, that this action is not founded on an account concerning the trade of merchandise, between merchant and merchant, their factors or servants; and is not within the exception of the statute of limitations. There is no error in the instructions given by the circuit court, and the judgment is affirmed, with costs.

Judgment affirmed.

*Charles B. Dufau, Plaintiff in error, *v.* Jean Henry Couprey's heirs, Defendants in error. (*a*)

Immaterial error.

Motion to dismiss a writ of error, on the ground, that one of the matters put in issue in the court below, did not appear, by the record, to have been decided: Refused, as the issue which was found by the jury, made the plea upon which no issue appears to have been decided, immaterial.

Error to the District Court for the Eastern District of Louisiana.

Livingston, for the plaintiff in error, stated, that the record showed that the proceedings in the district court were according to the practice in Louisiana, and not according to the course of the common law. There were two issues, and a denial of the debt; and this was tried by a jury; the other, on an allegation of a former recovery. The latter was an issue at law, and could not be submitted to a jury; but was for the decision of the court.

But the decision of the jury was given in general terms, and it cannot, therefore, be ascertained, but that they found their verdict on the plea of the former judgment, and not on the issue of fact. On an examination of the record, it will appear, that the former judgment did not decide the question between the parties.

Marshall, Ch. J., delivered the opinion of the court.—There were two pleas by the defendant: 1. That the defendant was not indebted to the plaintiff. 2. That the subject-matter of the suit was *res adjudicata*. The former plea was triable by the jury; the latter by the court. There was a trial by the jury of the issue, and the jury found a verdict for the defendant. Upon the plea of "*res adjudicata*," there does not appear to have been any replication or denial, so as to make any issue to the court. There is nothing on the record, *to show that the question of *res adjudicata* was even submitted to the jury upon the trial. Their verdict, for aught that [*171 appeared on the record, was simply confined to the first and proper issue, triable by the jury. This issue being found for the defendant, the other plea became immaterial to the defendant. The court, then, cannot infer that it was ever tried. There is, then, no error apparent on the record, and the judgment is affirmed, with costs.

Judgment affirmed.

(*a*) This case was decided at January term 1831.

*Nathaniel Cox, Nathaniel and James Dick, Plaintiffs in error, *v.* United States, Defendants in error.

Writ of error.—Judgment on penal bond.—Treasury transcripts. Lex loci contractûs.

The United States instituted a suit in the district court of the United States for the eastern district of Louisiana, according to the practice of that state, upon a joint and several bond, given by a navy-agent and his sureties, and a verdict and judgment were entered in favor of the plaintiffs, against the three defendants; which entry stated the sums for which the defendants were jointly and severally liable to the United States, according to the judgment. On the trial, one of the defendants took a separate defence; and he afterwards prosecuted a writ of error to this court, without joining the other two defendants in the writ; the other defendants also issued a separate writ of error; and the plaintiffs in error, in each writ, gave several appeal bonds.

The court overruled a motion to dismiss the cause: the ground of the motion being, that but one writ of error could be sued out; and that all the defendants should have united in the same.

The petition by which the suit on the bond was instituted, stated the debt to be $15,555.18, the verdict of the jury was for $20,000; and upon this a judgment was entered up against the estate of two of the obligors in the bond, jointly and severally, for $20,000, and a judgment against two of the legal representatives of one of the obligors, for $10,000 each. "Upon no possible ground, can this judgment be sustained."

The principles which have been established by the decisions of this court relative to the admission of treasury transcripts in evidence, in suits by the United States against public officers.

A bond was given by the navy-agent at New Orleans, and his sureties, to the United States, conditioned that he should faithfully account for all public moneys received by him, &c., the sureties in the bond having been sued on the same, after his insolvency and decease, claimed that the United States were bound to divide their action, and take judgment against each surety, for his proportion of the sum due, according to the law of Louisiana; considering it a contract made there, and to be governed in this respect by the law of that state: *Held*, that the liability of the sureties must be governed by the rules of the common law; the accountability of the principal being at the city of Washington, to the treasury of the United States, and the bond being joint and several, each is bound for the whole; and that the contribution between the sureties is a matter with which the United States have no concern.

The general rule of law is well settled, that the law of the place where the contract is made, and not where the action is brought, is to govern, in enforcing and expounding the contract; unless the parties have a view to its being executed elsewhere; in which case, it is to be governed according to the law of the place where it is to be executed.

Admitting the bond to have been signed at New Orleans, it is very clear, that the obligations imposed upon the parties thereby, looked for its execution to the city of Washington. It is
*173] immaterial, where the services as navy-agent were *to be performed; his accountability for non-performance was to be at the seat of government; he was bound to account, and the sureties undertook that he should account, for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond was given with reference to the laws of the United States on that subject; and such accounting is required to be with the treasury department, at the seat of government; the navy-agent is bound, by the terms of the bond, to pay over such sums as may be found due to the United States on such settlement, and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at Washington; and the liability of the parties must be governed by the rules of the common law.[1]

Error to the District Court for the Eastern District of Louisiana. On the 19th of October 1825, the district-attorney of the United States filed in the district court of the United States for the district of Louisiana, the following petition, and copy of a bond, on which the cause of action stated in the petition was founded:

[1] Duncan *v.* United States, 7 Pet. 435; United States *v.* Stephenson's Executors, 1 McLean 462.

Cox v. United States.

The petition of the United States, by their attorney, prosecuting within and for said district, respectfully states, that Joseph H. Hawkins, late of New Orleans, navy-agent of the United States, now deceased, John Dick, late of New Orleans, now deceased, and Nathaniel Cox, of the same place, on the 10th day of March, in the year of our Lord 1821, were indebted to the United States in the sum of $20,000, for the amount of their obligation in writing, sealed with their seals, for the said sum, bearing date the said day and year, and payable, jointly and severally, by them, their heirs, executors and administrators; as will appear by a certified copy thereof hereunto annexed. To which said obligation, a condition was annexed, wherein it was provided, that if the said Joseph H. Hawkins should regularly account, when thereunto required, for all public moneys that might be 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 general government of the United States, as should be duly authorized to settle and adjust his accounts; and should moreover pay over, as he 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 said obligation should be [*174 void, else it should remain in force. And the United States further state, that the said Joseph H. Hawkins did not, in his lifetime, regularly account, as aforesaid, for all public moneys received by him, from time to time, and for all public property committed to his care; and did not pay over, as aforesaid, any sum or sums of money due to the United States as aforesaid; and did not faithfully discharge, in every respect, the trust reposed in him, as aforesaid; but did, at his death, remain indebted to the United States in a large balance of money, to wit, the sum of $15,553.18, for moneys, from time to time, since the date of the said obligation, received from the United States, as navy-agent as aforesaid: by reason of all which, the condition of the said obligation hath become broken and the said debt become due; wherefore, they pray process of summons against the legal representatives of the said Joseph H. Hawkins, deceased, and of the said John Dick, deceased, and against the said Nathaniel Cox; and after due proceedings had, that judgment may be rendered against them for the said debt, with interest and costs. J. W. Smith, Attorney U. S.

Copy of bond annexed to the petition.—Know all men, by these presents, that we, Joseph H. Hawkins, as principal, and John Dick and Nathaniel Cox, as securities, are held and firmly bound unto the United States of America, in the sum of $20,000, current money of the United States, to be paid to the said United States, for which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, in the whole and for the whole, jointly and severally, firmly by these presents. Sealed with our seals, and dated this tenth day of March, Anno Domini 1821. The condition of the above obligation is such, that if the above-bonded Joseph H. Hawkins 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, any sum or sums that may be found due to the United States upon any such settlement or settlements, and shall also faithfully discharge, in every respect, the trust reposed in him, then the above obligation to be void and of no effect, otherwise, to remain in full force and virtue.

The bond was duly executed by the obligors, and then approved by the district-attorney of the United States for the Louisiana district. The copy was regularly certified from the navy department.

Citations were issued from the office of the clerk of the court, on the 20th October 1827, &c., to "the legal representatives of J. H. Hawkins, deceased," "the legal representatives of John Dick, deceased," "and to Nathaniel Cox;" to appear and answer, &c. The marshal returned *non est inventus* as to the legal representatives of J. H. Hawkins," and "served on the legal representatives of John Dick, deceased," and on "Nathaniel Cox." The separate answer of Nathaniel Cox, filed on the 11th of December 1825, stated, that he did sign the bond sued upon as surety of the late J. H. Hawkins, navy-agent; but he denied, that the sum of $15,553.18 was due by the sureties, as stated in the petition, but only $12,682.46; for this, that since the decease of the said J. H. Hawkins, he had paid on his account, and been allowed in credits at the treasury of the United States, the sum of $7317.54, deducting which from the amount of said bond, $20,000, leaves the aforesaid sum of $12,682,46. And that, as between himself and his co-surety, he was entitled to a credit for this sum, $7317.54, deducting which from the amount of $10,000, or one half the penalty of said bond, there will remain due by him the sum of $2682.46, and his co-surety the remainder of the sum, viz., $10,000, which apportionment he prayed might be made and allowed to him, as against his co-surety, with all other and further relief which he might be entitled to.

On the 27th of February 1828, on motion of the district-attorney, and on giving the court to understand that Mrs. Todd, a surviving sister, and one of the heirs of John Dick, deceased, resided out of the district, in the
*176] state of Virginia, the court *ordered that Levi Pierce, Esq., attorney of Nathaniel and John Dick, two of the heirs of John Dick, deceased, be appointed curator *ad hoc* of Mrs. Todd herein.

On the 3d of March 1820, Nathaniel Cox filed a supplemental answer, representing that the succession of his co-surety, John Dick, was solvent, and able to pay the debt claimed. He demanded that the United States divide their action, reducing their demand to the amount of the share and proportion due by each surety.

On the 20th May 1828, Nathaniel and James Dick filed their answer to the petition of the United States; that no amicable demand had been made according to law, and that they were, therefore, not bound for any expenses of this suit; and they further answered, that they were two of three heirs of J. Dick, who had accepted the succession of said J. Dick, with benefit of inventory; the third heir being Sarah Dick, wife of J. Todd, of the state of Virginia, citizen: and that, therefore, they were in no event bound for more than two-thirds of any debt of said J. Dick; that the debt now claimed, they denied was in any manner due by the estate of John Dick, but should the same be proved, they said that they had not received more than $4000

of the estate of J. Dick, and were liable for no more than $2000 each, of which they prayed judgment and trial by jury; and that they might be dismissed with, &c.

The court, on the 19th December 1829, on the plea of Nathaniel Cox for a division of the action, overruled the same. The cause came on for trial before a jury, on the 2d January 1830, when a "verdict for plaintiffs for $20,000, being the amount of the bond," was rendered.

Bills of exception were tendered, and sealed by the court, on the trial; which stated, that "Nathaniel Cox offered to prove, under the prayer of his answer, that his co-surety should be decreed to contribute in payment, according to their respective shares; that certain payments had been made in diminution of the balance of said Hawkins, since his death, and before the date of the transcript produced in evidence by the district-attorney, by the said Cox; and for this purpose, offered in evidence a certain transcript from the treasury books, duly certified; the introduction of said testimony was opposed *by the counsel for the heirs of John Dick, his co-surety; on the ground, that in this suit there could be no examination [*177 of the rights of the sureties, as between themselves; which objection being sustained by the court, the testimony was rejected."

And "that Nathaniel Cox also offered in evidence another transcript from the books of the treasury, duly authenticated, purporting to be a list of payments made and receipts taken, and passed at the treasury of the United States, in the name of said Joseph H. Hawkins, since the 30th September 1823 (it having been previously shown that the said Hawkins died on the first of October 1823), in support of the allegations in his answer, that he had paid the sum of $7317.54, since the decease of said Hawkins, in his capacity of surety; the introduction of said testimony was opposed by the attorney of the United States, on the ground, that no credits could be allowed but such as had been presented at the treasury, and refused; which objection being sustained by the court, the evidence was refused; and the same defendant having further offered in evidence the account of said Joseph H. Hawkins, as navy-agent, with the Bank of the United States, in this city, during the months of August and September, immediately preceding his death, in support of his said plea, the attorney for the United States objected to the introduction of the same, on the ground, that the same could not be evidence against the United States; the court sustained also this objection, and overruled the testimony."

On the 11th January 1830, Nathaniel Dick and James Dick filed a motion in arrest of judgment, stating that there was not in the case the number of parties required by law, the other heir not having filed any answer, or not being in court by judgment by default; that the judgment cannot be against two heirs, for the whole amount due by John Dick, when it is on record, by motion of the United States district-attorney, that there is another heir, to wit, Sarah Todd, the motion of the said attorney being on the 27th February 1828, as extracted from the record book: "On motion of the district-attorney, and on giving the court to understand, that Mrs. Todd, a surviving sister and one of the heirs of John Dick, deceased, resident out of the district, to wit, in the state of Virginia, ordered, that Levi Peirce, Esq., attorney of Nathaniel Dick, and *James Dick, two [*178

of the heirs of John Dick, deceased, be appointed curator *ad hoc* of the said Mrs. Todd herein."

The motion in arrest of judgment was overruled by the court; and on the 18th of January 1830, judgment was entered in favor of the United States, in the following terms:

"The United States *v.* Representatives of Hawkins *et al.*—The Court having maturely considered the motion in arrest of judgment, now order that judgment be entered up, as of the 15th instant, against the estate of John Dick and Nathaniel Cox, jointly and severally, for the sum of $20,000, with six per cent. interest from the 2d day of January 1830, until paid, and costs of suit; and that judgment be entered up against Nathaniel Dick and James Dick, for the sum of $10,000 each, with six per cent. interest from 2d January 1830, until paid, and the costs.

SAMUEL H. HARPER, Judge U. S."

The defendants, on the 20th of January 1830, paid into court the sum of $12,682.46, on account of the judgment.

Nathaniel Cox, on the 21st January 1830, issued a writ of error to this court; and on the same day, he filed an appeal bond, conditioned to prosecute the same with effect. The bond recited, that he had filed a petition, praying that a writ of error may be allowed to him from a certain final judgment rendered against him in the suit of the United States against the heirs and representatives of Joseph H. Hawkins, the heirs and representatives of John Dick, and Nathaniel Cox, in the district court of the United States in and for the eastern district of Louisiana. The writ of error alleged, that in the proceedings in the case in the district court of Louisiana, "manifest error had intervened to the great damage of the said Nathaniel Cox."

Afterwards, on the 22d January 1830, "Nathaniel Dick and James Dick, two of the heirs of John Dick, deceased," prayed a writ of error to this court, which was awarded; and an appeal bond was given by them, on the 25th of January 1830, which recited, that they "had filed a petition, praying that a writ of error may be allowed to them from a certain final judgment rendered against them, in the suit wherein the United States are plaintiffs, against the heirs and legal representatives *of Joseph H. Hawkins, *179] the heirs and legal representatives of John Dick, and Nathaniel Cox, defendants, in the district court of the United States for the eastern district of Louisiana." This writ of error stated that the court were informed, that in giving the judgment in the case, "manifest error had intervened" "to the great damage of Nathaniel Dick and James Dick, two of the heirs of said John Dick."

Separate citations were issued upon each writ of error. Upon the first, the citation required the United States "to show cause why the judgment rendered against Nathaniel Cox should not be reversed." On the second, the defendants in error were required to show cause "why the judgment rendered against Nathaniel Dick and James Dick should not be reversed."

The case, at an early day of the term, on the motion of *Taney*, Attorney-General of the United States, was dismissed; no appearance having been entered for the plaintiffs. It was afterwards reinstated, on motion of *Johnston*, who appeared as the plaintiff's counsel. Afterwards, the attorney-general of the United States moved the court "to quash the writ of error in the

cause, because all the parties had not joined in the writ of error, the judgment in the court below being joint and several; but had sued out several writs of error."

Before proceeding to argue the motion, Mr. *Taney* asked the court, if his having, on a former day, appeared in the case for the purpose of moving to dismiss the writs of error, was to be considered as a general appearance The court stated, that they considered it a special appearance, for the purpose of the motion only.

For the United States, it was contended, that all the defendants should have united in the same writ of error. The judgment being joint and several, it must stand against all; unless it should be reversed against all. The defendant, Nathaniel Cox, made a separate application for a writ of error, gave a separate bond, and issued a separate citation, calling on the United States to sustain the validity of the judgment of the district court against himself only. The *other plaintiffs in error, Nathaniel and James [*180
Dick, also proceeded separately, by writ of error, bond and citation, and they require the defendants in error "to show cause why the judgment against them shall not be reversed." Thus, therefore, the whole character of the case is changed, when brought to this court. Here, the proceedings are separate and distinct; the parties are different from those in the joint proceedings below; they came here by different writs of error; and call upon the United States to appear in this court by different citations and for separate purposes.

It is absolutely necessary, in proceedings at the common law, that all the parties to a judgment shall unite in the writ of error to the superior court, unless, by regular process, they have been severed. The writs of error by which the case is brought up are not in the proper form. They state a separate judgment to have been rendered in Louisiana, and the record shows a joint and several judgment. 9 Petersdorff's Abr. 10, note; 11 Wheat. 414. If the case can be brought up separately, one party may present it to this court at one time, and the other at another time. The question is unimportant in the final disposition of the case, unless, if the writs of error are erroneous, the security which is given in the court below will thereby be released; and thus the United States be deprived of the benefit of the appeal bond, the writs of error being a *supersedeas*.

Although the proceedings in the court of Louisiana are not according to the common law, while in that district, yet when these proceedings are brought to this court, they must go on according to the common-law rule; and so the act of congress considers the subject. Nor can the parties in such a case be without remedy. If the usual forms of the common law, in cases of writs of error, will not apply to such a case as this, and the proceedings in the courts of Louisiana, being according to the civil law, require a different form of a writ of error, to meet the actual situation of the parties, this court has full authority by law to frame the proper and competent process.

For the plaintiffs in error, *Johnston*, of Louisiana, stated, that he felt no particular interest in this question, except as a general rule of practice; inasmuch as the dismissal would not *preclude the plaintiffs from [*181
bringing up a writ of error in any form that might be prescribed,

within the time allowed by law. The law of congress does not prescribe the manner of suing out a writ of error. It is, therefore, left to the rules of practice which the court may adopt, to facilitate the uniform regular administration of justice. No rule has been established in this case. The court, in general, refer to the laws and practice in England, not as law, but as a guide; as the evidence of what enlightened men have considered, in the country from which we borrow our terms of law, as the best rules of practice.

It is true, by the laws of England, that all persons who may be damnified by a judgment, may sue out a writ of error, even those indirectly and remotely interested. It is true also, as a general rule, that all parties must join in a writ of error. But if the parties do not or will not join, the court order a summons and severance; and that proceeding authorizes any party to proceed in the writ. If the court, therefore, adopt the rule that all must join, they must also adopt the remedy of ordering, in all proper cases, a severance of the parties; and this makes the whole affair a mere matter of form.

It must be obvious, that in many cases, all the parties will not join in the appeal; sometimes, they are satisfied with the judgment; often, they have no interest in reversing it. It will sometimes occur, that the judgment is favorable to one defendant and unfavorable to the other; in suits against several, the chief question may be among the defendants; and in the case now pending, the question was, whether a payment made by one, should go to his credit, or to the credit of all: so, by the laws of Louisiana, where the defendants may pray judgment against the plaintiff, a judgment may be rendered against one defendant, while the other defendant may have judgment against the plaintiff: in all these cases, the defendants have a different and adverse interest, when there would be no motion to appeal, and when even their own interest might be compromitted. The party interested in reversing the judgment only will sue out a writ of error. The court cannot compel the other party to join, and justice could not be done, if either party could defeat the other of their legal rights. The aggrieved party must be allowed to bring up the case, and if it is necessary *to comply with obsolete forms, the court must decree a severance.

*182]

But in this case, all the parties are before the court. They had separate grounds of defence, the court below allowed them to sever in their answer; judgment was entered against all *in solido;* and separately, for the whole amount, against two of the defendants. They have both sued out a writ of error, so that the only motion here should be to consolidate. The parties have distinct grounds of error, and claim distinct remedies; but the judgment may be reversed in whole or in part; it may be good against one defendant, and erroneous as to the others. The case of *Williams* v. *Bank*, in 11 Wheat. 414, is not applicable, because Williams alone took up the case; but even there, I understand, the court would have granted summons and severance.

The reason assigned for the English rule, why all parties must join, is, that a writ of error suspends execution; which is not so here, where execution goes in all cases against all those who have not joined in the writ of error and given bond. This must be a very important principle in practice, and ought to be settled. It is extraordinary, that no such case has heretofore occurred. The object must be to have a reasonable rule, a practicable

and convenient rule, that will facilitate the administration of justice, that will advance the remedy by writ of error; and not one calculated to defeat or obstruct the course of the laws, by objections, merely technical, as to the forms of proceeding. It will be found more convenient to adapt our proceedings upon writ of error to the general practice of the state courts. They are more consonant to our system, and better known to the bench and the bar.

THE COURT overruled the motion to dismiss the writ of error.

The case afterwards came on for argument.

For the plaintiffs in error, the following errors in the proceedings and judgment were assigned:

1. The judgment is void, because no judgment could be rendered against these parties, under the general and indefinite description "of the legal representatives of Joseph H. Hawkins and John Dick." The citation was not legal or valid, *and the return does not state on whom service was made, and the truth of the return depends upon the marshal's knowledge of the legal representatives. It may be said, this is cured by the appearance of the parties, but J. and N. Dick deny that they are the only legal representatives, and the fact is admitted by the district-attorney, that they are not. [*183

2. The judgment is erroneous, because the court rejected legal evidence, to wit, "a transcript from the books of the treasury, duly authenticated, purporting to be a list of payments made and receipts taken and passed at the treasury of the United States," since the death of Hawkins, for $7317.54; which deprived him of the means of showing that other credits, besides those stated in the transcript on which the suit was brought, had subsequently gone to their credit, or that the payments made by Cox, after the death of Hawkins, ought to have gone to the credit of the bond, or to his half of it, or of showing that the amount claimed in the petition was too large, and thereby supporting his plea that he owed only $12,682.46, and not $15,553.18.

3. The judgment is erroneous, because it is rendered for a larger sum than is demanded in the petition.

4. Because it is rendered, first *in solido* against the sureties, and second, it is rendered against J. and N. Dick, each, for $10,000, that is, after a judgment against the parties, for the whole amount of the bond. There is also a judgment against two only of the legal representatives of J. Dick for an additional $20,000; making in all $40,000, which is double the amount of the bond, and a much larger sum than is claimed to be due.

5. Because the judgment is vague and void from uncertainty, being rendered against "the estate of J. Dick and Nathaniel Cox, jointly and severally." Whereas, the judgment ought to have been against the persons, in their individual character, who represent the estate of J. Dick.

6. Because the judgment, if rendered against the legal representatives of John Dick, ought to have been against all the *heirs jointly, and not against two of them, and not against them separately, and then only for an amount not exceeding the balance stated to be due to the government, and not exceeding the amount which they had received from the [*184

estate of John Dick; and the judgment ought to have stated, that the money was to be levied of the property, real and personal, of the estate of John Dick, in their hands to be administered.

7. The judgment is void, because no execution could issue against the estate of John Dick, and none could be executed.

8. The judgment is erroneous, because while it appears by the petition and transcript, that only $15,553.18 were due by Hawkins, the defendants have paid $12,682.46, and there is still a judgment against them unsatisfied *in solido* for $7317.54, and moreover against J. and N. Dick, for $10,000 each, and does not follow the verdict, which is also void on its face, being for a larger sum than is demanded.

9. The judgment is erroneous, because there is judgment for costs, notwithstanding the plea of the Dicks, which has not been disproved, that no amicable demand was made for the money; the practice of Louisiana requiring that such a demand of a debt must be made before suit, or the plaintiff cannot recover costs.

10. The motion in arrest of judgment ought to have prevailed, because judgment ought not to have been rendered against two of the heirs, for although sureties are jointly and severally bound, yet each and all of the heirs of either of the sureties must contribute equally to the portion due by the person they represent, according to the proportion they receive from the estate.

11. The court erred in refusing the evidence of Hawkins's account as navy-agent with the Bank of the United States. The money at his credit as navy-agent, in the bank, if any, is the property of the United States, and ought to go to the credit of his account with the government, and the evidence ought to have been received for what it was worth.

The whole proceedings are extremely irregular, and the judgment erroneous, and ought to be reversed.

*185] *Johnston* read the errors assigned, and commented on each. He would waive, in the argument, all the objections to the form of proceeding, and bring the question to the principal errors on which he hoped to reverse the judgment. The suit was instituted upon a bond of $20,000, against the sureties of Hawkins; by which they were bound to pay for him only so much as he was indebted to the government. The petition states, that Hawkins, at the time of his death, was indebted $15,553.18, and consequently, they were only bound for that sum, and no more. Yet a verdict has been rendered for $20,000, and judgment has been entered for $20,000, against the parties, *in solido;* which being a larger sum than was demanded, and for a sum exceeding the balance stated by the treasury to be due, is erroneous upon the face of the record.

But Cox, one of the sureties, pleaded, that since the death of Hawkins, he had paid the sum of $7317.54, in vouchers taken in the name of Hawkins, which had been admitted at the treasury; and tendered the transcript from the department in support of his plea. This the court refused; to which a bill of exceptions was taken, which brings this point before this court. The district court erred in this, because any payment made by either party, since the death of Hawkins was clearly subsequent to the balance on which suit was brought, as stated in the petition. It was, besides, legal

evidence, and necessary to his plea. The party did not tender vouchers as the court seemed to suppose; but a transcript from the treasury, of vouchers admitted since the death of Hawkins. The court erred in this also, in refusing the transcript. Cox pleaded, that he was himself entitled to a credit for $7317.54; which he had paid, as so much of his half of the bond; and prayed an apportionment with the co-security, and that each might contribute according to their respective shares. *He offered in evidence a certain transcript from the treasury books, duly certified, [*186 of certain payments made by Cox, in diminution of the balance of Hawkins, since his death, and before the date of the transcript offered by the district attorney.

Mr. Johnston argued, that this was a bond executed in Louisiana, and was governed by the laws of the place. That although the parties were bound *in solido*, it was only an eventual, not a positive responsibility. The principal is first bound, by every legal and moral obligation, unless he is absent or insolvent, or his affairs greatly involved; and the sureties have a right to demand a discussion of his property; and they are liable only when his property is exhausted. Then begins the responsibility of the sureties; and they are answerable, in the first instance, only for their proper proportion, unless in case of absence or insolvency; each has a right to pay, as Cox did here, the amount of his responsibility, and to remain bound only for the balance, on the failure of the co-surety.

The transcript ought to have been received, as evidence to show a payment after the death of Hawkins; whether the credit was to go to Cox or all the sureties. The evidence tendered was legal and proper, whatever legal consequences might follow.

The case was irregularly brought against the Dicks, without stating their names, and in what way, whether as heirs, executors or administrators, they were responsible. The Dicks were only two of three heirs; and as they had accepted the estate, "with the benefit of an inventory," they were liable only for the amount they had received. Yet the judgment is rendered against them *in solido*, as if they, the heirs, were jointly bound with Cox; and then judgment is rendered, in addition, against both the Dicks, for $10,000 each.

Mr. Johnston contended, the suit was improperly brought; the testimony was illegally rejected; the judgment was erroneous, being for more than was demanded; more than was due; being double, and not conformable to the verdict, and was itself void, on the face of the record.

Taney, Attorney-General, stated, that the suit was brought on the bond of a navy-agent, dated March 10th, 1821, taken *under the authority of acts of congress passed March 3d, 1809, § 3, 4 (2 U. S. Stat. [*187 535), and May 15th, 1820, § 3 (3 Ibid. 592). He contended, that the United States were not bound to divide their action, and reduce their demand against Cox. 1. The sureties being bound *in solido* with the principal, they are not, by the laws of Louisiana, entitled to a divison of the action. Civil Code of Louisiana, 615, 616, art. 3014. 2. But if they were so entitled by the laws of Louisiana, yet this bond is to be interpreted according to the rules of the common law, and the obligations of the parties measured accordingly. Each surety is bound for the whole, by the very

terms of his contract; and by the well-established course of judicial proceedings, as known to the common law, either surety may be used on an instrument of this description, and judgment rendered for the whole.

Where the act of congress speaks "of a bond with one or more sufficient sureties," it describes an instrument well known to the common law; which creates certain obligations on the one side, and gives certain rights and remedies on the other; and this bond being joint and several, the whole amount may be recovered from either. If the bond were joint only, suit against one could not be sustained, by the principles of the common law, without the other; but when you obtain judgment, you might levy the whole against either.

The meaning of the defence in this case is, that each surety is liable only for the one-half, and that no more can be recovered from him. The inconvenience and injustice of such an interpretation is evident. The law of congress intended the same contract and the same obligation, wherever the obligors resided. It meant to require "a bond and security," not only in the form known to the common law, but in its substance and effect also. We must resort to the common law for the form of the contract directed by the laws of congress. If we are able to look to it for the form, we must look to the same source for its substance and obligations.

The court were right in rejecting the transcript from the treasury, as evidence for the purpose for which it was offered. The transcript was not *188] offered to prove that Hawkins was entitled *to these credits; the credits had been already allowed to him at the treasury. The exception states, that the payments were made and receipts taken in his name. The evidence was offered to show that Cox was entitled to those credits.

This question arises under the 4th section of the act of congress, of March 3d, 1797 (1 U. S. Stat. 515). The words of the 4th section are general, and apply to all suits against individuals: § 1 speaks of "revenue officers and other persons accountable for public money:" § 2 speaks of cases of "delinquency," where suits have been instituted: § 3, of persons indebted to the United States as aforesaid: § 4 embraces all suits against "individuals." The fair constructions of the second and third sections would embrace suits against the sureties as well as the principal. But the fourth section seems to be carefully worded, so as to embrace suits against sureties, as well as principals. *United States* v. *Giles*, 9 Cranch 236.

Upon the death of Hawkins, and before and at the time of his death, Cox was indebted to the United States in $20,000 (the penalty of his bond), on account of the delinquency of Hawkins. His offer was to prove certain payments at the treasury, to discharge himself from a part of this debt. It was the claim of a credit to himself for the amount of such payments. He could not be allowed them, unless they had been first offered and rejected by the proper accounting officer.

To this it may be objected, that he could not prove them disallowed, because they had been allowed. But it is answered, that they had not been allowed to him, in discharge of his debt, but to Hawkins, in discharge of a larger debt. The allegation is, that they were credited to Hawkins, by mistake, when they ought to have been credited to him. It was his duty, if he claimed the credit, to have the error corrected at the treasury. It would

have been the common case of passing to the credit of one man, by mistake what properly belonged to another. The reason for requiring this application is obvious. It is the duty of the accounting officers to obtain information, and to warn the district-attorney of the grounds of the rejection. It might have appeared, that this money was paid out of the *funds of Hawkins. The reason why it was credited to him, and not to Cox, would have been stated, if he had applied at the treasury. [*189

But there is even a stronger reason for requiring that Cox should have claimed this credit at the treasury. The credits allowed to Hawkins's account cannot be altered by the accounting officer, without the application of Hawkins's representatives, and proof of the mistake. They remain there, therefore, to his credit. Suppose, his representatives are sued, would they not be entitled to these credits? They would not be bound by the verdict in Cox's case, for they are not parties; they are returned *non est inventus*. It is not only the requirement of law, therefore, but it is the dictate of justice, that Cox should furnish the accounting officer with the evidence of his claim to these credits; for otherwise, the United States may, in the first instance, be compelled to allow them to Cox, and afterwards, to allow them again to Hawkins, in the payment for the excess due beyond the penalty of the bond. As matters now stand, if Cox obtains the verdict, and Hawkins's representatives are sued, they have nothing to do but demand a copy of the transcript, and they prove him entitled to the credit. The transcript is made to prove for both. If it proves Cox's claim, because they were entered after Hawkins's death, it will prove Hawkins's claim to them, because they are made in his name. They may have been justly appended to Hawkins's credit, if paid out of his funds; and if Cox is entitled to them, he ought to exhibit his proof to the accounting officer.

The refusal to admit the account with the bank in evidence, is justified by the reasoning on the preceding point. The account of Hawkins with the bank could be no evidence against the United States. If he had no funds there, that fact could be proved by the proper officer of the bank, but an account between him and the bank, could, upon no principle, be evidence against a third party. But if his accounts were evidence against third parties, how could they be received, to prove that Cox paid at the treasury the items in question out of his own funds? The offer is not made in connection with the offer of other evidence to prove that Hawkins was insolvent, and left no *property out of which his payment could have been made. Nothing is offered but the transcript from the treasury, and the bank account; and standing by themselves, they cannot even tend to prove that the payment was made by Cox, and could not have been made out of Hawkins's funds. If he had not money to his credit as navy-agent, in the bank, this is by no means evidence, that he had not property or funds elsewhere, out of which this debt or these items might have been paid. [*190

As to the motion in the district court in arrest of judgment, by James and Nathaniel Dick, Mr. *Taney* argued, that this point divided itself into two branches.

1. That judgment must be arrested, because the proper parties are not before the court. This proposition assumes, that there can be no judgment

against any of the representatives of Dick, unless all of them are before the court. To this it is answered: 1. The law and practice of Louisiana does not require it. In the case of creditor, and principal and sureties debtors, the creditor may include all in one suit, or he may not. Civil Code, 616–17, art. 3018–20. It is the same principle, in cases of succession or representation of heirs; the demand is separate for his proportion. Civil Code, 327, art. 1376–7. Moreover, upon a mere point of practice, the decision of the court will be presumed to be right; and it is incumbent on the plaintiffs in error to show the law, or the decision, which proves them to be wrong.

2. If, by the practice of the Louisiana courts, it was necessary to make all the heirs parties, yet it would be otherwise, in the courts of the United States. The act of congress of May 26th, 1824 (4 U. S. Stat. 62), was not intended to allow a practice that would produce a discrepancy with an act of congress. The court could alter the practice by rule in any case; and in ordinary cases, evidence of the rule making the alteration would be required. But where the practice of the state would produce a discrepancy with a law of congress, no rule was necessary; it became the duty of the judge to reject the practice. In other words, the act of 1824 excludes all such practice and proceedings in the state courts as do not harmonize with the laws of congress. *If, therefore, a practice in the state courts, *191] requiring all the heirs of a deceased debtor to be made parties in a suit by the creditor, would be inconsistent with any rule of proceeding established by the laws of congress, such practice was not introduced, and was not intended to be introduced, by the act of 1824. A practice which required all the heirs of a deceased debtor to be made parties in a suit by the creditor, would be inconsistent with the laws of the United States; and if the state practice required Mrs. Todd to be made a defendant in this case, it would occasion a discrepancy with the laws of the United States. This is not a proceeding *in rem*, but a personal action against the heirs of John Dick, to charge them by reason of the property they have inherited from him. Civil Code, 326, art. 1370. Moreover, it is not suggested, that Mrs. Todd's share of the succession, or any other property belonging to her was in the eastern district of Louisiana. But the situation of any property belonging to her would not be material to this question. In the answer of Cox, she is stated to be the wife of J. Todd, of the state of Virginia. In the suggestion of the district-attorney, she is stated to reside out of the district, to wit, in the state of Virginia; and in the motion in arrest of judgment, the suggestion of the district-attorney is adopted, and made the foundation of the motion. It is nowhere suggested, that she was then within the district.

The act of congress of 1789, ch. 20, § 11, declares, "and no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Mrs. Todd, therefore, could not be made a party in this suit. The court had no jurisdiction in a personal action against her. And if in a suit against the other representatives, she is a necessary party, then the United States cannot sustain a suit anywhere for this claim. They can- *192] not sue Mrs. Todd, in *Louisiana, and they cannot sue Nathaniel and James Dick, in Virginia. *Craig* v. *Cummins*, Pet. C. C. 431 note.

As to the objection, that the judgment cannot be for the whole amount against two out of the three heirs, Mr. Taney argued: The only defendants in the case were Cox and the two Dicks. This verdict is a general one for plaintiffs, for $20,000. The judgment necessarily followed the verdict, and even formed it. The court could not, on that verdict, have given judgment against the Dicks for two-thirds of the sum due. The jury found the whole sum due jointly from the defendants, and the judgment necessarily followed it, unless the verdict was set aside. The verdict was conclusive. The defendants might have made the objection, before verdict, and if the court overruled it, have taken an exception; and then the opinion of the court could be revised on the writ of error. And if the court gave the direction, and the jury disregarded it, the court could have granted a new trial. The error complained of is in the verdict, and not in the judgment. It is one of fact, and not of law, and cannot be reviewed here on writ of error. *Parsons* v. *Armor*, 3 Pet. 425; *Parsons* v. *Bedford*, Ibid. 445, 449. Upon the authority of these cases, it seems clear, that as there is no exception to an opinion before the verdict—the verdict was conclusive, unless set aside on a motion for a new trial.

As to the objection that the representatives of Hawkins and of Dick are not named, it was considered, that Hawkins's representatives are not parties here, and were not parties below. They are not named, and have not appeared. The appearance of Nathaniel and James Dick, and their answer, waives the omission to name them. They answer, and state who are the representatives of John Dick. A party may voluntarily appear, without process against him.

It is said there was no amicable demand. 1. There is no necessity for an amicable demand, by the United States. It was the duty of the debtors to settle and pay; and if they did not, it was the duty of the officers to sue. The practice of Louisiana cannot alter the law of congress. *2. The amicable demand, if necessary, was a fact; and is disposed of by the verdict. [*193

The plaintiffs in error, Nathaniel and James Dick, state that they have received but $4000 of the succession of John Dick. This also is disposed of by the verdict. There is no opinion given by the court on this point, and no exception on the subject.

The judgment is said to be erroneous, because of its form. The form of the judgment depends on the practice in that state. It is not a judgment, in the first instance, against Nathaniel and James Dick, but against the estate of John Dick; and the latter part seems to be explanatory of the first. If it stood on the first clause, Mrs. Todd would be embraced in it, as she had succeeded to a part of the estate. The second clause seems to have been introduced, to show that the judgment was against the two defendants in court. The form is unlike a common-law judgment, but in a mere matter of form, in a proceeding so unlike those known to a court of common law, this court would require clear authority to show it was erroneous, before they reversed it. It was evidently intended to follow the verdict and contract.

Johnston, in reply, stated, that the ground of defence taken by the learned attorney of the government was one of great interest to the state of Louisiana. It is, that the bonds executed in that state by the inhabitants

of that state, to the government, are not governed by the laws of that state; but by the common law. To the admission of this principle, which must affect all the relations of all the citizens of Louisiana to the government, and entirely change the nature of their obligation and responsibilities upon all bonds to the government, he felt it his duty to protest. The government required a bond; but they have no law regulating the form and the extent of the obligation of the bond. They have no common law of the United States, and the court has no power to adopt any system. They have, therefore, no law, of binding force upon the court. But in this case, the court must apply the general rule applicable to all human affairs; that the contract shall be governed by the law *of the place, the only law known to the parties. Then the court have a guide, and the citizens a law. No injury will result, as the laws of all the states conform to the common law, except those of the state of Louisiana, which are founded on the principles of the civil law. Why should not the people of that state have the benefit of their laws, unless some material injury will result? The laws are quite as good for the enforcement of the contract, and the security of the government, and much more just and beneficent, than the severe and inflexible rules of the common law.

*194]

This case beautifully illustrates the difference in principle that runs through the two systems. The one contains a set of rigid principles that makes the hard enforcement of the contract its main object. The other is paternal, it aims at justice, but mild and mitigated justice. The one seems made only for the creditor, and to be utterly regardless of the rights or feelings of the debtors; it confers the power upon the creditor of forcing the payment, from any and all the parties, without the slightest regard to the justice of the case among the co-obligors. The other looks to all the rights of all the parties; how the claims of the creditor may be enforced, without injurious delay, and without a multiplicity of actions, and how the debtors shall respond, according to the principles and moral obligation existing between them. By the common law, the creditor demands his bond; he claims judgment equally against the principal who has contracted the debt, and against the innocent sureties who are to be made responsible for him. He selects among them, and chooses whom he will pursue, and whom he will sacrifice. The law places all the parties equally in his grasp; he may, in the wantonness of power, while he saves one, from motives of favor or caprice, select his victim, pursue him to judgment, seize and sell and sacrifice his property; and then the ruined man is turned over to his remedy against the other party by a due course of law. The bond was not made merely for the government or the inexorable creditor; but it contains legal as well as moral obligations, between the principal and the security, and among the sureties themselves. *Although all the defendants are liable, they are not, upon moral and equitable principles, equally bound to pay; the principal is first bound to pay, by duty and honor; and there is strict propriety, while judgment is taken against all, that his property should be first discussed and exhausted, and when that fails, recourse must be had to the sureties; and here takes place a law between them, by which each is bound to pay equally his proportion of the common loss, and then if either fail, the other is reponsible to the creditor for him. Here is a spirit of equity running through the whole of this judicial transaction,

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which strikes the common sense of mankind. The other conforms to the severe and rigorous principles of that system which declares "*fiat justitia, ruat cœlum*:" that is, enforce the law, and administer justice for the creditor according to its stern decrees, if you ruin every party who invokes its protection. Justice is equally done to the creditor, in both cases, but how differently; in one case, it works injustice and does irreparable injury, and often brings ruin to the parties. It is not extraordinary, therefore, that we should claim the benefit of our equal laws, whose spirit we feel and whose principles we understand; and that we should deprecate the harsh and rigorous rules of the common law. By the civil law, the creditor obtains his judgment against all the parties, which binds their properties, but execution runs against them, in the order of responsibility, and according to the principles of justice, unless in case of absence, insolvency or involvement.

The common law obliges one party to pay for the rest, at the discretion of the creditor, at any secrifice; and then gives rise to other suits, with great expense, delay and loss among the parties. So also, by the equitable principles of the civil law, either party may pay in advance his proportion, or any part of it, and he shall have credit upon any claim against him. Here, Mr. Cox, knowing that in consequence of the insolvency of Hawkins, he would be answerable for at least half of the bond, made payments to the government, for which he was entitled to credit, as among the co-sureties; but the court refuses to allow him to produce the transcript, either to prove the payment for *himself, or as a general credit for the benefit of all the defendants. [*196

If, the absence of all law in the United States upon the subject, and the necessity of a rule, do not oblige the court to adopt the general law, to wit, the *lex loci*, which appears so much in harmony with our system, and they are free to adopt any code; the civil law recommends itself by its superior equity. But why should the court adopt the common law, which congress have not dared to do, and which congress cannot do, by a declaratory law. It is, in the case of bonds, harsh, severe and unjust. If left without any law, what necessity is there for the application of any legal principles but the common sense and legal discretion of the court?

The bond requires no form, but merely to express, in simple language, the nature of the obligation. The signing and the delivery, which has given rise to so much contestation, is a question of fact, to be ascertained by proof, and decided by a jury; it is not a question of law, it depends upon circumstances and adjudged cases, even in England. And as to the seal, of what importance in this age is the wax or the impression? it is not required by act of congress, it proves nothing, it may be the seal of any other person, or of no person; and yet if the courts adopt the common law, a bond, no matter how solemnly expressed, subscribed and delivered, is of no validity unless it has the authority of the wax! When the court come to the bond itself, it expresses in clear and intelligible language, that the parties have bound themselves to pay for the principal, if he fails; and common justice and common sense would require, that each should pay his just proportion. It does not seem that any particular law is necessary, to enable the court to render judgment in such a case—much less the common law; and if there is no necessity, how unjust to adopt a foreign law to govern contracts in Louisiana, to create liabilities, unknown to the laws and the people, which

are not necessary for the security of the government! All the other states have the benefit of their laws in such cases; why should Louisiana present the singular anomaly of a foreign law, introduced, not by the legislative power, but by judicial construction?

*197] The court have determined to adopt the judicial exposition of *the laws of the states by the state tribunals, in order to introduce a general comformity and harmony between the two systems. Why not extend the principle so as to obtain a perfect adaptation to the laws of the states, and a general uniformity?

There is, besides, an additional reason for adopting the laws of the state, and that is, that although John Dick was bound by the common law, *in solido*, yet his representatives are only bound to contribute, according to the laws of Louisiana: that is, that each should be responsible only for the sum he received as heir, and not for the sum due by John Dick, or for the share of any of his heirs. Here, the obligation of the bond must conform to the law of distribution of Louisiana.

Mr. Johnston said, however important this principle might be, as a general rule to the people of the state, he did not consider it important to the decision of this case. He relied upon the fact as stated, that Hawkins owed, at the time of his death, only $15,553.18; that the court refused a transcript from the treasury, which is full evidence, showing payments made since his death; and that the judgment is contrary to the evidence and the law. So stands the case upon the record; but he had no objection to assent to the statements made of the facts by the attorney-general.

When Hawkins died, he was indebted to the government $22,870.72. He was insolvent, and the sureties knew they were responsible for $20,000; and as both were officers of the government, and desired not to be sued, Cox proceeded to pay $7317.54 in claims upon the government, and took the vouchers, in the name of Hawkins, but dated subsequent to his death; he forwarded the vouchers to the proper accounting officer, to be credited to his part of the bond; he did this in perfect good faith and confidence. The officer handed the vouchers to a clerk, who placed them to the credit of Hawkins's account, instead of opening an account with the sureties, and placing this as so much paid by Cox. Mr. Dick, Judge of the United States

*198] court, died soon after, before he had paid his proportion. *This payment would have left $12,682.46, instead of $15,553.18; and since the judgment, the heirs of Dick have paid $10,000, and Cox has paid $2682.46, making in all $20,000 paid to the government on this bond by the sureties. Now, the government has a judgment against them jointly for $20,000, upon which they have since paid $12,682.46, leaving them $7317.54 in debt; and they have a judgment against the Dicks, separately, for $10,000 each, while it has been fully and fairly paid; and while it appears by the record, that only $15,553.18 were demanded, and that $12,682.46 have been paid since the rendition of the judgment, and the balance paid before the suit brought.

Thompson, Justice, delivered the opinion of the court.—This cause came up by writ of error from the district court of Louisiana district. The suit was instituted, according to the practice of that court, by petition, which states that Joseph H. Hawkins, late of New Orleans, navy-agent of the United States, now deceased, John Dick, late of the same place, deceased,

and Nathaniel Cox, of the same place, on the 10th day of March 1821, by their bond, became jointly and severally bound to the United States in the penalty of $20,000. To which obligation a condition was annexed, by which it was provided, that if the said Joseph H. Hawkins 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 pay over, as he may be directed, any sum or sums that may be found due to the United States, upon any such settlement, and shall faithfully discharge in every respect *the trust reposed in him, then the obligation to be void, otherwise to remain in full force and virtue; and the petition further states [*199 that the said Hawkins did not account for all public moneys received by him, and did not pay over the sums due from him to the United States; but at his death remained indebted to the United States in the sum of $15,553.18, for moneys received by him from the United States, since the date of said bond, as navy-agent; by reason whereof, the condition of the said bond had become broken, and the said debt become due; and prayed process of summons against the legal representatives of Hawkins and Dick, deceased, and against Nathaniel Cox, and that judgment may be rendered against them for the said debt, with interest and cost. A copy of the bond, duly authenticated, is annexed to the petition; and citations were issued against the legal representatives of J. H. Hawkins, deceased, and of John Dick, deceased (without naming or designating them in any other manner), and against Nathaniel Cox. As to the representatives of Hawkins, the citation was returned not found; and as to the representatives of John Dick, it was returned served, and the like return as to Cox.

Cox appeared and answered, denying that the sum of $15,553.18 is due from the sureties, as stated in the petition; alleging that he has paid, since the decease of Hawkins, $7317.54, which had been allowed at the treasury of the United States; leaving a balance only of $8235.64. And according to the course of practice in Louisiana, he represents that the succession of his co-surety John Dick, is solvent; and demands that the United States divide their action, by reducing their demand to the amount of the share and proportion due by each surety; which was overruled by the court.

Nathaniel Dick and James Dick appear and answer, that they are two of three heirs of John Dick, and in no event bound for more than two-thirds of any debt of John Dick, and deny that the debt is in any manner due by the estate of John Dick; but should the same be proved, they say they have received *no more than $4000 of the estate of John Dick, and are [*200 liable for no more than $2000 each, and pray judgment and trial by jury. The cause was tried by a jury, and a general verdict for $20,000 found for the plaintiffs, being the amount of the penalty in the bond. Upon which the court gave judgment against the estate of John Dick and Nathaniel Cox, jointly and severally, for the sum of $20,000, with six per cent., interest from the 2d day of January 1830, until paid; and also gave judgment against Nathaniel Dick and James Dick, for the sum of $10,000 each, with interest, &c.

In the course of the trial, a bill of exceptions was taken to the opinion of the court, in rejecting evidence offered on the part of Cox, in support of

his answer, setting up the payment of $7317.54, made by him, after the death of Hawkins.

It is deemed unnecessary to notice the numerous and palpable errors contained in this record; that which arises from the entry of the judgment is insuperable. It is difficult to conceive, unless through mistake, how such a judgment could be entered. The demand in the petition is only $15,553.18. The verdict of the jury is $20,000; and upon this a judgment is entered up against the estate of John Dick and Nathaniel Cox, jointly and severally, for $20,000, and a judgment also against Nathaniel Dick and James Dick, for $10,000 each. Upon no possible grounds, therefore, can this judgment be sustained.

There are, however, one or two questions arising upon this record, which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice. Upon the trial, the defendant, N. Cox, offered in evidence a transcript from the books of the treasury, duly authenticated, purporting to be a list of payments made, and receipts taken and passed at the treasury of the United States, in the name of Joseph H. Hawkins, since the 3d of September 1823; it having been previously shown that Hawkins died on the 1st day of October of that year. This evidence was offered in support of the allegation in Cox's answer, that he had paid
*201] *$7317.54 since the decease of Hawkins, in his capacity of surety. This testimony was objected to by the attorney of the United States, on the ground that no credits could be allowed, but such as had been presented at the treasury and refused. The objection was sustained by the court, and the evidence rejected.

This was supposed in the court below, to come within the act of congress (1 U. S. Stat. 515), which declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial (except under certain specified circumstances, not applicable to this case), but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed. This transcript is not set out in the record, and we can only judge of it, from what is stated in the bill of exceptions; and from this it does not appear to be a case coming at all within the act of congress. It was not offered as evidence of any new claim for a credit which had not been presented to the accounting officers of the treasury. All the credits claimed had been given at the treasury; and the only purpose for which it was offered, was, to show that such credits were given, after the death of Hawkins; and although standing in his name, the payments could not have been made by him; and to let in evidence to show that they were in fact made by the surety. There is no evidence in the cause showing the course of keeping the accounts at the treasury in such cases. But it is believed, that new accounts are never opened with the sureties. The accounting officers have no means of deciding whether the money is paid out of the funds of the sureties, or out of those of the principal. That is a question entirely between the sureties and the representatives of the principal. If application had been made at the treasury, and the accounting officers had transferred the payments, and given credit to Cox instead of Hawkins, it would not have changed the state of the case as between the United States and the parties in the bond; and as between the sureties themselves, it would have decided nothing, even

if that was an inquiry that could have been gone into upon this trial.[1] But nothing done at the treasury, which did not fall within the scope of the authority of the accounting officers in settling accounts, could have been received in evidence. *In the case of the *United States* v. *Buford*, [*202
3 Pet. 29, it was held by this court, that an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such statements at the treasury can only be regarded as establishing items for moneys disbursed, through the ordinary channels of the department, when the transactions are shown by its books. If, then, the accounting officers of the treasury could have done nothing more than had already been done, by giving credit on Hawkins's account for payments alleged to have been made by Cox, after his death, whence the necessity of making any application to the treasury? It would have been a nugatory act; and the law surely ought not to be so construed, as to require of a party a mere idle ceremony. The law was intended for real and substantial purposes; that the United States should not be surprised by claims for credits, which they might not be able to meet and explain in the hurry of a trial. But as no new credit was asked in this case, it would have been useless to make any application to the treasury, for the mere purpose of being refused.

The evidence offered of Hawkins's account, as navy-agent, with the branch bank of New Orleans was properly rejected. It was not competent evidence in this cause, in any point of view, unless it was to show that there was a balance in favor of Hawkins, which ought to go to the credit of his account with the government. But for this purpose, it was not admissible; it not having been presented to the accounting officers of the treasury for allowance. This was setting up a claim for a new credit, and could not be received, according to the express provisions of the act of congress.

The proceedings in this cause, and the manner in which the judgment is entered, have been considered at the bar as affording a proper occasion for the court to decide, whether this contract, and the liability of the parties thereupon, are to be governed by the rules of the civil law which prevail in Louisiana, or by the common law which prevails here. It was contended on the part of the plaintiffs in error, that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the *sum due, according to the law of Louisiana; consid- [*203
ered it a contract made there, and to be governed in this respect by the law of the state. On the part of the United States, it is claimed, that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole; and that the contribution between the co-sureties is a matter with which the United States have no concern. The general rule on this subject is well settled; that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed. 2 Burr. 1077; 4 T. R. 182; 7 Ibid. 242; 2 Johns. 241; 4 Ibid.

[1] See Soule *v.* United States, 100 U. S. 11.

285. There is nothing appearing on the face of this bond, indicating the place of its execution, nor is there any evidence in the case, showing that fact. In the absence of all proof on that point, it being an official bond, taken in pursuance of an act of congress, it might well be assumed as having been executed at the seat of government. But it is most likely that, in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly, as the sufficiency of the sureties is approved by the district-attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear, that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial, where the services of navy-agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department, at the seat of government; and the navy-agent is bound, by the very terms of the bond, to pay over such sum as may be found due to the United States, on such settlement; *and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in point of view in which it can be considered, a contract to be executed at the city of Washington; and the liability of the parties must be governed by the rules of the common law.

*204]

The judgment of the court below is reversed; and the cause sent back, with directions to issue a *venire de novo.*

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 East Louisiana, 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, with directions to award a *venire facias de novo.*[1]

[1] For a further decision in this case, see 10 Pet. 125.

*Duncan McArthur, Plaintiff in error, *v.* Wesley S. Porter, Defendant in error.

Ejectment.

In an ejectment for a tract of land, the declaration described the same by specific metes and bounds; the jury found a verdict for the plaintiff, stating the defendant to be guilty of the trespass in the declaration mentioned, and "that the plaintiff do recover of the defendant the land described as follows"—describing the same, and referring to a diagram and report of a survey of the land in controversy, which was in evidence; this verdict was for but a part of the land claimed in the plaintiff's declaration. The circuit court, on motion of the plaintiff's counsel, instructed the jury to find a general verdict, saying that the plaintiff could take possession at his peril; and the jury found according to the instructions of the court: *Held*, that the jury were right in their original verdict; and the instruction of the court, that they should find a general verdict, the plaintiff having established a title only to part of the land, was erroneous.

The real question before the court was, whether the defendant, upon proof of a title to part of the premises described in the declaration of ejectment, was by law entitled to a general verdict for the whole of the premises sued for. That the action of ejectment is a fictitious action, and is moulded by courts to subserve the purposes of justice, in a manner peculiar to itself, is admitted; but the professed object is, to try the titles of the parties, and the jury are bound to pass upon those titles, as they are established by the evidence before them; they, therefore, do no more than their duty, when they find a verdict for the plaintiff, according to the extent and limits of his title, as it is proved by the evidence; it is equally their right so to do, since it is comprehended in the issue submitted to their decision. If, therefore, they find by the verdict, according to the truth of the case, that the plaintiff has title to part only of the premises in the declaration, and describe it by metes and bounds, and that so far the defendant is guilty; and as to the residue, find the issue for the defendants; such a verdict, in point of law, seems to be unexceptionable; and if so, the judgment following the verdict ought to conform to it: and if it should be a general judgment for the whole premises demanded in the declaration, it would be erroneous. Such, upon principle, and the analogies of the common law, would be the result, and the authorities clearly establish the doctrine; and it is confirmed as a matter of practice by the best text-writers on the subject.[1]

Error to the Circuit Court of Ohio. The case agreed by the counsel for the plaintiffs in error and for the defendants in this court, was as follows:

"This was an action of ejectment, which came up on a writ of error to the circuit court of the United States for the district of Ohio. One of the questions in dispute, on the trial of the cause below, was the boundary line between the lands of the plaintiff and defendant. Surveys had been made of the premises *in dispute, according to the pretensions of each party. These surveys, with the explanatory depositions taken on the ground, [*206 were placed on file and used in evidence on the trial. The jury, instead of a verdict according to the claim of either party, found an intermediate line. Their verdict was in these words, viz: 'We, the jury, do find the defendant guilty of the trespass in the plaintiff's declaration mentioned, and do assess the plaintiff's damages to one cent; and that the plaintiff do recover of the defendant the land described as follows, viz: Beginning at the stone planted in Spencer's orchard, designated on Looker's map (referring to the survey given in evidence), by the letter B, thence running in a north-westerly direction to a point in Dock's line, one hundred and twenty-four poles, eastwardly, on Dock's line, from the point marked D, on Looker's map, a hickory and dog-wood; thence westwardly, with Dock's line, one hundred and twenty-

[1] And see Barclay *v.* Howell, *post*, p. 698; Santee *v.* Keister, 6 Binn. 36; Bear *v.* Snyder, 11 Wend. 592; Van Alstyne *v.* Spraker, 13 Id. 578; Oothout *v.* Ledings, 15 Id. 410.

four poles, to the hickory and dog-wood aforesaid; thence running in a south-westwardly direction, with Taliaferro's line, to the place of beginning.' By reference to Looker's map or survey on file, the boundary here marked out by the jury was capable of being reduced to certainty. The counsel for the plaintiff below objected to the verdict being recorded, and moved the court to instruct the jury to find a general verdict of guilty for the plaintiff. The court so instructed the jury, saying 'the plaintiff would take possession at his peril.' The jury accordingly found a general verdict for plaintiff. To this instruction and opinion of the court, the defendant excepted, and brought this writ of error to reverse the judgment."

The case was argued by *Vinton* and *Doddridge*, for the plaintiff in error; and by *Ewing*, for the defendant.

Vinton, for the plaintiff.—The plaintiff below having title, in the opinion of the jury, to a part of the land claimed by him, it is admitted, they had a right, if they chose, to find in his favor a general verdict of guilty. And in that case, he would have taken possession, at his peril, of more than he was actually entitled to possess. But the jury, instead of a general verdict, thought proper to find a verdict for so much only as the plaintiff had title to. *Had they a right so to find? and if they had, is it not plain, *207] the court had no power to deny its exercise?

Where a verdict is rendered for part only of the premises demanded, the part found must be described with certainty, but numerous authorities show that the jury may find a part. Gilbert's Law of Ejectment 200; *Pemble* v. *Stearne*, 1 Ld. Raym. 165; 1 Inst. 227; Cro. Jac. 113; Sid. 232; Cro. Jac. 631; 6 Munf. 25; 1 Ibid. 162; 17 Serg. & Rawle 431; 16 Ibid. 245; 17 Ibid. 393. Gilbert, in his Law of Ejectment (page 61), says, "if an ejectment is brought for an acre of land, by metes and bounds, and the jury find half an acre, without specifying metes and bounds, the verdict is bad; because the sheriff cannot deliver possession." The authorities cited above clearly establish the right of the jury to find a part of the premises claimed. It is, emphatically, the duty of the jury to find facts; but by the interposition of the court, in this case, they were restrained, and that office was virtually taken out of their hands.

A leading object of judicial investigation is to reduce disputed and uncertain facts to certainty. But in a question of disputed boundary, it is obvious, that a general verdict, without describing the dividing line, or other specification, leaves the parties precisely where they began, and establishes nothing. And if, in such a case, the plaintiff has a right to demand at the hands of the jury a general verdict, it is clearly not practicable to try a question of boundary by the action of ejectment. A position which, it is presumed, no one will attempt to maintain.

The court, in their instruction to the jury, appear to have fallen into an error, in the application of the rule of law to be met with in the books, "that the plaintiff will take possession at his peril." On examination, it will be found, it is used for a different purpose than that to which it is to be applied in this case. It had its origin in this way. Anciently, in the action of ejectment, great particularity of description in the declaration was required. See *Cottingham* v. *King*, 1 Burr. 629. Many judgments were reversed for want of a specific description, in the declaration, of the

premises demanded. But when the action underwent the modifications *that placed it on its present footing, and it was held, that a general description of the premises was sufficient. But to prevent the plaintiff from taking advantage of the uncertainty of his declaration, by going into possession of more land than he was entitled to; the doctrine was established, "that he took possession, at his peril, of more than he had actually recovered." In all the cases where the courts have holden this language, it will be found, that exception had been taken to the sufficiency of the description of the premises in the declaration, after a general verdict. The above-cited case of *Cottingham* v. *King* is a leading case in point. This principle, therefore, is resorted to, to heal or cure the uncertainty of the declaration, and is not applicable to the verdict. If a verdict be uncertain, the judgment is not rendered upon it, and the rule applied to help out the verdict; but the verdict is set aside, or judgment reversed, and a *venire de novo* awarded. *Clay* v. *White*, 1 Munf. 162; *Gregory* v. *Jackson*, 6 Ibid. 25; *Martin* v. *Martin*, 17 Serg. & Rawle 431; 16 Ibid. 245; and see also the extract above from Gilbert's Ejectment. In the case of *Gregory* v. *Jackson*, which was an ejectment for one thousand acres of land, and a verdict for four hundred, part of the premises, without designating the boundaries, error was brought after judgment; the doctrine now contended for, was strongly insisted upon in argument, and overruled; the judgment was reversed and a *venire* awarded. There are many instances to be found of verdicts similar to that tendered by the jury in this case. The verdict in the case of *Green* v. *Watrous*, above cited, is of that description. [*208

In the case of *Hopkins* v. *Myers*, 1 Const. Court (S. C.) 56, the similitude of the verdict, even in its form, to the one in the present case, is very striking. The verdict in that case was sustained, and is in these words, viz: "We find for the plaintiff, with one dollar damages. We also find that the old hedge-row beginning at the river, and a line running along the same to its termination; and a line to be drawn from thence, so that it will intersect the course of an old line, surveyed by A. B. Shark, in the year 1813, in the centre of the gut, next to the river, and thence along said line, until its intersection with the tract of land said to belong to Railford, is the dividing line between the parties."

*The practice, as stated by Adams, in his Treatise on the Action of Ejectment, and relied upon by the defendant in error, will not sanction his interference with the verdict. He says (page 297), "if plaintiff obtain a verdict for the whole premises demanded, the entry of the judgment is, that he recover his term in the premises aforesaid, or that he recover possession of his term aforesaid. And this form is also used, where a moiety or other part of the premises is recovered; as, for example, when the plaintiff declares for forty acres in A., and recovers only twenty. And it is at the lessor's peril, that he take out execution for no more than he has recovered title to." This authority does not show that, in the example put, of a verdict for twenty acres, such finding of the jury may be disregarded or set aside, and a general verdict directed to be found in its stead; but it proves, that upon such a verdict, the plaintiff may take a judgment to recover his term in the premises; and since he is restrained from taking out execution for more than was found by the verdict, it is quite immaterial, [*209

whether the judgment, in its form, be general or special. The verdict, in either case, is the guide to the sheriff to direct him how to deliver possession. Gilbert's Evidence 109 ; *Connor* v. *West*, 5 Burr. 2672 ; *Green* v. *Watrous*, 17 Serg. & Rawle 393 ; Gilbert's Ejectment 61 ; Cro. Jac. 631.

If, in the present case, the plaintiff below had permitted the verdict tendered by the jury to be recorded, and had taken a judgment for his term, generally, it would have been liable to no exception. The defendant would have had no cause of complaint, since execution could issue for the part only found by the jury and described in their verdict. But now he has cause to complain, since there is no restriction upon the plaintiff in taking out execution for, and going into possession of, all he ever demanded.

Ewing, for the defendant in error, contended, that it was the duty of the jury to find a general verdict, unless, with the consent of the parties, a special verdict could not be given. The plaintiff in an ejectment who recovers, takes possession under the direction of the court, and this he does at his peril. A reference to the notes of the judges who presided at the trial *will show the extent of the recovery, and regulate the proceed-
*210] ings of the party. The only question in the case is, whether the judgment entered is erroneous, or whether a general judgment should have been entered on the finding of the jury. Adams on Ejectment 297 ; 2 Bibb 236.

Doddridge, in reply, argued, that there was a material difference between an action of ejectment to try title, and that in which the whole question was one of boundary. The case cited by the counsel for the defendant in error, from Bibb's reports, was of the former character, and was, therefore, not applicable to the question before the court. That case is also at variance with all the cases referred to in the opening argument for the plaintiff in error. The distinction is well known in England, and it is one which must necessarily arise under the Virginia land system. This system involves, in most cases, questions of boundary.

The action of ejectment is a creation of courts, and is to be moulded to meet the justice of the case. The practice under it, in Virginia, is different from that of England. The order of survey is a material proceeding in Virginia in the action of ejectment ; and it is made an order in the cause. It is analogous to a view in England ; and the survey so made becomes a part of the issue, presenting the very question which is to be decided by the jury. The witnesses are called by the surveyor before him, and he locates the bounds of the land. The order of survey and return becomes a part of the record, and the verdict of the jury is usually entered on the back of the survey, for the express purpose of showing what has been recovered.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of Ohio. The original action was an ejectment brought by the defendant in error against the plaintiff in error, and the declaration (which contains several counts) describes the land demanded by specific metes and bounds. At the trial, the jury found a verdict in the following terms : "We, the jury, find the defendant guilty of the trespass in the plaintiff's declaration *mentioned, and do assess
*211] the plaintiff's damages to one cent, and that the plaintiff do recover

of the defendant the land described, as follows, viz., beginning at the stone planted in Spencer's orchard, designated on Looker's map (referring to the diagram and report of the survey in court) by the letter B; thence running in a north-westerly direction to a point in Dock's line, one hundred and twenty-four poles, eastwardly, on Dock's line, from the point marked D, on Looker's map, a hickory and dog-wood; thence westwardly, with Dock's line, one hundred and twenty-four poles, to the hickory and dog-wood aforesaid; thence running in a south-westerly direction, with Taliaferro's line, to the place of beginning." The counsel for the plaintiff then moved the court to instruct the jury to find a general verdict; and thereupon, the court did instruct the jury to find a general verdict, saying, that the plaintiff would take possession at his peril; which general verdict was found by the jury accordingly; and to this instruction the defendant excepted. Other exceptions were taken, in the progress of the trial, but they have been abandoned at the argument; and the only question presented for our consideration is upon the instruction already mentioned.

From the survey ordered by the court, as well as from the other proceedings and evidence in the cause, it abundantly appears, that the case was one of conflicting titles, and the controversy was principally as to boundaries. The verdict of the jury, as originally found, was for part only of the land sued for in the ejectment, fixing upon an intermediate line of boundary, different from that asserted by either party. It was, therefore, equivalent to a verdict finding a part of the tract of land sued for, in favor of the plaintiff, and the residue in favor of the defendant. In other words, that the defendant was guilty of the ejectment as to a part, and not guilty as to the residue of the land described in the declaration.

The real question, then, before the court is, whether the plaintiff, upon the proof of a title to a part of the premises sued for in the ejectment, is by law entitled to a general verdict for the whole of the premises sued for. That the action of ejectment is a fictitious action, and is moulded by courts to subserve the purposes of justice, in a manner peculiar to itself, is admitted. But its professed object is to try the titles of the parties; *and the jury are bound to pass upon those titles, as they are established [*212
by the evidence before them. They, therefore, do no more than their duty, when they find a verdict for the plaintiff, according to the extent and limits of his title, as it is proved by the evidence. It is equally their right so to do, since it is comprehended in the issue submitted to their decision. If, therefore, they find by their verdict, according to the truth of the case, that the plaintiff has title to part only of the premises in the declaration, and describe it by metes and bounds, and that so far the defendant is guilty, and as to the residue, find the issue for the defendant; such a verdict, in point of law, would seem to be unexceptionable; and if so, the judgment following that verdict ought to conform to it; and if it should be a general judgment for the whole premises demanded in the declaration, it would be erroneous. Such, upon principle, and the analogies of the common law, would be the just result; and the authorities clearly establish the doctrine, and it is confirmed as a matter of practice by the best text-writers on the subject. Adams on Ejectment 294; Runnington on Ejectment 432; Bac. Abr., Ejectment, F, G. Thus, in *Mason* v. *Fox*, Cro. Jac. 632, where, in an ejectment, the jury found the defendant guilty as to part of the prem-

ises in the declaration, and not guilty as to the residue, all the judges were of opinion, that the judgment ought to conform to the verdict, for it was consequent upon the verdict; but that an entry of a general or variant judgment was but a misprision of the clerk, and amendable even after error brought. In *Burges* v. *Purvis*, 1 Burr. 326, the plaintiff sued for a moiety of a certain parcel of land, and had a verdict for one-third part of the premises; and the question was, whether, in such a case, the plaintiff could recover for a less undivided part than he sued for. The court held, that she could, and that she was entitled to a judgment for the one-third. Lord MANSFIELD, on that occasion, said, the rule undoubtedly is, that the plaintiff must recover according to his title. Here, she demanded half, and she appears entitled to a third, and so much she ought to recover; so, if you demand forty acres, you may certainly recover twenty acres; every day's experience proves this. And he added, that the case of *Abbott* v. *Skinner*, 1 Sid. 229, was directly in point. In 2 Roll. Abr. tit. Trial, p. 704, *pl. 22, there is a case where an ejectment was brought of a mes-
*213] suage, and it appeared in evidence, and was so found by the verdict, that only a small part of the messuage was built by encroachment on the lessor's land, not the residue; and the plaintiff had judgment for the parcel accordingly. *Taylor* v. *Wilbore*, Cro. Eliz. 768. These authorities (and the American authorities cited at the bar are to the same effect) demonstrate, that the plaintiff is entitled to recover only according to his title; and that if he shows a title to part only, he is entitled to have a verdict and judgment for that part, and no more. If this be the true state of the law, then the jury were right in their original verdict; and the instruction of the court, that they should find a general verdict (the plaintiff having established a title to only a part of the land) was erroneous.

But it has been argued, that such a general verdict, under such circumstances, is a matter of mere practice, and involves no inconvenience or repugnancy to the general principles of law, because the plaintiff must still, at his peril, take possession under his execution, upon a general judgment on such verdict, according to his title. That the whole proceedings in ejectment are founded in fictions, and the court will, in a summary manner, restrain the plaintiff, if he takes possession for more than his title, so that no injustice can be done to the defendant. And certain authorities have been relied upon in support of these suggestions. But in what manner can the court, in a case circumstanced like the present, interfere with the plaintiff in taking possession? If the special finding of the jury in the case of interfering titles, on a question of boundary, which may, and indeed, usually does, involve a comparison of the conflicting testimony of witnesses and other parol evidence, is to be set aside and disregarded, there is nothing upon the record to guide the plaintiff in regard to the extent of his title in taking possession; and he must be at liberty to take possession, according to his own view of the extent of his title. Nor can the court have, in such a case, any certain means to interfere, upon a summary application, to redress any supposed excess of the plaintiff, for that would be, in matters of fact, to usurp the functions of a jury, and to retry the cause upon its facts and merits, without their assistance. It might be different, in a case where the plain-
*214] tiff's title, as he proved it at the trial, was, *upon his own showing, less than the lands of which he had taken possession; for that would

involve no examination or decision upon conflicting matters of fact. And after all, what could this be, but an attempt, indirectly, to do that justice between the parties, which the original verdict sought to do directly, and in a manner entirely conformable to law?

As to the authorities relied on to sustain the practice of entering a general verdict, they do not, in our opinion, justify the doctrine for which they are cited. The language cited from Adams on Ejectment (p. 297) has been misunderstood. It does not mean, that where the plaintiff obtains a verdict for a part of the premises only, he is entitled to a general judgment for the whole premises sued for; for that would be inconsistent with what the author has said in a preceding page (p. 294);(*a*) but only that the same form of entering the judgment for the parcel recovered is adopted, as in cases where the whole is recovered; as, for example, if the plaintiff declares for forty acres in it, and he recovers only twenty acres, his judgment must be for the twenty acres; and it is at his peril, that he takes out execution for no more than he has proved title to, since otherwise his execution would be bad, as not conforming to the judgment. (*b*) The case of *Cottingham* v. *King*, 1 Burr. 621, was the case of a writ of error from Ireland, and the only question was, whether the declaration, which was for five thousand messuages, five thousand cottages, &c., a quarter of land, &c., was not void for uncertainty; a general verdict having been given for the plaintiff. One objection was, that the declaration was too uncertain to enable the sheriff to deliver possession, to which Lord MANSFIELD replied, that in this fictitious action, the plaintiff is to show the sheriff, and is to take possession, at his peril, of only what he was entitled to. If he takes more than he has recovered and shown title to, the court will, in a summary way, set it right. Now, it is plain, that his lordship was here addressing himself to a case, where the declaration was general, and the verdict was general for the whole premises; and not to a case, where there was a verdict for a specified parcel only of the premises. In the case *put, the judgment would be general, and the execution would conform to it; and therefore, if [*215 the plaintiff took possession beyond his own title established at the trial, the court might interfere in a summary manner, to prevent such a general recovery from working injustice. The same doctrine was afterwards held in *Connor* v. *West*, 5 Burr. 2672. But neither of these cases has any tendency to show, that upon proof of title to part of the premises, the plaintiff is entitled, as a matter of right, to a general verdict and judgment for the whole premises in the declaration. Such a point was never argued, nor considered by the court.

The case of *Kouns* v. *Lawall, Lessee of Grayson*, cited from 2 Bibb 236, approaches nearer to the present. Without meaning to express any opinion as to the correctness or incorrectness of the decision in that case, it is sufficient to say, that it is distinguishable from the case now before us. In that case, the court held the special finding of the jury void for uncertainty, and rejected it as surplusage; and then considered the finding of the jury as a general verdict for the plaintiff, upon which he might properly have a

(*a*) See also Adams' Eject. app'x, No. 34, where the form of a judgment for a parcel is given, and a judgment for the defendant for the residue.

(*b*) See Fare *v.* Denn, 1 Burr. 362, 366.

general judgment. No such objection occurs against the special finding in the present case, and we may decide it, without touching the authority of that decision.

Upon the whole, our opinion is, that the instruction of the circuit court was erroneous. It was not a mere matter of practice, but one involving essential rights of the defendant. The judgment is therefore, reversed, and the cause is to be remanded to the circuit court, with directions to award a *venire facias de novo*.

Judgment reversed.

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*216] **Ex parte* Joseph Roberts: and *Ex parte* George Adshead.

Mandamus.

Motion for a *mandamus* to the district judge of the United States for the southern district of New York, to set aside a judgment entered by default, on an inquest finding a forfeiture of goods to the United States, against which an information had been filed for a violation of the revenue laws. This is not a proper case for the interposition of this court, by way of *mandamus*; the application to the district court to set aside the default and inquest, was an application to the discretion of the court.

Motion for *Mandamus*. In the matter of the United States, upon the information of M. M. Noah, surveyor of the port of New York, *v.* Certain Cases of Cloth, marked F. Joseph, and marked S. Roberts, and George Adshead, claimants in the district court of the United States for the southern district of New York, *Beardsley*, of counsel for the claimants in those cases, in pursuance of written notice to the counsel of the United States in the district court, moved the court for a writ of *mandamus*, to be directed to the district court for the southern district of New York, commanding the said district court to set aside the verdict or judgment taken by default in those causes against a number of the cases of cloth which were the subject of the information; or commanding the said district court to show cause why the said verdict of judgment by default ought not to be set aside; and further moved the court for such other and further relief in the premises as this court should deem just and proper.

In the district court for the southern district of New York, an information was filed by the district-attorney, on behalf of the United States, upon the information of M. M. Noah, surveyor of the port of New York, against certain cases of cloth, seized as forfeited to the United States, under the act of congress of the 28th of May 1830; upon the ground, that the invoices under which the same were imported were made by a false valuation, extension, or otherwise, to defraud the United States. These cloths were claimed by Joseph Roberts and George Adshead; and after various proceedings in
*217] the district court, *they were, on the 4th day of January 1832, on an inquest by default in the cause, condemned as forfeited to the United States. An application was afterwards made to the district court to set aside the inquest, on the ground, that regular notice of the day of the trial of the same had not been given to the proctors of the claimants. The court refused to set aside the same, and an affidavit of one of the proctors of the claimants, stating the circumstances of the cases, and the proceedings of the attorney of the United States in the district court, was laid before this

court as the foundation of this motion for a *mandamus*. The district-attorney of the United States also made affidavit of the proceedings, which was presented by *Taney*, attorney general of the United States.

The motion for a *mandamus* was argued in writing by *Beardsley*, as counsel for the claimants.

MARSHALL, Ch. J., delivered the opinion of the court.—The court is of opinion, that the present is not a proper case for the interposition of this court by way of *mandamus*. The application to set aside the default and inquest, was an application to the discretion of the district court; and is not distinguishable in principle from applications to grant new trials. This court has always considered such applications as resting in the sound discretion of the court where the cause is depending, and not a matter for a *mandamus* or writ of error.

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*JOSEPH GRANT and others *v.* E. & H. RAYMOND. [*218

Patent-law.

Action for damages for an infringement of a patent right, granted to the plaintiff in 1825. The patent recited, that a former patent had been issued in 1821, to the same person, for the same improvement, "which had been cancelled, owing to the defective specification on which the same was granted;" the exclusive privilege given by the patent on which the suit was brought was to continue fourteen years from the day on which the original was issued. On the trial, the defendants objected, that the secretary of state had no power, by law, to accept a surrender of, and to cancel, the first letters patent; nor to inquire into, and decide upon the causes for so doing; nor to grant the second patent for the same invention, with an amended specification, for the unexpired portion of the term of fourteen years wihch had been granted by the first patent. The circuit court of the southern district of New York decided, in conformity with its former decisions, that such surrender might be made, when the defect arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; and that the secretary of state had authority to accept such surrender, and cancel the record of the patent; and to issue a new patent for the unexpired part of the fourteen years granted under the first patent. It will not be pretended, that this question is free from difficulty; but the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled; we would not willingly disregard the settled practice, in a case where we are not satisfied, it is contrary to law; and where we are satisfied, it is required by justice and good faith.

To promote the progress of useful arts, is the interest and policy of every enlightened government; it entered into the views of the framers of our constitution, and the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to congress; it is the reward stipulated for advantages derived by the public from the exertions of individuals; and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought to be construed in the spirit in which they have been made and to execute the contract fairly on the part of the United States, where the full benefit has been received, if this can be done, without transcending the intentions of the statutes, or countenancing acts which are fraudulent, or may prove mischievous.

If a mistake should be committed in the department of state, no one would say, it ought not be corrected; all would admit, that a new patent, correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued; and yet the laws does not, in terms, authorize a new patent, even in such a case; its emanation is not founded on the words of the law, but it is indipensably necessary to the faithful execution of the solemn promise made by the United States. Why should not the same step be taken, for the same purpose, if the mistake has been innocently committed by the inventor himself?

The great object and intention of the act is, to secure to the public the advantages to be derived

from the discoveries of individuals; and the means it employs are the compensation made to
*219] those individuals for the time and labor *devoted to those discoveries, by the exclusive right to make up and sell the things discovered, for a limited time. That which gives complete effect to this object and intention, by employing the same means for the correction of inadvertent error, which are directed in the first instance, cannot be a departure from the spirit and character of the act.[1]

Quære? What would be the effect of a second patent, issued after an innocent mistake in the specification, on those who, skilled in the act for which it was granted, preceiving the variance between the specifications and the machine, had constructed, sold and used the machine? This question is not before the court, and is not involved in the opinion given in the case. The defence, when true in fact, may be sufficient in law, notwithstanding the validity of the new patent.

The defendant in the circuit court, in his plea, assigned the particular defect supposed to exist in the specification, and then proceeded to answer, in the very words of the act, "that it does not contain a written description of the plaintiff's invention and improvement, and manner of using it, in such full, clear and exact terms, as to distinguish the same from all other things before known, so as to enable any person skilled in the art to make and use the same." The plea alleged, in the words of the act, that the pre-requisites to issuing a patent had not been complied with; the plaintiffs denied the facts alleged to the plea, and on this, issue was joined. At the trial, the counsel for the defendants, after the evidence was closed, asked the court to instruct the jury, that if they should be of opinion, that the defendants had maintained and proved the facts alleged in their plea, they must find for the defendants; the court refused this instruction, and instructed the jury, that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, or for the purpose of deceiving the public. The instruction was erroneous, and the judgment of the circuit court ought to be reversed.

This instruction was material, if the verdict ought to have been for the defendants, provided the allegations of the plea were sustained, and if such verdict would have supported a judgment in their favor; although the defect in the specification might not have arisen from design, and for the purpose of deceiving the public. That such is the law, the court is entirely satisfied; the third section of the act requires, as preliminary to a patent, a correct specification and description of the thing discovered; this is necessary, in order to give the public, after the privilege shall expire, the advantage for which the privilege is allowed, and is the foundation of the power to issue a patent. The necessary consequence of the ministerial character in which the secretary acts, is, that the performance of the pre-requisites to a patent must be examinable in any suit brought upon it. If the case was of the first impression, the court would come to this conclusion; but it is understood to be settled.

Courts did not, perhaps, at first, distinguish clearly between a defence which would authorize a verdict and judgment in favor of a defendant, in an action for the violation of a patent, leaving the plaintiff free to use his patent, and to bring other suits for its infringement; and one which is successful, would require the court to enter a judgment not only for the defendant in the particular case, but one which declares the patent to be void; the distinction is now well settled.

If the party is content with defending himself, he may either plead specially, or plead the general
*220] issue, and give the notice required by the sixth section, of any *special matter he means to use at the trial. If he shows that the patentee has failed in any of those pre-requisites on which the authority to issue the patent is made to depend, his defence is complete: he is entitled to the verdict of the jury, and the judgment of the court. But if, not content with defending himself, he seeks to annul the patent, he must proceed in precise conformity with the sixth section; if he depends on evidence "tending to prove that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the desired effect," it may avail him, so far as it respects himself, but will not justify a judgment declaring the patent void; unless "such concealment or addition shall fully appear to have been made for the purpose of deceiving the public;" which purpose must be found by the jury, to justify a judgment of *vacatur*.

The defendant is permitted to proceed according to the sixth section, but is not prohibited from

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[1] And see, Shaw *v.* Cooper, 7 Pet. 292; Morris *v.* Huntingdon, 1 Paine 348. This matter is now regulated by statute; R. S. § 4916.

proceeding in the usual manner, so far as respects his defence; except that special matter may not be given in evidence on the general issue, unaccompanied by the notice which the sixth section requires. The sixth section is not understood to control the third; the evidence of fraudulent intent is required only in the particular case, and for the particular purpose stated in the sixth section.

This case came before the court, in the first instance, on a Certificate of Division from the Circuit Court of the United States for the southern district of New York.

On inspecting the record, it appeared, that on the trial of the cause in the circuit court, the counsel for the defendants had excepted to the decisions of the court on various matters which had been presented for the consideration of the court; and that a bill of exceptions had been sealed by the court, on their motion. The record proceeded to state, that the cause afterwards came on for argument, on a motion for a new trial, when the opinions of the two judges of the circuit court were opposed upon questions presented for the decision of the court, excepted to on the trial, as stated in the bill of exceptions: "that upon the questions thus occurring before the court, the opinions of the said two judges were opposed; and upon request of the counsel for the plaintiffs, the points upon which the disagreement happened, were stated, under the direction of the judges, and certified under the seal of the court, to the supreme court.

Webster stated, that a question, preliminary to the argument of the case, was presented for the decision of the court. It was, whether the court would entertain the case, as it came up from the circuit court on a division of that court on a motion *for a new trial. This court had exercised their right to decide in cases where the opinions of the judges of the [*221 circuit court on questions of law had been opposed, when a motion for a new trial was before the court.

Story, Justice.—In the cases referred to, the division of the court took place on the trial of the cause before the jury, as well as on the motion for a new trial.

Marshall, Ch. J., suggested, that the case might be brought on, if the parties would agree, that it should stand as if a judgment had been given by the circuit court on the exceptions. The case, he said, could not be heard on a difference in opinion of the judges of the court, on a motion for a new trial.

The counsel for the plaintiffs and defendants having agreed that the case should stand as suggested by the chief justice, and an agreement in writing to that effect having been filed, the court made the following order: It is now here by the court considered and ordered, that this cause shall now be heard and decided, as on a writ of error brought after verdict and judgment in the circuit court, on the exceptions which were taken in that court; that the cause shall now proceed, as if judgment had been actually entered in the circuit court for the plaintiffs there, and that the certificate in the case shall be taken, regarded and treated as a writ of error, sued out by the defendants below, on the judgment of the circuit court, and that the question shall be, as in other cases, whether the said judgment ought to be reversed or affirmed; but that this court will reserve its opinion and judg-

ment in this cause, till the defendants in the court below shall have sued out a writ of error in this cause to the said circuit court, and filed a return thereto, with a bill of exceptions in this cause, in the usual form, signed by the court below, in this court.

The case came on for argument, after the defendants had sued out a writ
*222] of error on a judgment entered in the circuit *court for the plaintiffs, in conformity with the suggestion and order of this court. The case was as follows:

The action was brought to recover damages for an alleged infringement of a patent-right, and came on for trial in the circuit court, in November 1828, when a verdict was rendered for the plaintiffs for $3266.66.

The plaintiffs gave in evidence a patent from the United States, in the following term, the same being the patent declared upon:

"Whereas, Joseph Grant, a citizen of the United States, hath alleged, that he hath invented a new and useful improvement in the mode of manufacturing hat bodies, by the combination of motions, viz., the rotatory and revolving motion, with the vibrating or transverse motion, which forms the two hat bodies by machinery, and crosses the wool from one extremity of the hat bodies to the other, at one operation, called Grant's improved winding machine for setting up hat bodies (his former patent for the same invention, dated the 11th day of August 1821, having been cancelled, owing to the defective specification on which the same was granted), which improvement he states had not been known or used before his application; hath made oath that he does verily believe that he is the true inventor or discoverer of the said improvement; hath paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are, therefore, to grant, according to law, to the said Joseph Grant, his heirs, administrators or assigns, for the term of fourteen years, from the 11th day of August 1821, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said Joseph Grant himself, in the schedule hereunto annexed, and is made a part of these presents. In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed. Given under my hand, at the city of Washington, this 28th
*223] *day of April, in the year of our Lord 1825, and of the independence of the United States of America the forty-ninth.

[L. S.] J. Q. Adams.

By the President.—H. Clay, Secretary of State.

City of Washington, to wit:

I do hereby certify, that the foregoing letters-patent were delivered to me on the 28th day of April, in the year of our Lord 1825, to be examined; that I have examined the same, and find them conformable to law, and do hereby return the same to the secretary of state within fifteen days from the date aforesaid, to wit, on this 28th day of April, in the year aforesaid.

William Wirt,
Attorney-General of the U. S.

The schedule referred to in these letters-patent, and making part of the same, contained a description, in the words of the said Joseph Grant himself, of his improvement in the mode of manufacturing hat bodies by the combination of motions, viz., the rotary or revolving motion, with the vibrating or transverse motion, which forms the two hat bodies by machinery, and crosses the wool from one extremity of the hat bodies to the other, at one operation, called Grant's improved winding-machine for setting up hat bodies; his former patent for the same invention, dated on the 11th day of August, A. D. 1821, having been cancelled, owing to the defective specification on which the same was granted. The schedule, which contained a full description of the invention, and of the mode of using it, was also given in evidence.

The counsel for the plaintiffs also produced and read in evidence, a certificate of the secretary of state, duly authenticated under his hand and official seal, and certain papers thereto annexed, in the words and figures following:

To all to whom these presents shall come, greeting: I certify, that the annexed is a true copy of the record of cancellation of a patent granted to Joseph Grant, on the 11th of August 1821, and cancelled on the 28th of April, A. D. 1825; also, that the annexed is a true copy of the petition praying for the cancellation, and the issuing of another patent for the same invention. In testimony whereof, I, Henry Clay, secretary of state of the United States, have hereunto subscribed my name, and *caused the seal of the department of state to be affixed. Done at the city of [*224
Washington, this 19th day of May, A. D. 1828, and of the independence of the United States of America, the fifty-second.

[L. S.] H. CLAY.

This patent was returned to the patent-office, the seal broken, and now stands cancelled, owing to the defective specification on which it was issued, and another patent granted (with a corrected specification), on the 28th day of April 1825, bearing date with the first, and for the same invention.

The petition of Joseph Grant, of Providence, in the county of Providence, and state of Rhode Island, hatter, a citizen of the United States of America, respectfully represents, that your petitioner has invented a new and useful improvement in the mode of manufacturing hat bodies by the combination of motions, viz., the rotatory or revolving motion, with the vibrating or transverse motion, which forms the two hat bodies by machinery, and crosses the wool from one extremity of the hat bodies to the other, at one operation, called "Grant's improved winding-machine for setting up hat bodies," according to the specification, explanations and drawings herewith presented, which the subscriber prays may be taken as a part of his petition; an improvement not used or known before his application, the advantages of which your petitioner is desirous of securing to himself and his legal representatives. Your petitioner would further state, that he has, heretofore, viz., on the 11th day of August, A. D. 1821, obtained letters-patent from the president of the United States, for his said improvement, but owing to a defective specification on which the same were granted, he prays that the said patent may be cancelled, and a new and correct one granted, embracing the same improvements, so far as the same are set forth in the accompanying specification,

drawing and explanations. Your petitioner, therefore, prays, that letters-patent of the United States may be issued, granting to your petitioner, his heirs, administrators or assigns, the full and exclusive right of making, constructing, using and vending to others to be used, his said improvement, according to the specification and drawings hereto annexed, agreeably to the act of congress in such case made and provided; your petitioner having paid
*225] thirty dollars *into the treasury of the United States, and complied with other provisions of the said act. As in duty bound, will ever pray. JOSEPH GRANT.

To the Hon. Henry Clay, Secretary of state of the United States of America.

Providence, April 20th, 1825.

As the assignee of David Curtis, who was the assignee of Joseph Grant, of one moiety of the original patent, I unite in the prayer of the above petitioner, that the original patent may be cancelled, and a new one granted to the said Joseph Grant, as above set forth. SOLOMON TOWNSEND.

To the Hon. Henry Clay, Secretary of state of the United States of America.

Providence, April 20th, 1825.

The counsel for the defendant objected, that the secretary of state had no power, by law, to accept a surrender of and to cancel said letters-patent, nor to inquire into, or decide upon, the causes for so doing, nor to grant said second patent for the same invention, with an amended specification, for the unexpended portion of the term of fourteen years, which had been granted by the first patent.

The court decided, that such surrender might be made, when the defect in the specification arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; and that the secretary of state had authority to accept such surrender, and cancel the record of the patent, and to issue a new patent for the unexpired part of the fourteen years granted under the old patent in manner aforesaid. To which decision, the counsel for the defendant excepted.

The fourth plea, filed on the part of the defendant, after reciting the specification annexed to the patent of the plaintiffs, averred as follows: "And the defendants aver, that said specification does not correctly or accurately describe the improvement claimed by the said Joseph Grant as his invention; but said specification, and the drawings thereto annexed, are altogether defective in this, among other things, namely, in said specification, no proportions, sizes or distances are given, and the bigness or size of none of the principal parts of said machine is given in said specifications or drawings, but the same is wholly omitted; and in other particulars, said specifi-
*226] cation *and drawings are altogether defective. And the defendants aver, that said specification, annexed to and making part of said letters-patent, with the drawings thereto annexed, do not contain a written description of his, the said Joseph Grant's, invention and improvement aforesaid, and manner of using it, in such full, clear and exact terms as to distinguish the same from all other thing before known, and so as to enable any person skilled in the art of which said machine or improvement is a branch, or with which it is most nearly connected, to make and use the same; and

that, for the cause aforesaid, said letters-patent are void. All which the defendants are ready to verify; wherefore, they pray judgment if the said Joseph Grant and Solomon Townsend ought to have or maintain their aforesaid action against them, and for their costs." To which plea, the following replication was filed:

And as to the said plea of the said Eliakim Raymond and Henry Raymond, by them fourthly above pleaded, the said Joseph Grant and Solomon Townsend say, that, by reason of anything in the said last-mentioned plea alleged, they ought not to be barred from having and maintaining their aforesaid action thereof against them, the said Eliakim Raymond and Henry Raymond, because they say, that the specification mentioned in the said last-mentioned plea does correctly and accurately describe the improvement claimed by the said Joseph Grant, as his invention; and because they say further, that neither the said specification, nor the drawings thereto annexed, are defective in any of the particulars in that behalf alleged in the said last-mentioned plea; and this they, the said Joseph Grant and Solomon Townsend, pray may be inquired of by the country: and the said Eliakim Raymond and Henry Raymond do the like, &c.

The counsel for the defendants, on the said trial, introduced sundry witnesses to prove the allegations traversed in the said fourth plea, and insisted, that they had proved the same, and that the said specification of the said Joseph Grant did not describe the improvement which he claimed to have invented, in such full, clear and exact terms as to distinguish the from all other things before known, nor so as to enable a person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make and use the same; *and they requested the court [*227
to charge the jury, that if they found that the defendants had maintained and proved their averments in that respect, that they must find the same for the defendants; which instructions the court refused to give, but instructed the jury, that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, and for the purpose of deceiving the public; to which opinion, the counsel for the defendants also excepted.

The case was argued by *Webster*, for the defendants in the circuit court, now before the court as plaintiffs in error; and by *Ogden*, for the defendants, plaintiffs in the circuit court.

Webster stated, that the first question for the decision of the court was, whether the secretary of state can accept the surrender of a patent, cancel it, and grant a new one for the unexpired term for which a patent had been granted, on a suggestion that the specification is defective through inadvertence or mistake?

It cannot but be doubted, whether such cancellation can be made anywhere, so as to take out a new patent. The whole system of patents rests on statute provision. There is no common-law power, or prerogative right, in the president, to issue a patent. In this particular, our law is different from the English. Ours is a statute grant; theirs is an emanation out of a statute prohibition. With us, the fountain is statute; with them, prerogative. Our statute makes no provision for any surrender, and the issuing of

a new patent thereon. Indeed, it seems impossible to reconcile such a proceeding to the requisitions of the act. How can the patentee allege, or assign for his second patent, that his improvement had not been known, before that application? That is a statute requisition; here, in the case before the court, it had been in use three years. The party must claim, and in this case does claim, under his second patent, as a new and substantive patent; not under his first, with an amended specification. On surrender or cancellation of the patent, the party comes for a new patent, for the same
*228] invention. Now, in all such *cases, it must be that the thing has been used or known before that application. In this very case, it does not appear, that his petition contained the statute requisites; it refers to his former application.

But however this may be, the secretary of state has no authority to make a record of cancellation, and to issue a new patent. The secretary of state is a merely ministerial officer; all the laws relating to granting patents regard him as merely ministerial; his department is denominated an executive department; he has nowhere any particle of judicial power. On the subject of patents, as well as all others, he acts wholly ministerially. By the first patent law, April 10th, 1790, the secretaries of state, war, and attorney-general, were invested with authority to grant or refuse patents. But this was repealed by the existing law of February 21st, 1793; the power of granting or withholding patents, was by this act taken away from everybody. The secretary was to give the patent out, on certain requisitions being complied with, without exercising any judgment, or making any inquiry; and the patent was to avail the grantee what it might, according to the truth of the representations of the patentee. It is matter of right and matter of course, to issue the patent; if the requisites of the law be complied with. The secretary has nothing to do but make out the patent. He is applied to as keeper of the seal. And if a dispute arises between inventors, the secretary cannot decide it; he is to appoint umpires. § 9. He is not trusted to decide even whether the form of the letters-patent be conformable to law; that belongs to the attorney-general. The general power of the secretary is commented on the *Marbury* v. *Madison*, 1 Cranch 159–60. He is to record diplomatic transactions; but he cannot alter or cancel those records. He records treaties and acts of congress, but those, of course, he cannot alter. The secretary has no power to record in his office any transaction not his own, except so far as authorized by statute.

In regard to patents, the statute declares what shall be recorded. 1. The
*229] patent itself. 2. The assignment of it, if requested. *These are all. The secretary has nothing more to do. As to cancelling a patent, he is *functus officio*. The breaking the seal, or other cancellation, by the patentee, of his patent, is just as effectual, if done anywhere else, as if done at the state department. It is not a transaction which the law has prescribed for recording anywhere. He can neither authorize this cancellation, nor forbid it; nor make it matter of official record.

The vacating and cancelling the record of a patent is in its nature a judicial act. The act of 1793 treats it as such, and provides two modes of such vacation. (Citing the 6th and 10th sections of the act.) The common law also provides a mode. The court cannot add a new section to the act. In England, the repealing of patents is always regarded as a judicial act.

Godson on Patents 200. The limitations under which the court below thought the secretary could vacate one patent and issue another, show that the power he is expected to exercise is judicial. The defect must arise from inadvertence or mistake, without fraud or misconduct. The power of the secretary to act, then, depends upon his having adjudged the case to be one of mistake, and not a case of fraud. This is judicial power. How can the secretary make this judicial investigation? 1. He has no parties before him, and no power to bring persons before him. When done in court, this is done in the presence of litigant parties. 2. He cannot summon witnesses before him, and if they should come voluntarily, he cannot administer an oath to them. Such oaths would be extra-judicial and nugatory. He cannot require the parties' own oath. Now, whether the want of a proper specification be the effect of accident or of fraud, is a question of fact; and it is to be decided by the secretary, without parties, oaths or witnesses. Besides, the surrender is to be accepted only when the specification is defective. Is not that very question a question of fact, or a mixed question of law and fact? Certainly it is. It is for the jury: even a court cannot determine it without a jury. By act of April 20th, 1818, the secretary of state appoints a superintendent. Does he delegate to him his judicial power?

*There is but one way of answering this view of the subject. It must be contended, that in every case, on the mere suggestion of the patentee, a new patent is to be issued for the residue of the term, with an amended specification; leaving it to be decided, when suit should be brought, whether the defect was inadvertent or fraudulent. This would change the whole patent system. Its effects would be monstrous. Patentees would try their claims under one specification; they might fail; and they would call it inadvertence, and try another experiment. A man builds an expensive factory, puts in costly machinery, not patented, not described in any specification; he expends much money; by and by, he is sued for violating a patent, and he finds, that since he built, an old patent has come out with a new specification. A hearing, of which he knew nothing has been had before the secretary, and a new patent has issued, and he is called on to stop his factory. Now this supposed case is the very case before the court. The defendants erected their works in 1823, 1824. They knew of the plaintiff's patent of August 11th, 1821, but it did not describe any machinery used by them. But in 1825, he surrendered his first patent, took out another, with a specification describing their machinery, and sued them. Under the direction of the court, he has recovered a verdict for $3266; and is entitled, of course, to have this trebled, and the defendants are ruined. Is this legal? A bill in equity is pending also, to stop the defendants' factory. [*230

Now, what reason is there for saying, that defendants shall suffer these losses, even by the mistake or inadvertence of the patentee? The invention had become public, and if not protected by the first patent, it was gone for ever. A bad patent is no patent. 1 Barn. & Ald. 386. It may be well for congress to give the courts or judges power to vacate patents, on a patentee's own motion; but then, the congress would provide limitations and securities for innocent persons. On the doctrine of this case, there are no securities.

What are the consequences of such a principle? A man finds out there are other machines made like his, which he *would like to stop; he sets up inadvertence, gets a new patent, and stops them. If he [*231

swears it, who can deny it? It is of younger date, and he swears he meant to describe it. This would furnish irresistible temptation to perjury.

There is a deeper objection. A man makes an invention; he gets a patent, but his specification does not describe it, but describes something else. In the meantime, the public use, not what he has patented, but what he has not. Now, how is the public to be deprived of the use of this? It is denied, that they can be prevented this use. The decision of this court, in *Pennock* v. *Dialogue* proves this cannot be. The invention was used and known before it was patented. A patent, not describing an invention, is void as to that invention, and does not protect it. The invention, by a single month's use, unprotected by a patent, becomes public property and can never be resumed. Whether the patent be void, through fraud or inadvertence, if it does not describe the invention, then the invention is not protected, but has become public property. *Pennock* v. *Dialogue* so decides. (2 Pet. 1.) In England, a *scire facias* to repeal a patent is a criminal proceeding, and does not allow costs. 7 T. R. 367; Godson 201.

This case was tried in New York, before *Pennock* v. *Dialogue* was decided in this court. The only case applicable to the one now before the court is *Morris* v. *Huntington*, 1 Paine 348, that was decided in 1824. Its doctrine was materially changed by *Pennock* v. *Dialogue*. After all, that case only decides, that a patent, while another is in existence, is void. The judge then goes on to say, it may be surrendered.

It seems admitted, that the new patent ought not to reach back so as to affect those who had already used the invention. But how can this distinction be made? *Brooke* v. *Clarke*, 1 B. & Ald. 396 note. The great and conclusive objection is this—the new patent is granted on the new application, and the invention had been public four years. This is fully settled in the case of *Pennock* v. *Dialogue*.

*232] The second point is presented on the defendants' fourth plea. *The court instructed the jury, that the patent would not be void, unless the defective or imperfect specification arose from design, or the purpose of deceiving the public. This point presents two questions:

1. Whether the patent would be void or not, for the reasons stated; the direction of the court was not pertinent to the issue. The parties were at issue on a question of fact; witnesses were examined, and counsel had summed up; but the court told the jury, the issue was immaterial, and under this question, the jury found a verdict for plaintiff. It can require no argument, to prove that this is an illegal direction. 2 Day 519; 1 Stark. 388; 9 Cranch 339, 355.

2. If the question had legally arisen, the law was wrongly stated. It is insisted, that the plea was a good bar. If the specification was defective, as set forth in the plea, the plaintiff could not recover, whether that effect arose from accident or design. The very words of the third section of the statute require this. There are certain conditions precedent to be complied with, before an inventor can obtain a patent; this is one of them. The language of this section is emphatic and absolute; it could not be stronger. Courts may just as well dispense with the oath. Suppose, he omit to deliver any written specification whatever; can he afterwards say, that omission was owing to inadvertence? Yet a defective or bad specification is no specification. The same law that requires a written specification, requires

a full and accurate one. A defective one is no better than none at all. Suppose, he omit to sign the specification, can that be cured? A party is to describe his invention so as to answer two purposes: 1. To distinguish it from all other things before known. 2. To enable any person skilled in the art to make and use it. If he fail in either of these, he fails in a condition precedent. This is all very clear, and there would be no doubt about it but for the sixth section. That section has been supposed to raise the doubt.

This section, as has been observed by most judges, is inartificially *drawn. It speaks of the right of a defendant to give this act in evidence, in an action founded on the act itself. It is not grammatical. [*233
It seems borrowed from the law of 1791. The first important remark is, that the preceding sections have described the whole of the patentee's right. This section has for its object, the giving of immunities and protection to those who may be sued by patentees. Therefore, its object was not to enlarge the right of patentees. Second, most of its provisions are only affirmative, and the right existed before. The action being case, all the material defences are competent. Third, it gives some matters as a defence, not mentioned in the first act, such as license or abandonment to the public. Fourth, it does not repeat the same objections to specification. It allows the defendant to prove three things, as fatal defects in his specification: 1. That it does not contain the whole truth relative to the discovery, with intent to deceive the public; this provision may stand with the first section. 2. That it contains more than is necessary to produce the desired effect, with intent to deceive the public; this may stand with the third section. 3. That the thing had been used, or described in a public work; this may also stand.

Now, the fraudulent attempt is applied only to the first two. In these cases, congress may say that fraud shall be proved; because, even with these defects, it may be a patent and a very useful patent. It may be a valid patent, though the patentee take it but for part of his invention; yet if he fraudulently deceive the public, by keeping part back, it shall be void. So, it may be a good and valuable patent, though it contain more than is necessary to produce the desired effect. But if it be not so described as to be distinguished from other things before known, or so that skillful persons can use it, it is no patent, or of no use at all. These last objections go to its very existence; and are, therefore, made pre-requisites; they are absolute conditions precedent.

But the main consideration yet is, that this sixth section has an object of its own. It looks, not so much to the defence in its suits, as to the judicial vacation of the patent. It does not look mainly to the defence of the suit, because it leaves *out several known grounds of defence. 1. [*234
License. 2. Abandonment to the public. 3. That the patent is broader than the invention. 4. That the machine was not well described. All these are defences, and yet not mentioned here. The object of the sixth section is, like that of the tenth, to repeal, for fraud proved. All this may stand, without contradicting the third section, or doing violence to its language. Indeed, *Pennock* v. *Dialogue*, 2 Pet. 1, has apparently decided this. The sixth section speaks of inventions known before the patentee's discovery. This does not contradict the third section—"known before application." The court has settled this, and it decides this case.

The plaintiff relied below on the following cases: *Park* v. *Little and Wood*, 3 W. C. C. 196, in April 1813; *Gray* v. *James*, Pet. C. C. 401, in 1817. But it does not appear in this case, whether the defendant was or was not proceeding with a view to vacate the patent. Most probably he was; for at that time, such was the practice. This is rendered still more probable, by a decision looking the other way, in 1820, by the same judge. *Kneass* v. *Schuylkill Bank*, 4 W. C. C. 13. This case is clearly for the plaintiffs in error. The case of *Whittemore* v. *Cutter*, 1 Gallis. 429, decided in May 1813, was probably a case to vacate; at any rate, the judges doubted, and would have divided, if the case had turned on this point. The case of *Lowell* v. *Lewis*, 1 Mason 183, in 1817, was probably a similar case; page 189 cited particularly.

How can the court dispense with the express words of the third section. Here they are put into a form of a special plea; can they be disregarded? Suppose, there be but one witness; though this is merely a formal requisite, can the court dispense with it? Besides, why should the statute require a specification, unless it was to be full and accurate? For what purpose, should an insufficient specification be enjoined? The court may as well say, there shall be none. The statute says as imperatively what the specification shall contain, as that there shall be a specification at all. If an imperfect or defective specification does not render a patent void, what harm does it do it? Let this question be answered. *Now, the patentee says his *235] specification in 1821 was defective, not through fraud, but defective. But why was not that patent good, or this? If defective through fraud, he could not get another. It must be presumed to be defective through inadvertence. If so, what need of a new one?

Compare the two rules of law decided in this case together. 1. The judge held, that party might surrender his patent, and take a new one, when the specification in the first was defective through mistake, and without fraud. 2. The court ruled, that though a specification be altogether defective, yet the patent is not void, unless such defect arise from design. How can these things stand together? If the last proposition be true, all inquiry about the first is idle; unless the question be, whether a man, having one good patent, may surrender it and take out another good one for the same thing. It is now matter of settled law, that if a patent be broader than the invention, it is void; and it is never inquired, whether this arise from design or accident. In nine times out of ten, it arises from inadvertence. Now, on what principle is this? Not because the plaintiff's invention has not been invaded. It may have been exactly copied. It is because he has not rightly described what he claimed, and therefore, his patent protects him in nothing. So, if a patent be for an improvement of an old machine, it must state the improvement accurately, and distinguish between what is old and what new.

Finally, the English statute has always been construed the other way. Our sixth section is a substitute for the English *scire facias*. Davis's Patent Cases 413; Godson 124; Holroyd 100, note. Also, Dodson's Patents 56; 1 T. R. 605; 1 W. C. C. 71; 3 Ibid. 198; 1 Mason 189–90; 4 Ibid. 9, 10; 3 Wheat. 518; 2 H. Bl. 478; 1 Ves. & Beam. 67; 8 T. R. 101; 2 Car. & Payne 558, 565; 11 East 107; 14 Ves. 131.

Ogden, for the defendants in error.—The first question is, whether the secretary of state of the United States has a power by law to accept of the surrender of *and to cancel a patent which had once been issued, and to grant a second patent for the same invention, with an amended [*236 specification, for the unexpired portion of the term of fourteen years which had been granted by the first patent? Upon this question, there is not known a single case where the point has been expressly decided in the United States. The patent law is silent upon the subject; and the question must then be decided upon general principles.

A patent for a useful machine is a grant of the exclusive privilege of making and using the machine for a limited time. Now, it would seem, that a grantee may surrender his grant. A man who has a privilege may surrender that privilege. If a man cancels his patent upon record, it amounts to a surrender of it. The difficulty in the question, if there be any, must be in the other branch of it. Has the secretary of state the power, after the surrender of one patent, to grant a new one for the same invention, with an amended specification, for the unexpired portion of the term of fourteen years which had been granted by the first patent? Why should he not? When the first patent is cancelled, the invention is unprotected. If a useful one, why should not the inventor have the benefit of it? He certainly never intended to abandon the benefit of it to the public. His first patent is evidence of that. A specification requires to be drawn with great accuracy. Mechanics, by whom machines are usually invented, it cannot be supposed, are capable of drawing a proper specification. Can it be supposed, that the law ever intended to punish their ignorance in drawing a very special legal paper, by a forfeiture of all the advantages of their invention?

It is apprehended, that the issuing a new patent, in England, where there has been no sufficient specification, to comply with the condition of the first patent, is pretty much a matter of course. In the case *Ex parte Beck*, 1 Bro. C. C. 575, the lord chancellor says, "that perhaps, upon the petitioner's applying for a new patent, the officers might, under these circumstances, be induced to remit their fees; but that he could give no relief upon the present petition." Here, the lord chancellor speaks of the issuing of a new patent, as a matter of course. *In our patent law, the inventor must file his specification, before he can procure his patent. In England, [*237 the patent contains upon its face a condition, that if the patentee shall not make and file a specification, within a limited time after the date of the patent, then the patent, and all the liberties and advantages under it, shall cease and be void.

One of the cases cited by the plaintiff in error shows, that where the specification is not filed within the time mentioned in the patent, although the patent is void, a new one may be taken out by the inventor for the same invention. This case, in principle, seems to support the proposition for which the defendant in error contends; that if a first patent is void for want of a specification, or for want of a sufficient specification, a new one may be issued for the same invention, to the same inventor. In the case of *Morris* v. *Huntington*, 1 Paine 355, Mr. Justice THOMPSON says, "I see no insuperable objection to entering a *vacatur* of the patent of record, in the department of state, if taken out inadvertently, or by mistake. All the proceedings in that department on the subject of patents are *ex parte*, except

in the case of interfering applications. The department acts rather ministerially than judicially, and upon the representation of the applicant, without entering into an examination of the question of right; and there seems to be no good reason why, on a like *ex parte* application, the patent may not be surrendered and cancelled of record, if no misconduct be imputable to the patentee in taking it out." Also, page 356. So far then as this question has ever arisen in any of our courts, the right to surrender an old patent and procure a new one has been recognised. See also, *Barrett* v. *Hall*, 1 Mason 475, as to the second point.

The second point is settled by the express terms of the patent law, and by the adjudications which have taken place under it.

1. By the express terms of the patent law. The sixth section of the patent act declares, "that the defendant shall be permitted to plead the general issue, and give this act and any special matter in evidence, of which notice in writing must have been given, &c., thirty days before the trial; tending to prove that the specification filed by the plaintiff *does not *238] contain the whole truth relative to the discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, &c. So, therefore, if the specification does not contain the whole truth relative to the discovery, or if it contains more than is necessary to produce the described effect, the patent shall not, for these causes, or either of them, be evidence, unless "the concealment or addition shall fully appear to have been made for the purpose of deceiving the public."

2. By the adjudications which have taken place under the law. The first case in which the question came up, was the case of *Whitney* v. *Carter*, in the circuit court of Georgia; that case is cited in Mr. Fessenden's Essay on the Law of Patents 123. His honor Judge JOHNSON, in charging the jury in that case, said, "he considered the defendants' second objection equally unsupported, and referred to the sixth section of the patent law, by which it is required, that the concealment alleged (in order to defeat the patentee's recovery) must appear to have been made for the purpose of deceiving the public. That Mr. Whitney could have no motive for such concealment," &c. In the case of *Gray and Osgood* v. *James et al.*, Pet. C. C. 394, this question came up before the circuit court in Pennsylvania. Judge WASHINGTON says, "but if the jury should be of opinion, that the specification is materially defective, the objection will not be sufficient to invalidate the plaintiff's patent, unless they should also be satisfied, that the concealment of the circumstances not described, was intended to deceive the public." In the case of *Whittemore* v. *Cutter*, 1 Gallis. 429, Mr. Justice STORY says, "any defect or concealment in a specification, to avoid a patent, must arise from an intention to deceive the public." In the case of *Lowell* v. *Lewis*, 1 Mason 189, the same learned judge makes a similar declaration.

*239] MARSHALL, Ch. J., delivered the opinion of the court.—*This action was brought by Grant and Townsend against E. & H. Raymond, to recover damages for an infringement of their right under a patent granted to the plaintiff, Joseph Grant, in April 1825. It recited, that a former patent had been issued in August 1821, to the same person, for the same improvement, "which had been cancelled, owing to the defective

specification on which the same was granted." The exclusive privilege given by the patent on which the suit is brought, is to continue fourteen years from the day on which the original was issued.

One of the pleas filed by the defendants, contained, the following averment: "And the defendants aver, that said specification does not correctly or accurately describe the improvement claimed by the said Joseph Grant as his invention, but said specification, and the drawings thereto annexed, are altogether defective in this, among other things, namely, in said specification, no proportion, sizes or distances are given, and the bigness or size of none of the principal parts of said machine is given in said specifications or drawings, but the same is wholly omitted; and in other particulars, said specifications and drawings are wholly defective; and the defendants aver, that said specifications annexed to, and making part of, said letters-patent, with the drawings thereto annexed, do not contain a written description of his, the said Joseph Grant's, invention and improvement aforesaid, and manner of using it, in such full, clear and exact terms, as to distinguish the same from all other things before known, and so as to enable any person skilled in the art of which said machine or improvement is a branch, or with which it is most nearly connected, to make and use the same; and that, for the cause aforesaid, said letters-patent are void."

The plaintiffs reply, that they ought not to be barred. "because they say, that the specification mentioned in the said last-mentioned plea, does correctly and accurately describe the improvement claimed by the said Joseph Grant as his invention; and because they say further, that neither the said specification, nor the drawings thereto annexed, are defective in any of the particulars in that behalf alleged in the said last-mentioned plea, and this they pray may be inquired of by the country." On this replication, issue was joined.

*At the trial, the counsel for the defendants objected, that the secretary of state had no power by law to accept a surrender of, and [*240 to cancel, the said letters-patent, or to inquire into, or to decide upon, the causes for so doing, or to grant said second patent for the same invention, with an amended specification, for the unexpired portion of the term of fourteen years which had been granted by the first patent. The court decided, that such surrender might be made, when the defect arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; and that the secretary of state had authority to accept such surrender, and cancel the record of the patent, and to issue a new patent for the unexpired part of the fourteen years granted under the old patent, in manner aforesaid. To which decision, the counsel for the defendants excepted.

After adducing the testimony on which they relied to support their plea hereinbefore stated, the counsel for the defendants moved the court to instruct the jury, that if they found, that the defendants had maintained and proved their averments in that respect, that they must find the same for the defendants; which instructions the court refused to give, but instructed the jury, that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, and for the purpose of deceiving the public; to which opinion, the counsel for the defendants also excepted.

The jury found a verdict for the plaintiffs, and assessed their damages to $3266.66; the judgment on which is brought before this court by a writ of error.

The first question in the cause respects the power of the secretary of state to receive a surrender of a patent, cancel the record thereof, and issue a new patent, for the unexpired part of the fourteen years for which the original patent had been granted. The court was of opinion, that this might be done, "when the defect in the specification arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee." The right of the patentee to surrender his patent has not been denied, but the plaintiffs in error insist, that no power exists to grant a new patent for
*241] the unexpired term. The *words of the act, they say, do not confer this power. It cannot be exercised, with its necessary guards, by the department of state; and inconvenience of no inconsiderable magnitude might result to the public from its exercise. The secretary of state is, in the act of making out patents, a mere ministerial officer, and can exercise no power which is not expressly given.

It is undoubtedly true, that the secretary of state may be considered, in issuing patents, as a ministerial officer. If the pre-requisites of the law be complied with, he can exercise no judgment on the question, whether the patent shall be issued. It is equally true, that the act of congress contains no words which expressly authorize the secretary to issue a corrected patent, if the original, from some mistake or inadvertence in the patentee, should be found incompetent to secure the reward which the law intended to confer on him for his invention. The force of this objection, and of the argument founded on it, is felt. If the new patent can be sustained, it must be on the general spirit and object of the law, not on his letter.

To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our constitution, and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to congress. This subject was among the first which followed the organization of our government. It was taken up by the first congress, at its second session, and an act was passed, authorizing a patent to be issued to the inventor of any useful art, &c., on his petition, "granting to such petitioner, his heirs, administrators or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery." The law further declares, that the patent "shall be good and available to the grantee or grantees, by force of this act, to all and every intent and purpose herein contained." The amendatory act of 1793 contains the same language, and it cannot be doubted, that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions, for the time mentioned in their patent.
*242] It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where

the full benefit has been actually received ; if this can be done, without transcending the intention of the statute, or countenancing acts which are fraudulent, or may prove mischievous. The public yields nothing which it has not agreed to yield ; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved ; and for his exclusive enjoyment of it, during that time, the public faith is pledged. That sense of justice and of right which all feel, pleads strongly against depriving the inventor of the compensation thus solemnly promised, because he has committed an inadvertent or innocent mistake.

If the mistake should be committed in the department of state, no one would say, that it ought not to be corrected. All would admit, that a new patent, correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued. And yet the act does not, in terms, authorize a new patent, even in this case. Its emanation is not founded on the words of the law, but is indispensably necessary to the faithful execution of the solemn promise made by the United States. Why should not the same step be taken, for the same purpose, if the mistake has been innocently committed by the inventor himself ?

The counsel for the plaintiffs in error have shown very clearly, that the question of inadvertence or mistake is a judicial question, which cannot be decided by the secretary of state. Neither can he decide those judicial questions on which the validity of the first patent depends ; yet he issues it, without inquiring into them. Why may he not, in like manner, issue the second patent also ? The correct performance of all those preliminaries on which the validity of the original depends, are always examinable in the court in which a suit for its violation shall be brought. Why may not those points on which the validity of the amended patent depends, be examined *before the same tribunal? In the case under consideration, those questions were not supposed by the circuit court to have been decided [*243 in the department of state, but were expressly submitted to the jury. The rightfulness of issuing the new patent is declared to depend on the fact, that " the defect in the specification arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee." The jury were, of course, to inquire into the fact. The condition on which the right to issue the patent depended, could be stated to them for no other purpose.

It has been said, that this permission to issue a new patent, on a reformed specification, when the first was defective, through the mistake of the patentee, would change the whole character of the act of congress. We are not convinced of this. The great object and intention of the act is, to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals, for the time and labor devoted to these discoveries, by the exclusive right to make, use and sell the things discovered, for a limited time. That which gives complete effect to this object and intention, by employing the same means for the correction of inadvertent error, which are directed in the first instance, cannot, we think, be a departure from the spirit and character of the act.

An objection much relied on is, that after the invention has been brought into general use, those skilled in the art or science with which it is connected,

perceiving the variance between the specification and the machine, and availing themselves of it, may have constructed, sold and used the machine, without infringing the legal rights of the patentee, or incurring the penalties of the law. The new patent would retroact on them, and expose them to penalties to which they were not liable when the act was committed. This objection is more formidable in appearance than in reality. It is not probable, that the defect in the specification can be so apparent as to be perceived by any but those who examine it for the purpose of pirating the invention; they are not entitled to much favor. But the answer to the objection is, that this defence is not made in this case; and the *opinion of the circuit court does not go so far as to say, that such a defence would not be successful. That question is not before the court, and is not involved in the opinion we are considering. The defence, when true in fact, may be sufficient in law, notwithstanding the validity of the new patent.

*244]

It has been also argued, that the new patent must issue on the new specification, and on the application which accompanies it. Consequently, it will not be true, that the machine was "not known or used before the application." But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application; and if the new patent is valid, the law must be considered as satisfied, if the machine was not known or used before that application.

It has been urged, that the public was put into possession of the machine, by the open sale and use of it under the defective specification, and cannot be deprived of it, by the grant of a new patent. The machine is no longer the subject of a patent. This would be perfectly true, if the second patent could be considered as independent of the first. But it is in no respect so considered. The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If, by an innocent mistake, the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery, without paying the stipulated consideration. The attempt would be disreputable in an individual, and a court of equity might interpose to restrain him.

It will not be pretended, that this question is free from difficulty. But the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard this settled practice, in a case where we are not satisfied, it is contrary to law, and where we are satisfied, that it is required by justice and good faith.

*We will now proceed to the second exception. The plea assigns the particular defect supposed to exist in the specification, and then proceeds to aver, in the very words of the act, that it "does not contain a written description of his the said Joseph Grant's invention and improvement aforesaid, and manner of using it, in such full, clear and exact terms as to distinguish the same from all other things before known, and so as to enable any person skilled in the art, &c. to make and use the same," &c. The plea alleges, in the words of the act, that the pre-requisites to the issu-

*245]

ing a patent had not been complied with. If the matter alleged in this plea constituted no bar to the action, the plaintiffs might have demurred, and have submitted the question of law to the court. But they have chosen to deny the facts alleged in the plea, and to aver in their replication "that neither the specification nor the drawings thereto annexed, are defective in any of the particulars in that behalf alleged." Issue was joined upon this replication, and it is that issue which the jury were sworn to try.

At the trial, the counsel for the defendants, after the evidence was closed, asked the court, in substance, to instruct the jury, that if they should be of opinion, that the defendants had maintained and proved the facts alleged in their plea, they must find for the defendants. The court refused this instruction. Ought it to have been refused? If, in the opinion of the jury, the defendants have proved and maintained every fact alleged in the plea on which the issue they are sworn to try is joined, ought not the jury to find that issue for the defendants? Is not this required by their oaths? The conclusion, "and that for the cause aforesaid, said letters-patent are void," is an inference of law from the facts previously alleged; not the allegation of a distinct fact, to be submitted to the jury. The court proceeded to instruct the jury, "that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design or for the purpose of deceiving the public." Now, this "design," this "purpose of deceiving the public," constituted no part of the issue. The defendants had not alleged it, and could not be supposed to come prepared to prove it. A verdict for them would not imply it. The instruction is *understood to direct a verdict, which finds in fact that the description or specification is not defective; and this verdict against the [*246 evidence is to be found, because that debt "arose not from design, or for the purpose of deceiving the public."

But we must inquire, whether the instruction, independent of its departure from the issue, be consistent with law. It is, "that the patent would not be void, unless," &c. The fifth section of the act gives the party aggrieved, an action for the infringement of his patent-right. The sixth provides, "that the defendant in such action shall be permitted to plead the general issue, and give this act in evidence, and to give in evidence any special matter, of which notice in writing may have been given to the plaintiff, or his attorney, thirty days before trial, tending to prove that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public; or that the thing thus secured," &c.; "in either of which cases, judgment shall be rendered for the defendant with costs, and the patent shall be declared void."

Courts did not, perhaps, at first, distinguish clearly between a defence which would authorize a verdict and judgment in favor of the defendant in the particular action, leaving the plaintiff free to use his patent, and to bring other suits for its infringement; and one which, if successful, would require the court to enter a judgment not only for the defendant in the particular case, but one which declares the patent to be void. This distinction is now well settled. If the party is content with defending himself, he may either plead specially; or plead the general issue, and give the notice

required by the sixth section of any special matter he means to use at the trial. If he shows, that the patentee has failed in any of those pre-requisites on which the authority to issue the patent is made to depend, his defence is complete. He is entitled to the verdict of the jury, and the judgment of the court. But if, not content with defending himself, he seeks to annul the patent, he must proceed in precise conformity to the sixth section. If he depends on evidence "tending to prove that the specification filed by the plaintiff *does not contain the whole truth relative *247] to his discovery, or that it contains more than is necessary to produce the described effect," it may avail him so far as respects himself, but will not justify a judgment declaring the patent void, unless such "concealment or addition shall fully appear to have been made for the purpose of deceiving the public;" which purpose must be found by the jury, to justify a judgment of *vacatur* by the court. The defendant is permitted to proceed according to the sixth section, but is not prohibited from proceeding in the usual manner, so far as respects his defence; except that special matter may not be given in evidence on the general issue, unaccompanied by the notice which the sixth section requires. The sixth section is not understood to control the third. The evidence of fraudulent intent is required only in the particular case, and for the particular purpose stated in the sixth section.

This instruction was material, if the verdict ought to have been for the defendants, provided the allegations of the plea were sustained, and if such verdict would have supported a judgment in their favor; although the defect in the specification might not have arisen from design, and for the purpose of deceiving the public. That such is the law, we are entirely satisfied. The third section requires, as preliminary to a patent, a correct specification and description of the thing discovered. This is necessary, in order to give the public, after the privilege shall expire, the advantage for which the privilege is allowed, and is the foundation of the power to issue the patent. The necessary consequence of the ministerial character in which the secretary acts, is, that the performance of the pre-requisites to a patent must be examinable in any suit brought upon it. If the case was of the first impression, we should come to this conclusion; but it is understood to be settled.

The act of parliament concerning monopolies contains an exception on which the grants of patents for inventions have issued in that country. The construction of so much of that exception as connects the specification with the patent, and makes the validity of the latter dependent on the correctness of the former, is applicable, we think, to proceedings under the third section of the American act. The English books *are full of cases in *248] which it has been held, that a defective specification is a good bar, when pleaded to, or a sufficient defence, when given in evidence on the general issue, on an action brought for the infringement of a patent-right. They are very well summed up in Godson's Law of Patents, title Specification; and also in the chapter respecting the infringement of patents: also in Holroyd on Patents, where he treats of the specification, its form and requisites. It is deemed unnecessary to go through the cases, because there is no contrariety in them, and because the question is supposed to be substantially settled in this country. *Pennock and Sellers* v. *Dialogue*, 1 Pet. 1,

was not, it is true, a case of defect in the specification or description required by the third section, but one in which the applicant did not bring himself within the provision of the first section, which requires, that before a patent shall issue, the petitioner shall allege that he has invented a new and useful art, machine, &c., "not known or used before the application." This pre-requisite of the first section, so far as a failure in it may affect the validity of the patent, is not distinguishable from a failure of the pre-requisites of the third section. On the trial, evidence was given to show that the patentee had permitted his invention to be used, before he took out his patent. The court declared its opinion to the jury, that if an inventor makes his discovery public, he abandons the inchoate right to the exclusive use of the invention. "It is possible," added the court, "that the inventor may not have intended to give the benefit of his discovery to the public." "But it is not a question of intention," "but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say, whether the evidence brings this case within the principle which has been stated. If it does, the court is of opinion, that the plaintiff is not entitled to a verdict." The jury found a verdict for the defendants, an exception was taken to the opinion, and the judgment was affirmed by this court.

This case affirms the principle, that a failure on the part of the patentee, in those pre-requisites of the act which authorize the patent, is a bar to a recovery in an action for its infringement; and that the validity of this defence does not depend on *the invention of the inventor, but is [*249
a legal inference upon his conduct.

Upon these authorities, and this reasoning, we are of opinion, that the instruction was erroneous, and that the judgment ought to be reversed, and the cause remanded. One of the judges composing the majority thinks, that the direction would have been erroneous, on a plea properly framed upon the third section of the act, and averring the facts of a defective specification, and a non-compliance with other requisitions of that section, for that such a plea would be a good bar and defence to the action; but, in his view, the plea relies upon the facts as avoiding the patent entirely, and avers it to be void. He thinks, however, that the replication puts the facts, and not the point, whether void or not, in issue; and that the direction of the court was erroneous, since it was equivalent to a declaration, that if all the facts were proved, the issue ought not to be found for the defendants, unless the imperfection of the specification arose from a fraudulent design.

The judgment is 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 southern district of New York, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said circuit court erred, in instructing the jury, "that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, and for the purpose of deceiving the public." 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 directions to award a *venire facias de novo*.

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*250] *The President, Directors and Company of the BANK OF THE UNITED STATES, Plaintiffs in error, *v.* WILLIAM S. HATCH, Defendant in error.

Notice of non-payment.—Discharge of indorser.

A suit was instituted by the bank against Pearson, the drawer of a bill of exchange, indorsed by Hatch, which suit stood for trial at an approaching term; the attorney and agent of the bank agreed with Pearson, that the suit against him should be continued, without judgment, until the term after that at which judgment would have been entered, if Pearson would permit a person in confinement under an execution at his suit, to attend a distant court, as a witness for the bank, in a suit in which the bank was plaintiff; the witness was permitted to attend the court, and the suit against Pearson was continued, agreeable to the said agreement. This was an agreement for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agent of the bank; it was a virtual discharge of the indorser of the bill.[1]

McLemore *v.* Powell, 12 Wheat. 584, re-affirmed.

The notary-public, on the non-payment of a bill of exchange, left a notice of the same for the indorser, at a private boarding-house, where the indorser lodged; calling at the boarding-house, and inquiring for the indorser of a bill, of a fellow-boarder, he was informed, that he was not within, and he then left the notice with the fellow-boarder, requesting him to leave it with the indorser: *Held*, that this was sufficient notice to the indorser, to make him liable for the payment of the bill.

United States Bank *v.* Hatch, 1 McLean 90, affirmed.

ERROR to the Circuit Court of Ohio. This action was brought by the plaintiffs in error, in the circuit court of the United States for the district of Ohio, against William S. Hatch, by *scire facias* upon a judgment obtained against Elijah Pearson, in a suit brought against him and the said William S. Hatch, in which the marshal returned "not found," as to William S. Hatch. The action was upon a bill of exchange, drawn by Elijah Pearson, and indorsed by William S. Hatch. The issue was joined upon the plea of *non assumpsit*.

At the trial, the defendant offered in evidence a deposition of one John M. Ferry, to which the counsel of the plaintiffs objected, on the grounds stated in the opinion of the court; which objection was overruled by the court, and the deposition read. To this opinion of the court, the plaintiffs' counsel excepted.

*251] *The jury found the following special verdict, to wit: "And afterwards, to wit, at the December term of said court, in the year last aforesaid, came the parties, by their said attorneys; and thereupon, for trying the issue joined, came a jury, who found, that E. Pearson made

[1] If the holder of a negotiable promissory note does anything, the effect of which is, to suspend, impair or destroy the right of the prior parties to indemnity from those liable over to them, he cannot resort to those affected by his conduct, to make good the default of the maker of the instrument. Ross *v.* Jones, 22 Wall. 587. Any stipulation made, after the recovery of judgment against the principal, whereby the creditor puts it out of his power to proceed for the collection thereof, will discharge a surety. Ducker *v.* Rapp, 67 N. Y. 464. And see Greene *v.* Bates, 74 Id. 353; Pomeroy *v.* Tanner, 70 Id. 547.

the bill of exchange, a copy of which is attached to the declaration of the said plaintiffs in the original suit against said Pearson, the drawer of said bill, and that the said bill was regularly indorsed by the present defendant Hatch. They also find, that on the 25th day of July, in the year 1820, said bill of exchange was duly protested for non-payment, and that on said day last mentioned, and on the succeeding day, the said defendant Hatch was boarding at the house of Henry Bainbridge, in the city of Cincinnati; that on the 26th day of July, in the year 1820, the notary-public by whom said bill was protested, called at the house of said Bainbridge, and inquired for said Hatch, and was informed by a Mr. Young, that said Hatch was not within; the said notary then left a written notice of said protest with said Young, who was at that time in the house aforesaid, and requested him to deliver said notice to said Hatch; and that in the summer of said year, 1820, said Young was a boarder at said house. They also find, that a suit was commenced against said Pearson, the drawer, on said bill of exchange, which suit stood for trial at the September term, in the year 1822, of the circuit court of the United States for the district of Ohio. They also find, that previous to the year 1822, one Griffin Yeatman was confined on the jail limits of Hamilton county, in said state, on a *capias ad respondendum*, issued at the instance of, and on a judgment in favor of, said Pearson. That said Yeatman was a material witness for the plaintiffs, in a number of suits then pending in said courts; that one George W. Jones, who was the then agent for plaintiffs, and one William M. Worthington, the then attorney for the plaintiffs, agreed with the said Pearson, that in consideration, he, the said Pearson, would permit the said Yeatman to leave the said jail limits, and attend said court, during the term aforesaid, then the suit then pending in said court against said Pearson, on said bill of exchange, should be continued, without judgment, until the term of said court next ensuing said September term, A. D. 1822. That in pursuance of this agreement, the said Pearson permitted the *said Yeatman to leave said jail-limits, and attend said court; and that said suit against said Pearson was continued, agreeable to said agreement. Now, therefore, if, upon this finding, the court shall be of opinion, that the plaintiff is entitled to judgment, then the jury find for the plaintiff, to recover of the defendant the amount of said bill, together with the interest thereon; but if the court shall be of opinion, upon the said finding, that the defendant is entitled to a judgment, then and in that case, the jury find for the defendant."

[*252

Upon this special verdict, the court below gave judgment for the defendant, and the plaintiffs below thereupon prosecuted this writ of error.

The case was argued by *Sergeant* and *Webster*, for the plaintiffs in error; and by *Ewing*, for the defendant.

For the *plaintiffs* in error, it was contended, 1. That the notice of the non-payment of the bill of exchange was sufficiently proved. 2. That the plaintiffs had not discharged the indorser by the facts set forth in the special verdict.

1. The notice was sufficient. The notary-public went to the house in which the indorser was a boarder, in the city of Cincinnati, and inquired if Mr. Hatch was within, and was informed by Young, also a boarder in the

house, that he was not; and the notary then left a notice of the non-payment of the bill with Young, and requested him to deliver the notice to Mr. Hatch. The law does not require a notice of the non-payment of a bill or note to be in writing; nor that it shall be given, if the indorser cannot be found, and no one is at his residence, abode or place of business, to receive it. In this case, the indorser was not at home, and no agent was left who could receive the notice for him. But a notice in writing was left at his residence, which is certainly sufficient. *Stedman* v. *Gooch*, 1 Esp. 4; *Williams* v. *Bank of United States*, 2 Pet. 96, 101. A lodger in a lodging-house is in his dwelling, in contemplation of law; and this was the dwelling of Mr. Hatch. If left with any one found in the lodging-house, or at the house, it was a full compliance with the law.

*253] 2. As to the discharge of the indorser. *If the circumstances stated in the special verdict have operated to release the indorser, any delay in prosecuting a suit against the drawer will have the same effect. If a party becomes nonsuit, if he postpones his suit from the absence of testimony, or for any cause, however immaterial to the merits of the case, the same effect will follow. The indorser has no right to insist on the institution of a suit, and he cannot, therefore, claim the benefit of any proceedings in a suit to which he was not a party, and with which he could not interfere. Even a stipulation not to sue the drawer, when it does not bind the indorser, and leaves him free to proceed upon the note or bill, on his paying the holder the amount, will not release the indorser. The agreement found by the special verdict did not operate on the debt. No time was given for its payment; it did not suspend the claim, the right of action, or the obligation; nor did it affect directly or indirectly any one but the drawer. By paying the debt, as the indorser should have done, he would have obtained an immediate right of action against the drawer.

The principles established by this court in the case of *McLemore* v. *Powell*, 12 Wheat. 554, are: before the parties to a bill or note are fixed by notice, any *laches* on the part of the holder will discharge the indorsers; after notice, no *laches* can be imputed, and no diligence is required. So also, in *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 654, *per* EYRE, C. J. This is, therefore, the established law. In all cases where parties originally liable have been held discharged, either a new security has been given to the holder, or time given to such parties, to the prejudice of the rights of the parties held discharged. The allowance of time for the payment of the debt, must have been binding on all the parties, which was not done in this case. *Collott* v. *Haigh*, 3 Camp. 281; *English* v. *Darby*, 2 Bos. & Pul. 61; *Clarke* v. *Devlin*, 3 Ibid. 363; Bailey on Bills (4th ed.) 270, 274.

This is not a case of subrogation. The indorser could not have come into court, and having paid the holder of the bill, have prosecuted this suit against the drawer, in the name of the holder. He could not, therefore, have been prejudiced by the agreement, as it did not suspend or impair his right of action.

*254] *Ewing*, for the defendant in error, contended, that the notice was not sufficient to charge the indorser of the bill. Where parties to a note or bill reside in the same town, personal notice is required. 2 Pet. 101. The notice in this case was left with a stranger, and no diligence was used

to find the indorser, Hatch, who was only a boarder at the house. If notice left with an agent would be sufficient, this was not done, in the case before the court. The keeper of the boarding-house might have been a proper person to receive the notice.

The agreement between the plaintiffs in error and the drawer of the bill, discharged the indorser. By the agreement, the plaintiffs received a benefit; there was a consideration for it. They obtained the testimony of Yeatman, who was a material witness for them. It prejudiced the drawee of the bill, because it took from him his remedy against Pearson. The court would have enforced the observance of this agreement. Had the plaintiffs proposed to take judgment, upon proof of this agreement, and its execution by the drawer of the bill, the court would have refused to enter judgment. Had the judgment been taken, upon applicatior during the term, and proof of the facts, it would have been set aside and the cause continued. If these positions are correct, the indorser was discharged. The whole of the principles of the law on this matter have been decided in *McLemore* v. *Powell*, 12 Wheat. 554. If Hatch, after the agreement, before the following term of the court, had applied to the plaintiffs and paid off the bill, he had a claim to be subrogated to their rights, which were to proceed with the suit against the drawer; but the plaintiffs had so tied up their hands, that no judgment could have been taken at that term. They had thus, in the very words of the court, in the case of *McLemore* v. *Powell*, suspended their own remedy, so as to prejudice the rights of the indorser; and he must then be discharged.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of Ohio. The Bank of the United States, as holders, brought an action upon a bill of exchange, jointly against Elijah Pearson, as drawer, and against William S. Hatch, as indorser, under a *statute [*255
of Ohio authorizing such a proceeding. The marshal having returned the writ "not found" as to Hatch, the bank proceeded to take judgment against Pearson alone. The present suit is a *scire facias* against Hatch, to make him a party to the same judgment, so that execution may also issue against him, according to the provisions of the same statute. The declaration and bill of exchange in the original proceedings have not been, as they ought to have been, sent up in the record, as they constitute a part of it; and for this imperfection, a *certiorari* ought to have been awarded, if anything material in it were now controverted by the parties. It appears from some exhibits in the proceedings, that the bill of exchange was dated at Cincinnati on the 23d of May 1820, and was as follows:

"Sixty days after date hereof, pay to the order of William S. Hatch, at the office of discount and deposit of the Bank of the United States at Cincinnati, six thousand six hundred dollars, which charge to the account of,
Yours, respectfully, E. Pearson."

Addressed—"Mr. Thomas Graham, Cincinnati, Ohio."

It was indorsed by Hatch, and accepted by Graham. Hatch pleaded the general issue, *non assumpsit;* and at the trial, the jury found a special verdict, as follows:

"And afterwards, to wit, at the December term of said court, in the year last aforesaid, came the parties, by their said attorneys; and thereupon, for

trying the issue joined, came a jury, to wit, William B. Van Hook, David Todd, John Larwell, Randall Stiver, Isaac N. Norton, A. R. Chase, Truman Beecher, J. R. Geddings, William Rayne, William A. Needham, Ira Paige and William A. Johnson, who, being empannelled, elected, tried, sworn and affirmed to try the issue between the parties, upon their oath do say, that E. Pearson made the bill of exchange, a copy of which is attached to the declaration of the said plaintiffs in the original suit against said Pearson, the drawer of said bill, and that the said bill was regularly indorsed by the present defendant Hatch. They also find, that on the 25th day of July, in the year 1820, said bill of exchange was duly protested for non-payment, and that on said day last mentioned, and on the succeeding day, the said defendant Hatch was boarding at the house of Henry Bainbridge, in the city of Cincinnati; *256] that on the 26th day of July, in the year 1820, the notary-public *by whom said bill was protested, called at the house of said Bainbridge, and inquired for said Hatch, and was informed by a Mr. Young, that said Hatch was not within; the said notary then left a written notice of said protest with said Young, who was at that time in the house aforesaid, and requested him to deliver said notice to said Hatch; and that in the summer of said year, 1820, said Young was a boarder at said house. They also find, that a suit was commenced against said Pearson, the drawer of said bill of exchange, which suit stood for trial at the September term, in the year 1822, of the circuit court of the United States for the district of Ohio. They also find, that previous to the year 1822, one Griffin Yeatman was confined on the jail-limits of Hamilton county, in said state, on a *ca. sa.*, issued at the instance of, and on a judgment in favor of, said Pearson. That said Yeatman was a material witness for the plaintiff, in a number of suits then pending in said court; that one George W. Jones, who was the then agent for plaintiffs, and one William M. Worthington, the then attorney for the plaintiffs, agreed with the said Pearson, that, in consideration, he, the said Pearson, would permit the said Yeatman to leave the said jail-limits, and attend said court, during the term aforesaid, then the suit then pending in said court against said Pearson, on said bill of exchange, should be continued, without judgment, until the term of said court next ensuing said September term, A. D. 1822. That, in pursuance of this agreement, the said Pearson permitted the said Yeatman to leave said jail-limits, and attend said court; and that said suit against said Pearson was continued agreeable to said agreement. Now, therefore, if upon this finding, the court shall be of opinion, that the plaintiff is entitled to judgment, then the jury find for the plaintiff, to recover of the defendant the amount of said bill, together with the interest thereon; but if the court shall be of opinion, upon the said finding, that the defendant is entitled to a judgment, then and in that case, the jury find for the defendant." Upon this special verdict, the court below gave judgment for the defendant.

Two questions, arising out of the special verdict, have been argued at the bar. First, whether the notice to Hatch of the dishonor of the bill was *257] sufficient? Secondly, if it was, *whether the agreement between the bank and Pearson was a discharge of the indorser?

Upon the first point, we are of opinion, that the notice was sufficient. In cases of this nature, the law does not require the highest and strictest decree of diligence in giving notice; but such a degree of reasonable diligence as

will ordinarily bring home notice to the party. It is a rule founded upon public convenience, and the general course of business; and only requires that, in common intendment and presumption, the notice is by such means as will be effectual. In the present case, the notice was left at a private boarding-house, where Hatch lodged; which must be considered, to all intents and purposes, his dwelling-house. It was left, then, at the proper place; and if the delivery had been to the master of the house, or to a servant of the house, there could be no doubt that it would have been sufficient. *Stedman* v. *Gooch*, 1 Esp. 4. The notary called at the house, and upon inquiry of a fellow-boarder and inmate of the house, he was informed, that Hatch was not within; he then left the notice with the fellow-boarder, requesting him to deliver it to Hatch. The latter must necessarily be understood, by receiving the notice, under such circumstances, impliedly to engage to make the delivery. The question then is, whether such a notice, so delivered, does not afford as reasonable a presumption of its being received, as if delivered to a servant of the house. This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of civility as this. In our large cities, many persons engaged in business live in boarding-houses in this manner. It is not always easy to obtain access to the master of the house, or to servants, who may be safely intrusted with the delivery of notices of this sort. A person, who resides in the house upon a footing of equality with all the guests, may well be supposed to feel a deeper interest in such matters, than a mere servant, whose occupations are pressing and various, and whose pursuits do not lead him *to place so high a value upon a scrupulous discharge of duty. We think, that a stricter rule would [*258 be found inconvenient, and tend to subvert rather than to subserve the purposes of justice. No case exactly in point has been cited at the bar. That of *Stedman* v. *Gooch*, 1 Esp. 4, approaches near to it; but there the notice was left with the woman who kept the house at which the party was a lodger. No stress, however, seems to have been laid upon this circumstance, to distinguish it from the case of a delivery to any other inmate of the house, either servant or fellow-boarder.

The other question is one of more nicety, and not less important. It appears from the special verdict, that the contract with Pearson, for the continuance of the suit on this very bill, without judgment, until the next term of the circuit court, was for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agents of the bank. What, then, is to be deemed the true construction of it? Did it amount to no more than an agreement, that that particular suit should stand continued, leaving the bank at full liberty to discontinue that, on the morrow, at their discretion, and to commence a new suit, and new proceedings for the same debt? Or was it intended by the parties, to suspend the enforcement of any remedy for the debt, for the stipulated period, and rely solely on that suit for a recovery? We are of opinion, that the intention of the parties, apparent on the contract, was to suspend the right to recover the debt, until the next term of the court. It is scarcely

possible, that Pearson should have been willing to give a valuable consideration for the delay of a term, and yet have intentionally left avenues open to be harassed by a new suit, in the interval. Indeed, no other remedy, except in that particular suit, seems to have been within the contemplation of either party. If the bank had engaged, for a like consideration, not to sue Pearson on the bill, for the same period, there could have been no doubt, that it would be a contract suspending all remedy. What substantial difference is there between such a contract, and a contract to suspend a suit already commenced, which is the only apparent remedy for the recovery of the bill, during the same period? Is it not the natural, nay necessary, intendment, that the defendant shall have the full benefit of the whole period,
*259] *as a delay of payment of the debt? It is no answer, that a new suit would be attended with more delay. That might or might not be the case, according to the different course of practice in different states; and, at all events, it would harass the party with new expenses of litigation. But the true inquiry is, whether the parties did or did not intend a surceasing of all legal proceedings during the period? We think, that the just and natural exposition of the contract is, that they did.

If this, then, be the correct exposition of the contract, the case clearly falls within the principle laid down by this court in *McLemore* v. *Powell*, 12 Wheat. 554. That was the case of a voluntary agreement, without consideration, by the holder, with the drawer of the bill, for delay, after the parties had been fixed by due notice of the dishonor of the bill. The court held, that the agreement was not binding in point of law, and therefore, it did not exonerate the indorser. On that occasion, the court said, "We admit the doctrine, that, although the indorser has received due notice of the dishonor of the bill, yet if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it," &c. "If the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill, for the stipulated period, and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him, as against the holder himself. If, therefore, such a contract be entered into, without his assent, it is to his prejudice, and discharges him." The same reasoning applies with full force to the present case. If the bank could not have any remedy on the bill to recover payment, but was bound to wait until the next term of the circuit court, the defendant Hatch, as indorser, could not, by paying the bill, place himself in a better situation. He would be liable to the same equities, under the agreement suspending the remedy, as the bank. The same principles,
*260] which this court adopted in the *case of *McLemore* v. *Powell*, 12 Wheat. 554, will be found illustrated and confirmed in an able opinion of Mr. Chancellor KENT, in *King* v. *Baldwin*, 2 Johns. Ch. 554, and applied to a case between principal and surety. There are other authorities to the same effect. *Gould* v. *Robson*, 8 East 576; *Laxton* v. *Peat*, 2 Camp. 188; *Hubbly* v. *Brown*, 16 Johns. 70; Bayley on Bills 234.

There is a recent case in England, which approaches very near to the

circumstances of the present case. We allude to *Lee* v. *Levi*, 1 Car. & P. 553. In that case, the holder, after suit brought against the acceptor and the indorser, had taken a *cognovit* of the acceptor, for the amount of the bill, payable by instalments; and at the trial of the suit against the indorser, Lord Chief Justice ABBOTT thought, that this was a giving time, which discharged the indorser, and the jury found a verdict accordingly. That case afterwards came before the whole court for revision (6 Dow. & Ry. 475), and was then decided upon a mere collateral point, viz., that the defence, having arisen after suit brought against the indorser, should have been taken advantage of by special plea, and could not be given in evidence under the general issue; so that the ruling of the lord chief justice was not brought directly into judgment. It was not, however, in any measure overruled.

Upon the whole, we are of opinion, upon the ground of the agreement stated in the special verdict being a virtual discharge of the indorser, that the judgment of the circuit court ought to be affirmed, with costs.

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

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*JAMES MCDONALD'S Heirs, Appellants, *v.* FREEMAN SMALLEY and others, Appellees. [*261

Land-law of Ohio.

The plaintiff's entry of land in Ohio was made in the name of a person who was dead at the time of the entry. This entry is a nullity in the state of Ohio.
Galt *v.* Galloway, 4 Pet. 332, re-affirmed.

APPEAL from the Circuit Court of Ohio.

This case was argued by *Vinton* and *Doddridge*, for the appellants; and by *Corwin* and *Bibb*, for the appellees.

MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the court of the United States for the seventh circuit and district of Ohio, to obtain a conveyance for land which the defendants hold by a senior patent, and which the plaintiffs claim under a prior entry. The bill was dismissed by the circuit court, and the plaintiffs have appealed to this court.

Serious doubts exist respecting the validity of the entry under which the claim has been made, and several points have been discussed at the bar. It is unnecessary to decide more than one of these questions, because that is decisive of the case. David Anderson, in whose name the entry under which the plaintiffs claim was made, was dead at the time. The entry, therefore, as was determined in *Galt* v. *Galloway*, 4 Pet. 332, 345, is, in the state of Ohio, a nullity. This being the foundation of the plaintiff's title, they must fail in their action. Counsel, at the bar, have endeavored to distinguish this case from that, by treating the entry as one made in the name of the wrong person, through the mistake of the surveyor. We do not think he is

sustained by the fact or the law of the case. The decree is affirmed, with costs.

Decree affirmed.

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*262] *John Conard, Marshal of the Eastern District of Pennsylvania—United States, Plaintiffs in error, *v.* Pacific Insurance Company of New York, Defendants.

Lien for duties.—Damages.

Conard *v.* Atlantic Insurance Company, 1 Pet. 386, re-affirmed.

The bringing up with the record of the proceedings in the circuit court, the charge of the court at large, is a practice which this court has often disapproved, and deems incorrect.

The case of Harris *v.* Dennie, 3 Pet. 292, decided no more than that no creditor of the importer could, by any attachment or process, take goods imported into the United States, upon their importation, out of the possession of the United States, until the lien of the United States for the duties accruing thereon was actually discharged, either by payment of the duties, or by giving security therefor, according to the requirements of the law on the part of the importer.

There is no doubt, that if the importer has the general right and property in the goods, that right draws after it a constructive possession, and the master of the ship is but a bailee, maintaining the possession for his benefit.

There is no pretence to say, that the property of the importer in the goods is divested by any possession subsequently taken by the United States, for the purpose of maintaining their lien for duties; that possession is not adverse to the title of the importer; and indeed, it may be properly deemed, not so much an exclusive, as a concurrent and mixed, possession, for the joint benefit of the importer and of the United States. It leaves the importer's right to the immediate possession perfect, the moment the lien for the duties is discharged; and if he tenders the duties, or the proper security therefor, and the collector refuses the delivery of the goods, it is a tortious conversion of the property, for which an action of trespass or trover will lie.

The case not being one which called for vindictive or exemplary damages, the circuit court charged the jury, that the plaintiffs were entitled to recover such damages as they had proved themselves entitled to, on account of the actual injury sustained by the seizure and detention of the goods; and in ascertaining what these damages were, the court directed them, that the plaintiffs had a right to recover the value of the goods (teas) at the time of the levy, with interest from the expiration of the usual credit on extensive sales. This was in conformity to the decisions of this court in the case of Conard *v.* Nicoll, 4 Pet. 291.

Pacific Insurance Co. *v.* Conard, Bald. 138, affirmed.

Error to the Circuit Court for the Eastern District of Pennsylvania. This was an action of trespass *de bonis asportatis*, brought by the Pacific Insurance Company of New York, against John Conard, marshal of the eastern district of Pennsylvania.

*263] *The plaintiffs declared in the common form of trespass, specifying the goods and chattels seized and taken by the defendant to wit, sundry packages of teas, of the value, altogether, of upwards of $60,000, and laying the damages at $120,000.

To this declaration, the defendant pleaded the general issue, and also pleaded specially: 1. That on the 1st of May 1828, the plaintiffs received $40,000, paid to them by the defendant, in full satisfaction of the trespasses and wrongs complained of. 2. That at the April sessions of the court, 1826, the plaintiffs impleaded him in a plea of trespass to the plaintiffs, damages $40,000, and on the 30th of April 1828, by judgment of the court, recovered the same, which is the same trespass complained of in this declaration, which judgment remains in full force; and afterwards, on the 30th of April 1828,

the said sum of $40,000 was paid to him in satisfaction thereof. 3. That at April sessions 1826, the plaintiffs impleaded him in a certain plea of trespass, to their damage $40,000, being the identical trespass complained of in this suit, and on the 30th of April 1828, the said plaintiffs recovered in the said plea, by the judgment of the court, against the defendant, with six cents damages, and costs which they had sustained by the same trespasses, which judgment remains in force; and that on the 30th day of April 1828, the sum of $40,000 was paid in full satisfaction thereof.

Upon the first plea, issue was joined. To the special pleas, the plaintiffs replied, that they did not receive the sum of $40,000, in full satisfaction of the trespasses and damages complained of, and of the other wrongs in the declaration mentioned; and tendered an issue thereon. To the third and fourth pleas, the plaintiffs replied, that they ought not to be barred from maintaining their action by anything alleged in the same, because on the 9th day of October 1826, a certain bond was executed by the said plaintiffs, and by them delivered to and accepted by the United States of America, in the following words:

"Know all men, by these presents, that we, the Pacific Insurance Company of New York, are held and firmly bound unto the United States of America, in the sum of $60,000, *lawful money of the United States of America, to be paid to the said the United States of America, [*264 their certain attorney, successors or assigns, to which payment well and truly to be made and done, we do bind ourselves and our successors, firmly by these presents. Sealed with our seal of incorporation, and dated this ninth day of October, in the year of our Lord 1826. Whereas, the goods and merchandise described in an invoice, a copy whereof is annexed, imported from Canton, in the ship Addison, safely arrived at the port of Philadelphia, have been levied on by the marshal of the eastern district of Pennsylvania, by virtue of an execution, on a judgment in favor of the United States, against Edward Thomson, of Philadelphia, as the property of the said Edward Thomson; and whereas, the Pacific Insurance Company of New York claim to be the owners, in law or equity, of the said goods, and actually hold the bill of lading and invoice thereof, under which the said goods have been duly entered at the custom-house, and the duties thereon secured to be paid according to law; and whereas, it has been agreed by and between the secretary of the treasury, in behalf of the United States, and the said Pacific Insurance Company, that a suit shall be instituted by the said named company, against the said marshal, in which the sole question to be tried and decided shall be, whether the United States, or the said Pacific Insurance Company, are entitled to the said goods and the proceeds thereof; and whereas, it has been further agreed, that the said goods shall be delivered to the said Pacific Insurance Company, without prejudice to the rights of the United States under the said executions or otherwise, and that they shall sell and dispose of the same in the best manner and for the best price they can obtain therefor, and for cash, or upon credit, as they may judge expedient; and that the moneys arising from the sale thereof, deducting the duties and all customary charges and commissions on such sales, shall be deposited by the said Pacific Insurance Company, as soon as received from and after the sale, in the Bank of the United States, to the credit of the

president of the said bank, in trust, to be invested in the stocks of the United
*265] States, in the name of the said president, in trust, so to *remain until it shall be judicially and finally decided to whom the said goods, or the proceeds thereof, do of right, and according to law, belong; and on the further trust, that whenever such decision shall be made, the said president of the said bank shall deliver the said moneys, or transfer the said stocks, to the party in whose favor such decision shall be made. And whereas, in pursuance of the said agreement, the said goods have this day been delivered to the said Pacific Insurance Company, for the purposes aforesaid, it being understood and agreed, that such delivery of the goods shall not prejudice any existing right of the said company. Now, the condition of this obligation is such, that if the said Pacific Insurance Company shall comply with the said arrangements, and well and truly sell and dispose of the said goods, and cause the moneys arising from the sale thereof, after deducting therefrom the duties, charges and commissions as aforesaid, to be deposited in the Bank of the United States, to the credit of the president of the said bank, in trust, according to the true intent and meaning of the above-recited agreement, and for the purposes therein set forth, this obligation to be void, but otherwise, to be and remain in full force and virtue. Sealed and delivered by the Pacific Insurance Company of New York.

Invoice of merchandise, shipped by Rodney Fisher, attorney for John R. Thomson, on board the American ship Addison, A. Hedelius, master, bound for Philadelphia, for account and risk of Edward Thomson, Esquire, a native citizen of the United States of America, residing there, and consigned to order. The invoice amounted to $29,981.21, and was dated Canton, November 22d, 1825, and signed Rodney Fisher, attorney for John R. Thomson.

And that, heretofore, to wit, on the same day and year aforesaid, at the district aforesaid, a certain other bond was executed by the said plaintiffs, and by them delivered to, and accepted by, the United States, of America, in the following words: [This bond was in all respects similar to that last recited, saving that it applied to an invoice of merchandise amounting
*266] *to $30,107.87, shipped in the same manner, on board the ship Superior from Canton, on the 2d of December 1825.]

The plaintiffs further alleged, that when the bond was executed, the defendant agreed, that a suit should be instituted against him, as marshal aforesaid, in which the sole question to be tried and decided should be, whether the United States or the plaintiffs were entitled to the goods or the proceeds. And do further say, that afterwards, to wit, at the April sessions of this court, in the year 1826, in conformity with the said bond, and with the said agreement, a suit was instituted by the said plaintiffs, in their name, as plaintiffs, against the said John Conard, marshal of the eastern district of Pennsylvania, for the trial and decision of the said question only, and for no other purpose whatever, and in which suit the sole question tried and decided was, whether the United States or the said plaintiffs were entitled to said goods, and the proceeds thereof. And further, that all the pleadings and proceedings in the said suit were subject to the said agreement, and were governed and controlled thereby; and that, in fact and in truth, the said plaintiffs did not, on the trial of the said suit, claim to

recover, and did offer any evidence for the purpose of recovering any damages whatever from the said John Conard, marshal; and that no damages whatever were recovered in the said court, except six cents. And further, that in the said suit it was judicially and finally decided, that the said goods and the proceeds thereof did, of right and according to law, belong to the said plaintiffs, and a verdict and judgment for nominal damages were rendered; and the plaintiffs did not receive or claim, therein or thereby, any other or further damages, or any damages whatever, for the said trespass and other wrongs. And further, that the suit bere mentioned, and the plea in the defendant's plea mentioned and referred to, are the same plea or suit, and not other or different pleas or suits, than in the said plea mentioned.

Upon the first of these replications, issue was joined. To the others, that is, the replications to the third and fourth pleas, there was a general demurrer and joinder in demurrer. Upon this demurrer, the court below gave judgment for theplaintiffs.

*On the 22d day of May 1830, the issues came to trial. The plaintiffs produced a variety of evidence, parol and written, to establish [*267 their title to the property, before and at the time of the trespass complained of, being substantially the same as that exhibited by the plaintiffs in the case of the *Atlantic Insurance Company* v. *Conard*, 1 Pet. 386. They also gave in evidence a writ of *fieri facias*, at the suit of the United States, against Edward Thomson, under which it appeared, by indorsement thereon, that the defendant (Conard) levied upon the goods and merchandise in the declaration specified, on the 16th day of March 1826, on board the ship in which they arrived. And they offered "further to prove a demand of the collector, and refused by him, after the levy was made, to permit an entry and deliver the goods. But the counsel for the defendant objected to such proof; and the objection was overruled by the court, and the evidence given." To this opinion of the court, the defendant excepted.

The evidence being closed, the counsel for the defendant asked the court to charge the jury:

1. That the United States had a lien upon the goods imported in the ships the Superior and the Addison, from Canton, in the month of March 1826, for the duties accruing upon that importation; and that the United States, as an effect of their liens, had the possession of the said goods, the moment of their importation.

2. That the documents exhibited in evidence, prove that Edward Thomson was, in fact, the importer of the goods in question, and that, under the act of congress of 1799, he must be regarded, for the purposes of that act, as the original consignee and owner, although the property in the goods might have been in the plaintiffs.

3. That Edward Thomson, as the importer, and the original consignee and owner, was the only person entitled by law to enter the goods at the custom-house, or give bonds for the duties, or to pay the duties; and that any recognition by the collector, or other public officer, of any other person, as entitled to enter, is not authorized by the law of the United States, and cannot be admitted to vary the rights of the parties.

4. That the United States having a lien upon, and a *possession [*268 of, the goods, at the time of their importation, and Edward Thomson being, in contemplation of the act of congress, the only person by whom

this entry could legally be made, the possession of the United States was never divested, by any act of the plaintiffs, to which the United States did not consent.

5. That possession of the goods being, at the time of the levy made by the defendant, legally in the United States, and neither actually nor constructively in the plaintiffs, the present action, founded, as it must be, upon a possession by the plaintiffs, either actual or constructive, cannot be maintained.

6. That according to the act of congress, and Edward Thomson regarded as the original importer, owner and consignee, and he being largely indebted upon bonds to the United States, for duties then remaining unpaid, the lien of the United States for the duties which accrued on that importation, could not be divested, except upon the payment of the said duties in cash.

7. That the agreement of the 9th of October 1826, connected with the facts given in evidence, amounts to a release or waiver by the plaintiffs, of all demand for damages arising from the acts of the officers of the United States, in taking possession and detaining the goods in question.

8. That in an action of trespass, such as the present, where no circumstances of aggravation in the motives or conduct of the defendant are alleged or pretended, the value of the goods taken, or the diminution of that value by their detention, is the only just and legal measure of damages.

9. That the claim for damages, on the score of professional compensation, paid in this and other causes connected with the transaction, is inadmissible, and that, therefore, the evidence respecting it should be wholly disregarded by the jury.

The charge to the jury was as follows: In this case, there are two questions for your consideration: 1. Whether the plaintiffs can sustain this action. 2. The amount of damages to which they are entitled.

The facts of the case are few. On the 10th and 11th July 1825, the plaintiffs advanced $60,000 to Edward Thomson on his *respondentia* bonds. He shipped the money for Canton, took bills of lading, deliverable to his *factor John R. Thomson, and assigned them to the plaintiffs. The money arrived safely; and was invested in the teas now in controversy. The teas were shipped on board of the ships Addison and Superior, which arrived in the Delaware, on the 15th March 1826, when, with their cargoes, they were levied on by the defendant, by virtue of an execution at the suit of the United States against Edward Thomson. The teas in question were landed and deposited in the public stores, under the care of the custom-house officer, where they remained until the fall 1826, when, by an agreement made between the plaintiffs and the secretary of the treasury, they were delivered to them and sold under their direction for their account. Immediately on hearing of the levy, the plaintiffs, by their agent, offered to the collector to secure the duties, and demanded the teas; they were refused. On this state of the facts, the counsel for the defendant contends, that Edward Thomson remained the legal owner of the teas, at the time of the levy; that the plaintiffs did not become the owners or consignees thereof, or the agents of Thomson, so as to authorize them to enter the teas at the custom-house, according to the provisions of the 36th section of the revenue law, which, he contends, could only be made by Thomson himself; that he, being indebted to the United States by bonds for duties unpaid, was, by the

*269]

proviso of the 62d section of the law, prohibited from making an entry, without the actual payment of the duties accruing, for which the United States had a lien, until they were paid; and that, therefore, the plaintiffs, not having offered to pay the duties on their demand of the teas from the collector, had no right to the possession of the goods, and cannot maintain this action.

Were this a question open for consideration, I should have no hesitation in saying, that the whole transaction between Thomson and the plaintiffs made them the legal owners and consignees of the property purchased by the outward shipment, and that, as such, they had a right to enter the teas, on securing the duties, without being affected by the delinquency of Thomson at the custom-house, as much so as if the shipment had been made in their own name and on their own account. *But it has not been left for [*270 me to declare the law in this case. It has been definitively settled by the supreme court in the case of the *Atlantic Insurance Company* v. *Conard*, decided at January term 1828, and the case of *Francis H. Nicoll* v. *Conard*, at the last term. The first of these cases was an action of trespass, brought to try the right of property in the plaintiffs to teas shipped in the Addison and Superior, under circumstances in all respects agreeing with this case. The court decided, that they were the owners and entitled to the proceeds of what had been sold under the agreement; the court declaring the plaintiffs to be the owners and consignees by the agreement between them and Thomson, and the consequent acts. The second was a similar action, brought for the same purpose, as well as the recovery of damages for levying on certain goods and a quantity of teas shipped, and in all respects circumstanced like the present. The cause was tried before Judge Washington, in this place, and resulted in a verdict and judgment for the plaintiffs, not only for the proceeds of the property which had been sold, but a large amount in damages. It was removed by writ of error to the supreme court, and the judgment affirmed. The judge who delivered their opinion did not think proper to add or to alter anything in the very able and excellent charge delivered to the jury by his lamented predecessor. The affirmance was in these words—that charge embraced every point material to the decision of this case, and, connected with the opinion of the court in the former case, leaves for you and the court no other duty than acquiescence in the well-established principles which control the cause before you. The right of property in the teas which are the subject of this action has already been settled by the judgment of this court, in a former action between the same parties, and is conclusive, on that point, in this.

But the defendant's counsel contends, that in the case of *Harris* v. *Dennie*, decided at the last term of the supreme court, a principle has been settled, which will prevent the plaintiff's recovering. The case was this: James De Wolf, Jr., was indebted to the United States, on duty bonds unpaid; goods consigned to him arrived in the port of Boston, which were attached by his creditors in Massachusetts, by a writ in the hands *of Dennie, [*271 the sheriff. The marshal attached the same goods by process from the district court, at the suit of the United States. At the time of the attachment by Dennie, the plaintiffs offered to secure the duties, and demanded possession, which the collector refused. On an action by the sheriff against the marshal, the court decided, that he could not sustain it, because the

plaintiffs in the attachment were neither owners, consignees nor agents ; that De Wolf continued the owner, and being delinquent on former bonds, had no right to enter the goods, till payment of the duties, and that the plaintiffs, claiming only as creditors, had no right to the possession, on the mere offer to secure them. This case has no bearing on the right of an owner or consignee to enter goods, on offering to secure duties accruing. It was there declared, that the United States had no lien on the goods for the amount due by De Wolf on other importations. It only decided, that a mere creditor could acquire no right to the possession of goods, so imported, consigned to De Wolf, until the duties were actually paid. The authority of the two cases referred to, does not seem to me to be at all shaken by that of *Harris* v. *Dennie*, and I am, therefore, clearly of opinion, that the plaintiffs have well established their right to maintain the present action for the recovery of damages for the seizure of the goods in question.

It is next alleged, that by the agreement of the 9th of October, and the acts accompanying it, the defendant is released from all claims for damages. The decision of this and the supreme court, in the case of *Nicoll* v. *Conard*, settles the reverse, and declares that damages may be recovered, notwithstanding this agreement. In that case, the defendant pleaded this agreement as a bar to this action ; the court overruled the plea and rendered judgment for the plaintiffs, so that this question has already been settled, as a matter of law, and is not open for your consideration as one of fact.

The counsel for the defendant next contends, that the rule of damages in this case is furnished by the balance due on the *respondentia* bonds, after deducting the amount of the sales. This ground is assumed, by considering the plaintiffs as mere mortgagees of the teas, an idea wholly inadmissible, after the two solemn decisions of the supreme court, each adjudging the
*272] legal right of property to be in the respective plaintiffs, as *owners ; and one of them awarding damages, without any reference to the amount due on the *respondentia* bonds. These decisions are binding authority on this court, which must be governed by them, to their full extent. We are not at liberty to say, that the plaintiffs in those actions were legal owners, only to the extent of the debt due them by Edward Thomson. The entire property in the teas was vested in them, and this court has passed the same judgment as to those now in controversy. This action of trespass would assume a singular aspect, if the plaintiffs could not recover damages to the amount of their property which has been taken from them by the defendant Edward Thomson, who had no legal property in these teas. Whether the plaintiffs can, in any event, be considered as trustees for him, his creditors or assigns, is not material to inquire in this action. On this question of damages, we cannot settle accounts between trustees and *cestuis que trust* (if there can be such, as to this property) who are no parties to this suit. It is enough for the plaintiffs, to exhibit record evidence of their being the acknowledged legal owners. It necessarily results, from such ownership, that they are legally entitled to all the damages arising from its seizure and detention. The right to damages must be commensurate with the right of property ; to adopt any other rule would introduce endless confusion and mischief. The plaintiffs then are before you as the legal owners of the teas, and with no legal impediment in the way of their recovery.

The next question for your consideration is, the amount of damages which

the plaintiffs are entitled to recover, as the legal owners of the teas. The rule which ought to govern juries, in assessing damages for injuries to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the operation of his rights, in feeling or reputation: and even this may be exceeded, by setting a public example to prevent a repetition of the act. In such cases, there is no certain fixed standard; for a jury may properly take into view, not only what is due to the party complaining, but to the public, by *inflicting what are called in law speculative, exemplary or vindictive [*273
damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be, a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judical proceedings, fairly and properly conducted, which are instituted to try contested rights to property. If the plaintiff in an action of trespass succeed, he is entitled to legal satisfaction for the injury sustained by the taking and detention, in cases not attended with the circumstances of aggravation before mentioned. The general rule of damage is the value of the property taken, with interest from the time of the taking, down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner by the trespass; these are taken into consideration, only in a case more or less aggravated. But where the party, taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the legal trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under the orders of the government, in execution of his duties as a public officer; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him; he has taken the property of the plaintiffs for the debt of Edward Thomson, and must make them compensation for the injury they have sustained thereby, but no further.

It has long since been well settled, that a jury ought, in no case, to find exemplary damages against a public officer, acting in obedience to orders from the government, without any *circumstances of aggravation, if [*274
he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge WASHINGTON instructed the jury, that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved, to their satisfaction, he had sustained, by the seizure and detention of the property levied on, but that they ought not to give vindictive, imaginary or speculative damages. The affirmance of his charge makes it the guide for

us, in this case. Our true inquiry then must be, what damages have the plaintiffs so proved themselves to be entitled to?

There can be no doubt, that they have a right to the value of the teas, at the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York, or this place, in the spring of 1826. If, in your opinion, they afford evidence of their real value, or if you are satisfied from the evidence you have heard, that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices at which sales were actually made, as would make them equal to what they would have been, had they come to the possession of the plaintiffs at the time of the levy. But you may perhaps think, that, under all the circumstances of this case, it would not be proper to affix a valuation, beyond the sales of other teas of a quality similar to those in controversy, and that they afford a fair value of what the plaintiffs would have received, had they remained at their disposal, which will afford a correct mode of ascertaining their actual value. This, however, is a matter exclusively for your consideration; you will judge of their value from all the evidence.

Thus far, the case is attended with no difficulty. But it is not so easy to decide on the other items for which the plaintiffs claim an allowance in damages. In marine trepasses, the supreme court have, at different times, laid down the following as the rule of damages, in cases unaccompanied with aggravation. In 2 Cranch 124–56, the actual prime cost of the cargo, interest, insurance, and expenses necessarily sustained by bringing the vessel into the United States. *In 3 Dall. 334, the full value of the property injured or destroyed: counsel fees rejected as an item of damage. In 2 Wheat. 335, the prime cost of the cargo, all charges, insurance and interest. In 3 Wheat. 560, the prime cost, or value of the property, at the time of loss, or the diminution of its value by the injury, and interest. In 1 Gallis. 315, the prime cost and interest. In 9 Wheat. 376–7, the case of *The Apollo*, where the vessel and cargo are lost and destroyed, their actual value, with interest from the trespass. The same rule also as to the partial injury—when property has been restored, demurrage for the vessel, and interest; where it has been sold, the gross amount of sales and interest, with an addition of ten per cent., where the sales was under disadvantageous circumstances, or the property had not arrived at its place of destination. In 3 Wheat. 559, a loss by deterioration of the cargo, not occasioned by the improper conduct of the master, is not allowed. Probable or possible profits on the voyage, either on the ship or cargo, have in every instance been rejected. 9 Wheat. 376–7, 383.

*275]

In none of these cases, do the court recognise an allowance for such claims as are now set up by the plaintiff; but they all seem to concur in adopting a rule which excludes them. No good reason seems to be presented, for a distinction between the compensation due to a party injured by a marine trespass, and one committed on land; neither do the judges, in delivering the opinion of the court, refer to such distinction as one existing. In the case of *The Apollo*, Judge STORY observes, "such, it is believed, have been the rules generally adopted in practice, in cases which did not call for vindictive or aggravated damages." And it may be truly said, if these rules do not furnish a complete indemnification, in all cases, they have

so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation, on principles of public policy, 9 Wheat. 379; and, in almost all cases, will give a fair and just recompense, 3 Ibid. 561.

In 3 Wheat. 558, the court, in assigning their reasons for *giving other damages in the case then before them, remark, that it was one [*276 of gross and wanton outrage, without any just excuse, and that, under such circumstances, the honor of the country, and the duty of the court, equally require, that a just compensation should be made to the unoffending neutral, for all the injuries and losses actually sustained by him. The respondents, in that case, were the owners of a privateer, who were, by policy, held responsible for the conduct of the officers and men employed by them, but not to the extent of vindictive damages. This seems to afford a practical definition of injuries and losses actually sustained, and the class of cases where compensation is allowed for them, which seems to be midway between those attended with no aggravation, and those which justify vindictive dumages.

If the present were a case of marine trespass, I think, there is no doubt, that the damages could not exceed the value of the teas, and interest, if they had not been restored, or, as the result has been a restoration, the injury done by the seizure, which would be the loss in the sales, in the fall in the market, and interest for the detention; for there exist none of the matters of aggravation which have induced courts of admiralty to go further.

It is in their sound discretion, to allow or refuse counsel fees, according to the nature of the case, either as damages, or a part of the costs, as in the case of *The Apollo;* but, by a late case, they were allowed as costs, in a case where it was adjudged by the supreme court that no damages could be claimed. They form an item of costs, in such courts, but not in courts of common law. It would be legislation, by the common-law courts, to order them to be taxed as costs. The expenses of prosecuting claims of this description do not come within the principles established by the courts, in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise. I think it a safe rule, in common-law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage, than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike; *or, if any discrimination prevails, it [*277 should be in favor of the defendant who could use no discretion, but was bound to do the act which has exposed him to this action. The case of *Woodham* v. *Gelston*, seems to me to be based on this rule, and the damages recovered in that case were only such as related to the property. The marshal's fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them: they were a charge on the property, in the nature of storage or bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant, and having been paid by plaintiff, he was entitled to recover it back; but they say, if it had been a mere voluntary payment, a deduction wonld have been proper. The other items were for wharfage and ship-keeping, which were disallowed, because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken; none related to personal expenses in prosecuting the suit.

In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's fees. They held the jury to strict rules; for they struck out an item of compound interest allowed by the verdict. On the principle of this case of *Woodham* v. *Gelston*, the charges of the auction sales are allowable, because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premium paid in place of storage.

No case at common law has been cited, which conflicts with this rule to any extent, except one under the patent law, in which the learned judge of the first circuit has adjudged counsel fees in prosecuting a suit for an infringement of a patent-right, to be a part of the "actual damage" sustained by the plaintiff. Without questioning the correctness of this decision, it is sufficient to observe, that it may have been founded on the words of the act of congress, or reasons growing out of it. It is not declared to be a rule applicable to ordinary actions of trespass, by the principles of the common law. Had it been so declared, the high authority of that court would have induced me to doubt the correctness of my opinoin. But it does not *278] *seem to me, to establish the principle which must govern the present case, and leaves me free to follow the settled course of decisions, in making the value of the property, and interest for its detention, the only test of damages, in cases like the present. There is the same reason for making the expenses of prosecuting and conducting a suit for the enforcement of a contract, as for the recovery of damages for a trespass divested of every feature of aggravation; the legal compensation for the detention of a debt, is the amount due, interest and costs. Courts and juries can make no allowance for expenses incurred by withholding money justly due, however groundless or unjust the pretext for refusing payment may be. The rule of damages is fixed and invariable. There can be no legal distinction between the mere detention of property, and the price at which it was sold. If Conard had purchased these teas, and refused to pay the price, the plaintiffs' right of recovery becomes limited to that and interest; by the levy, he becomes liable for their value or market price. The expenses of the plaintiffs, in pursuing their right to damages due by contract, or those due by tort, would seem to come under the same principle of justice and law. It might be a good principle, to allow them in both cases; but I find none such established, so as to have become a rule which can be laid down to you as the existing law of the action of trespass. It is all-important, that in matters of this kind, the principle which governs them should be fixed and uniform. If we once begin to diverge from the old line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship, that the plaintiffs shall not be allowed their actual disbursements in recovering this property; but the hardship is equally great, in a suit for money lent, or to recover possession of land; they are deemed in law losses without injury, for which no legal remedy is afforded.[1]

I am, therefore, of opinion, that you cannot, by assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements;

[1] See Day *v.* Woodworth, 13 How. 363; Teese *v.* Huntingdon, 23 Id. 2; Flanders *v.* Tweed, 15 Wall. 450; Philip *v.* Nock, 17 Id. 460; The Baltimore, 8 Id. 378.

they being consequent losses only, and not the actual or direct injury to their property, which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstances of aggravation on the *part of the defendant. Had there been any such, a very different rule would [*279 have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

You will then carefully weigh all the evidence in the cause, and ascertain the true value of the teas, at the time of the levy, or when they could have come into market, by the rules of the custom-house, if there had been no claim asserted to them by the United States, other than for the duties, with interest, deducting therefrom the net amount of sales; after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled. You will consider Mr. Conard as the only defendant. The government is no party to this suit, nor is there any evidence which justifies us in saying, that they agreed to indemnify him; that must depend exclusively on the discretion of congress, who are bound by no pledge given by executive officers. You will have no reference, in making up your verdict, to the course which may, in my event, be taken there, on an application by Mr. Conard for relief. You will award to the plaintiffs such sum as you may think them entitled to receive from the defendant, according to the rules of law, without taking into view the supposed hardship on him. The plaintiffs' recovery is not to be one dollar less than their legal right, though it might ruin the defendant; nor one dollar more, though you might think the public treasury would be opened for his relief."

To this charge, the counsel for the defendant excepted, and the judge sealed a bill of exceptions, set out at large in the transcript of the record. A verdict was given for the plaintiffs, and the damages found were $42,591.58. Judgment was rendered accordingly. The defendant prosecuted a writ of error to this court.

The case was submitted to the court by *Taney*, Attorney-General, for the United States; and by *Ogden* and *Sergeant*, for the defendants.

Story, Justice, delivered the opinion of the court.—This case, upon all the leading points, presents the same facts and circumstances, which were before this court in the *cases of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386, and *Conard* v. *Nicoll*, 4 Ibid. 291. Those cases [*280 underwent the most deliberate consideration of the court, and we are entirely satisfied with the doctrines maintained in them. The present case has been submitted without argument, and contains, at large, the charge of the learned judge who presided at the trial, a practice which this court has often disapproved, and deems incorrect, and for the continuation of which, nothing but the peculiar circumstances of the present class of cases could furnish any just apology. The only points, to which it is now necessary to advert, are those which are not embraced in the former cases, reported in the first and fourth volumes of Peters's reports.

At the trial, the plaintiffs offered to prove a demand of the collector, and a refusal by him, after the levy was made, to permit an entry and delivery

of the goods at the custom-house ; but the counsel for the defendant objected to such proof, and the objection was overruled by the court, and the evidence given. And we are of opinion, that this evidence was properly admitted. The ground of this objection must have been, that the plaintiffs were not the legal owners and consignees of the goods, and so were not entitled to make an entry of them at the custom-house, and to have a delivery of them, after such entry. But to this the proper answer is given by the learned judge in his charge, in conformity to the prior decisions of this court. The plaintiffs were both owners and consignees ; the consignment of the homeward cargo was to order ; and the plaintiffs, in virtue of the assignment, and the indorsement and possession of the bills of lading and the other transactions stated in the case, became consignees as well as owners of the homeward cargo ; and as such, were clearly entitled to enter the same, and to have delivery thereof, upon giving bonds in conformity with the provisions of the duty collection act of 1799, ch. 128. The 36th and 62d sections of that act clearly confer the right ; and the proviso of the 62d section in nowise restrains it in cases like the present.

Another point, which appears to have been pressed by the counsel for the defendant at the trial, was, that the United States had a lien upon, and a possession of, the goods constituting the homeward cargo, at the time of *281] their importation, for the *amount of duties accruing thereon, and that the plaintiffs, not having an actual or constructive possession, could not maintain the present action ; and *Harris* v. *Dennie*, 3 Pet. 292, was relied on in support of this objection to the recovery. But that case has no bearing on the point. It decided no more than that no creditor could, by any attachment or process, take the goods, upon their importation, out of the possession of the United States, until the lien of the United States for the duties accruing thereon was actually discharged, either by payment of the duties, or by giving security therefor, according to the requirements of law on the part of the importer. There is no doubt, that if the importer has the general right and property in the goods, that right draws after it a constructive possession, and the master of the ship is but a bailee, maintaining that possession for his benefit. And there is no pretence to say, that the property of the importer in the goods is divested by any possession subsequently taken by the United States, after the arrival of the goods, for the purpose of maintaining their lien for duties. That possession is not adverse to the title of the importer ; and indeed, it may be properly deemed not so much an exclusive, as a concurrent and mixed, possession, for the joint benefit of the importer and of the United States. It leaves the importer's right to the immediate possession perfect, the moment the lien for the duties is discharged ; and if he tenders the duties, or the proper security therefor, and the collector or other officer refuses the delivery of the goods, it is a tortious conversion of the property, for which an action of trespass or trover will lie. But this case does not even present that peculiarity ; for the seizure of the goods was not under any authority to take possession, in order to secure the duties, but it was made by the defendant, as marshal, to satisfy an execution against Edward Thomson, who had at the time no property or interest in the goods. The act was, therefore, the common case of an unlawful seizure and levy of one man's property to satisfy an execution against another man ; and in such a case, trespass is clearly a fit and appropriate remedy.

Another point was, that the agreement of the 9th of October 1826, stated in the case, connected with the facts in evidence, amounted to a release or waiver by the plaintiffs, of all demand *for damages arising from the acts of the officers of the United States in taking possession of and [*282 detaining the goods in question. Upon this point, it is unnecessary to say more, than that the agreement itself repels any such notion of a release or waiver; and it was expressly overruled in *Conard* v. *Nicoll*, 4 Pet. 292.

Another point was, as to the rule of damages; and here the learned judge in his charge seems to have laid down the very rule contended for by the defendant's counsel. The case not being one, which called for vindictive or exemplary damages, he charged the jury (in conformity to the decision in *Conard* v. *Nicoll*), that the plaintiffs were entitled to recover such damages only, as they had proved themselves entitled to, on account of the actual injury sustained by the seizure and detention of the good; and in ascertaining what those damages were, he directed them, that the plaintiffs had a right to recover the value of the goods (teas) at the time of the levy, with interest from the expiration of the usual credit on extensive sales. And in the close of the charge, he farther directed them to deduct therefrom the net amount of the sales of the teas (they had been sold under the arrangements stipulated in the agreement of the 9th of October 1826), after payment of duties and charges of sale, and that the balance would be the amount to which the plaintiff would be entitled. In what manner the jury actually applied these directions, in forming their verdict, does not appear; and there is no reason to suppose, that they have not been applied as favorably as the circumstances of the case justified.

Upon the whole, upon a careful review of the charge, and of the points upon which the counsel of the defendant requested the direction of the court to the jury, we can perceive no error in point of law, applicable to the present case, which calls for the interposition of the corrective power of this court. The judgment of the circuit court is, therefore, affirmed, together with interest upon the amount, at the rate of six per centum, as additional damages and costs.

Judgment affirmed.

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*David Ross, Plaintiff in error, *v.* Charles McLung, Defendant in error. [*283

Recording of deeds.

Construction of the act of the legislature of North Carolina, concerning the registration of deeds, passed in 1715.

The questions which grow out of the language of this act, so far as they have been settled by judicial decisions, cannot be disturbed by this court; whatever might have been their opinion in this case, had it remained open for consideration, the peace of society, and the security of titles require, that the court should conform to the construction which has been made in the courts of the state, if it can discover what that construction is.

In the probate of deeds, the court has a special limited jurisdiction; and the record should state facts which show its jurisdiction in the particular case; if this rule be disregarded, every deed admitted to record, on whatever evidence, must be considered as regularly admitted.

Error to the Circuit Court of East Tennessee. This was an action of ejectment, instituted in the circuit court, by the plaintiff in error, for the recovery of 5000 acres of land, situate in the district of East Tennessee.

On the trial of the cause, the plaintiff excepted to the opinion of the court, in rejecting certain evidence offered by him in support of his title from the original grantor, Stockley Donelson, holding under a patent from the state of North Carolina. The court refused to admit the deed of conveyance to the plaintiff, on the ground, that the same was not registered according to the provisions of the law. The bill of exceptions, containing the matters offered in evidence and rejected by the court, is stated in the opinion of the court.

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

For the *plaintiff*, it was contended, that the circuit court erred: 1. In not permitting the deed of conveyance from Stockley Donelson and John Hackett, to David Ross, the lessor of the plaintiff, to be read to the jury, on the certificates of probate and registration indorsed on said deed. *284] *2. In not permitting parol testimony to be given to the jury, to prove that said deed of conveyance had been duly proven in the court of pleas, &c., for Hawkins county, according to the provisions of the law of that state. 3. In not permitting said deed to be read in evidence, without either certificate of probate, or parol evidence of its having been duly proven; as it had been on record in the register's office for more than thirty years.

Marshall, Ch. J., delivered the opinion of the court.—This was an ejectment brought by the plaintiff in error in the court of the United States for the seventh circuit and district of East Tennessee.

At the trial, the plaintiff gave in evidence a patent from the state of North Carolina to Stockley Donelson, which covered the land in controversy. He then offered a deed of conveyance from the said Stockley Donelson and John Hackett to David Ross, the lessor of the plaintiff, for 5000 acres, being the same land contained in the aforesaid grant, which deed of conveyance is dated the 9th day of September 1793, and is witnessed by Walter King, Thomas N. Clark and Meriwether Smith; and of which deed of conveyance a copy was annexed, and made a part of the bill of exceptions; and on the back of said deed was the following indorsement of probate and registration viz:

December sessions, 1793. This deed was proven in open court, and ordered to be recorded. Richard Mitchell, Clerk.

This conveyance is registered, 27th December 1793, in liber G, page 127, in the register's office of Hawkin's county. Thomas Jackson, C. R.

State of Tennessee. At a court of pleas and quarter sessions began and held for the county of Hawkins, at the court-house in Rogersville, on the second Monday of December 1793. Present, Thomas Henderson, Isaac Lane, James Berry and Thomas Amey, Esquires. A deed of conveyance from Stockley Donelson and John Hackett to David Ross, proved in open court by M. Smith, that he saw Donelson sign for himself, and signed as attorney for Haget, and ordered to be registered.

*285] *State of Tennessee. I, Stockley D. Mitchell, clerk of the court of pleas and quarter sessions of Hawkins county, in the state afore-

said, do certify the foregoing to be a true copy from the records of my office. Given under my hand, at office in Rogersville, this 16th day of October, A. D. 1828. STOCKLEY D. MITCHELL,

Clerk of the Court of Pleas, &c., for Hawkins county, Tennessee.

To the reading of which deed of conveyance on the probates and registration aforesaid, the defendant objected, and the court sustained the objection, and would not permit said deed to be read.

Plaintiff then offered to prove, by Meriwether Smith, who was one of the subscribing witnesses to said deed, that he proved the execution of said deed in the court of pleas and quarter sessions for Hawkins county, at December sessions of said court, in the year 1793; and plaintiff also offered to prove, by Mitchell, whose name was subscribed to the probate on the back of said deed, that he, Richard Mitchell, was the clerk of the court of pleas and quarter sessions for Hawkins county, in the year 1793; and that the foregoing deed was the one proved by Meriwether Smith, the subscribing witness thereto, at December term of said court, in the year 1793; but the court would not permit said proof to be given in support of the probate of said deed.

Plaintiff offered to prove further, that said deed and grant covered the land sued for, and that Anne Hackett, the defendant, was in possession, at the time of the institution of this suit; but said proof was rejected by the court.

The jury found a verdict for defendant, and the lessor of the plaintiff moved for a new trial, and produced and read the affidavit of Thomas Hopkins, trustee, annexed, marked C; but the court refused a new trial.

While the cause was before the jury, the plaintiff offered to read a grant from the state of North Carolina, to Stockley Donelson and John Hackett, for 5000 acres of land, dated the 22d day of February 1795; which last-mentioned grant also covered the land in dispute; which grant the court considered as read to the jury.

The jury found a verdict for the defendant, the judgment on which is brought before this court by a writ of error.

*The plaintiff contends, that the instructions given by the court are erroneous, and that the deed from Donelson and Hackett, to Ross, ought to have been admitted. [*286

In the year 1715, the state of North Carolina passed an act concerning the registration of deeds, the fifth section of which is in these words: "No conveyance or bill of sale for lands, other than mortgages, in what manner soever drawn, shall be good and available in law, unless the same shall be acknowledged by the vendor, or proved by one or more evidences, on oath, either before the chief justice, or in the court of the precinct where the land lieth, and registered by the public register of the precinct where the land lieth, within twelve months after the date of the said deed; and that all deeds so drawn and executed, shall be valid, and pass estates in land, or right to other estate, without livery of seisin, attornment or other ceremony in the law whatsoever."

Under this act, two requisites are essential to the validity of a deed—probate and registration in the precinct or county in which the land lies. The proof which shall be sufficient to establish these requisites, is not pre-

scribed by the act, with such precision as to exclude difference of opinion respecting it. But the questions which grow out of the language of the act, so far as they have been settled by judicial decisions, cannot be disturbed by this court. Whatever might have been our opinion on the case, had it remained open for consideration, the peace of society, and the security of titles, require, that we should conform to the construction which has been made in the courts of the state, if we can discern what that construction is.

The plaintiff contends, that the deed ought to have beeen admitted on the certificates of probate and registration indorsed on it. First, the certificate of probate. It is in these words, "December session 1783. This deed was proven in open court, and ordered to be recorded." The act requires that the deed should be acknowledged by the vendor, or proved by one or more witnesses, in the court of the county in which the land lieth. It appears to be universally understood, that the proof ought to be made by a subscribing witness, to the deed; and certainly, an instrument to which there
*287] are subscribing witnesses, ought *to be proved by some one of them, if any one be living. The fact, too, to which the witness testifies, ought to be stated on the record, that a judgment may be formed on its sufficiency. The order of the court that it should be recorded, does not, the defendant contends, cure this defect. The court proceeds *ex parte*, in a summary manner, and the correctness of its proceedings ought to appear on the record. Its judgment is not presumed to be right, as when acting in a regular course.

In *Knox* v. *Bowman's Lessee*, decided in the supreme court of Tennesseee, at Knoxville, on exceptions taken in the inferior court, a question arose on the probate of a deed indorsed thus: "State of Tennessee, Washington county. At a court held for the county of Washington, on the first Monday of November 1789, the within deed of conveyance, from Bradley Gamble to Michael Massingile, was proved in court, by the oath of —— Starns. Given under my hand, at office, 27th of November 1817. James Sevier, Clerk." This deed was admitted. On considering the exception taken to its admission, the court observed, "the clerk should have given a copy from the minute-book *verbatim*, and not a history of what had taken place; because the court, and not he, must judge of the conclusions which are proper to be made from the naked fact appearing on the record-book. Had an exact copy been given, the court should have presumed, after such a lapse of time, at least, until the contrary were shown, that Starns was a subscribing witness." The court added, "where enough is stated by the clerk, to show that a witness was sworn, or that the deed was acknowledged by the bargainor, however informally or unscientifically the clerk may have expressed the fact, the legality of the probate or acknowledgment should be euforced, and such old probate should be presumed to have been made in the proper county, until the contrary appear." The general principles laid down by the court in the last sentence, show that every reasonable presumption will be made to support an ancient probate, where the entry has been informal or unscientific; but the decision on the particular point seems applicable to the very case before the court. The clerk certifies, that the
*288] deed was proved by the oath of Starns. This is undertaking to show what, in point of law, is proof, *and to certify his conclusion, instead

of stating the fact which the witness did prove, so as to enable the court to draw the inference of law from it. So, in this case, instead of stating the fact to which the witness testified, the clerk certifies that the deed was proved. This, according to the decision in the case cited, is a legal inference which the court alone could draw from the fact as certified.

In the same case, a deed was offered from Gales to the lessor of the plaintiff, indorsed thus: "February session, 1802. This deed was legally admitted to record." The court allowed this deed also to be given in evidence, and an exception was taken to its admission. In commenting on this opinion, the supreme court observed, "it is not said, in what country nor upon what ground, whether because proved by witnesses, or acknowledged by the bargainor, or for some other cause." Both these exceptions were sustained, and the judgment of the inferior court was reversed. The ground of reversal appears to be, that the certificate of probate stated the legal inference, without stating the fact from which that inference was drawn. In the one case, it was stated, that the deed was proved in court by the oath of Starns; in the other, that it was legally admitted to record, If legally admitted, it could not be material to inquire, whether it was admitted on the acknowledgment of the vendor, or the proof of witnesses. The error, therefore, must be, that the conclusion to which the court came is indorsed on the deed, and not the fact which led to that conclusion. In the probate of deeds, the court has a special limited jurisdiction; and the record should state facts which show its jurisdiction in the particular case. If this rule be disregarded, every deed admitted to record, on whatever evidence, must be considered as regularly admitted.

The counsel for the plaintiff has endeavored to cure this defect in the indorsement on the deed, by a distinct entry made in Hawkins county court, at the same session of December 1793. That entry is in these words: "At a court of pleas and quarter sessions began and held for the county of Hawkins, at the court-house in Rogersville, on the second Monday of December, 1793. Present, Thomas Henderson, Isaac Lane, James Berry and Thomas Amey, Esquires. A deed of conveyance from Stockley Donelson and John Hackett to David Ross, proved *in open court, by M. Smith, that he saw Donelson sign for himself, and signed as attorney for Hackett, and ordered to be registered." "State of Tennessee: I, Stockley D. Mitchell, clerk of the court of pleas and quarter sessions of Hawkins county, in the state aforesaid, do certify the foregoing to be a true copy from the records of my office. Given under my hand at office, in Rogersville, this 16th day of October, A. D. 1828. Stockley D. Mitchell, clerk of the Court of Pleas, &c., for Hawkins county, Tennessee." [*289

The difficulty of applying this certificate to the deed offered in evidence is insurmountable. The deed offered in evidence purports to have been executed by Stockley Donelson and John Hackett, each for himself, and not by attorney; the probate indorsed on the deed, represents it to have been so executed. The entry certified by Stockley D. Mitchell, in 1828, shows the probate of a deed executed by Stockley Donelson for himself, and as attorney in fact for John Hackett. They cannot be presumed to be the same. Stockley Donelson and John Hackett may have conveyed more than one tract of land to David Ross; and it is not at all improbable, that Meriwether Smith may have witnessed both deeds.

An attempt has been made to reconcile this incompatibility, by parol testimony. Richard Mitchell, who was clerk of the court for Hawkins county, in the year 1793, was offered as as witness, to prove that the deed now offered in evidence was the one proved by Meriwether Smith, the subscribing witness thereto, at December term 1793, but the court would not permit this proof to be given in support of the deed; and to this opinion also, an exception was taken. This is an attempt by parol testimony to vary a record. It is an attempt to prove by the officer of the court, that his official certificate of probate, indorsed on the deed, did not conform to the true state of the proof. This is in such direct opposition to the settled rules of evidence, as to render it unnecessary to remark the danger of trusting to memory in such a case, after a lapse of thirty-five years.

There are other objections to the admission of this certificate, which would require very serious consideration, if it were necessary to decide them.

*290] It is questioned, whether the order *made on the second Monday of December 1793, even if it related to the deed under which the plaintiff claims, could be given in evidence, as it was not indorsed on the deed or registered with it. The plaintiff's counsel has cited several acts of assembly, which are supposed to settle this point in his favor. It was fully considered in the case of *Minick's Lessee* v. *Hodges, Brown and others*, decided in the supreme court of Tennessee, in July 1831. A decision on it is unnecessary, because the court is satisfied, that the order must relate to a different deed.

We are of opinion, that there is no error in the opinions given by the circuit court. The judgment is affirmed, with costs.

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

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*219] *Asa Green, Plaintiff in error, *v.* The Lessee of Henry Neal, Defendant in error.

Statute of limitations.—State decisions.

Patton's Lessee *v.* Easton, 1 Wheat. 476, and Powell's Lessee *v.* Harman, 2 Pet. 241, as to the statutes of limitations of Tennessee, overruled.

In the case of Patton's Lesse *v.* Easton, this court, after examining the provisions of the statute of limitations of Tennessee, in referencee to a peaceable possession of land for seven years, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit set up to the lands, say: This question, too, has at length been decided in the supreme court for the state of Tennessee, which have settled the construction of the act of 1797; it has been decided, that a possession of seven years is a bar only when held "under a grant, or a deed founded on a grant; the deed must be connected with the grant; this court concurs in that opinion." The two cases to which the court referred were decided 1805, and the court considered that they settled the construction of the act of 1797; but it is now made to appear, that these decisions were made under such circumstances, that they were never considered, in the state of Tennessee, as fully settling the construction of the act; the question was frequently raised before the supreme court of Tennessee, but the construction of the two statutes

of limitation was never considered as finally settled, until 1825, when the case of Gray *v.* Darby's Lessee was decided. In that case, it has been adjudged, that it is not necessary, to entitle an individual to the benefit of the statutes, that he should show a connected title, either legal or equitable; that if he prove an adverse possession, under a deed, of seven years before suit is brought, and show that the land has been granted, he brings himself within the statutes; since this decision, the law has been considered settled in Tennessee, and there has been so general an acquiescence in all the courts of the state, that the point is not now raised or discussed. As it appears to this court, that the construction of the statutes of limitation of Tennessee is now well settled, different from what was supposed to be the rule at the time this court decided the cases of Patton's Lessee *v.* Easton, and Powell's Lessee *v.* Harman, and as the instructions of the circuit court of Tennessee were governed by these decisions, and not by the settled law of the state; the judgment must be reversed, and the cause remanded for further proceedings.[1]

This court have uniformly adopted the decisions of the state tribunals, respectively, in the construction of their statutes; this has been done, as a matter of principle, in all cases where the decision of a state court has become a rule of property.

In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states; the rights of parties are determined under these laws, and it would be a strange perversion of principle, if the judicial exposition of these laws by the state tribunals should be disregarded. These expositions constitute the law, and fix the rule of property; rights are acquired under this rule, and it regulates all the transactions which come within its scope.

On all questions arising under the constitution and laws of the Union, this *court may exercise a revising power; and its decisions are final and obligatory on all other judicial [*292 tribunals, state as well federal; a state tribunal has a right to examine any such questions, and to determine thereon, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different, when the question arises under a local law; the decision of this question by the highest tribunal of a state should be considered as final by this court; not because the state tribunal in such a case, has any power to bind this court; but because, in the language of the court in the case of Shelby *v.* Guy, 11 Wheat. 361, "a fixed and received construction by a state, in its own courts, makes a part of the statute law."

If the construction of the highest judicial tribunal of a state forms a part of the statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply, where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made, with more force and propriety, against the federal tribunals, for a disregard of this rule, than by conforming to it; they profess to be bound by the local law, and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection, that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state, at the time the decision is made; this constitutes the rule of property within the state, by which the rights of litigant parties mus the determined.

As the federal tribunals profess to be governed by this rule, they cannot act inconsistently by

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[1] The decisions of the highest court of a state, upon the construction of its own statute of limitations, are binding upon the federal courts. Leffingwell *v.* Dutch Church, 16 Pet. 455; Tioga Railroad *v.* Blossburg and Corning Railroad, 20 Wall. 137; Andrew *v.* Redfield, 98 U. S. 235; Amy *v.* Dubuque, Id. 471; Capelle *v.* Trinity Church, 11 Bank. Reg. 536. And if the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and overrule its former decisions, the supreme court will follow the latest settled adjudications. Leffingwell *v.* Warren, 2 Black 599; S. P. Suydam *v.* Williamson, 24 How. 427. But such action of the state court is not allowed to retroact upon the judgments of the federal courts. Loring *v.* Marsh, 2 Cliff. 311; King *v.* Wilson, 1 Dill. 555; Morgan *v.* Curtenius, 20 How. 1. Nor will it be permitted to affect past transactions. Gelpcke *v.* Dubuque, 1 Wall. 175; Mitchell *v.* Burlington, 4 Id. 270; Larned *v.* Burlington, Id. 275; City of Kenosha *v.* Lamson, 9 Id. 477.

enforcing it; if they change their decision, it is because the rule on which the decision was founded has been changed.

Neal *v.* Green, 1 McLean 18, reversed.

Error to the Circuit Court of West Tennessee.

Grundy, for the plaintiff in error; *Isaacks*, for the defendant.

The facts of the case are fully stated in the opinion of the court, delivered by—

McLean, Justice.—This writ of error is prosecuted to reverse a judgment of the circuit court for West Tennessee. An action of ejectment was prosecuted by Neal in that court, to recover the possession of 640 acres of land. The issue was joined, and at the trial, the defendant relied upon the statute of limitations, and prayed certain instructions of the court to the jury Instructions were given, as stated in the following bill of exceptions.

"On the trial, the plaintiff introduced in evidence a grant from the state of North Carolina, dated ———, to *Willoughby Williams, for the *293] land in controversy, and deduced a regular chain of conveyances to plaintiff's lessor, and proved defendant in possession of the land in question, at the time suit was brought; defendant introduced a deed from Andrew Jackson to Edward Dillon, and proved that the defendant held by a lease from Dillon; and also in support of Dillon's title, introduced evidence tending to prove that persons claiming under and for Dillon, had been more than seven years in possession of the premises in dispute, adverse to the plaintiffs; upon which the court charged the jury, that according to the present state of decision in the supreme court of the United States, they could not charge that defendant's title was made good by the statute of limitations."

The decision of the point raised by the bill of exceptions in this case, is one of great importance, both as it respects the amount of property which may be affected by it, and the principle which it involves. In the case of *Patton's Lessee* v. *Easton*, which was brought to this court by writ of error, in 1816, the same question which was raised by the bill of exceptions, was then decided. But it is contended, that under the peculiar circumstances of the case now before the court, they ought not to feel themselves bound by their former decision. This court, in the case of *Powell's Lessee* v. *Harman*, 2 Pet. 241, gave another decision, under the authority of the one just named; but the question was not argued before the court. The question involves, in the first place, the construction of the statutes of limitation passed in 1715 and in 1797. The former was adopted by the state of Tennessee, from North Carolina; the third section of which provides, "that no person of persons, or their heirs, which hereafter shall have any right or title to any lands, tenements or hereditaments, shall hereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue; and in default thereof, such person or persons, so not entering, or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section provides, after enumerating certain disabilities, and the time within which suit must be brought, after they shall cease, that "all possessions held, without suing such claim as *294] aforesaid, shall *be a perpetual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time,

leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land."

In the year 1797, the legislature, in order to settle the "true construction of the existing laws respecting seven years' possession," enact, "that in all cases, wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then and in that case, the person or persons so holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, such quantity of land as shall be specified in his, her or their said grant, or deed of conveyance founded on a grant as aforesaid." This act further provides, that those who neglect, for the term of seven years, to assert their claim, shall be barred.

This court, in the conclusion of their opinion, in the case of *Patton's Lessee* v. *Easton*, say, "this question, too, has at length been decided in the supreme court of the state. Subsequent to the division of opinion on this question in the circuit court, two cases have been decided in the supreme court for the state of Tennessee, which have settled the construction of the act of 1797. It has been decided, that a possession of seven years is a bar only when held 'under a grant, or a deed founded on a grant.' The deed must be connected with the grant; this court concurs in that opinion. A deed cannot be 'founded on a grant,' which gives a title not derived in law or equity from that grant, and the words, 'founded on a grant,' are too important to be discarded." The two decided cases to which reference is made above, are *Lillard* v. *Elliott*, and *Douglass* v. *Bledsoe's Heirs*. These cases were decided in the year 1815; and this court considered, that they settled the construction of the statute of 1797. But it is now made to appear, that these decisions were made under such circumstances, that they were never considered, in the state of Tennessee, as fully settling the construction of the act.

In the case of *Lillard* v. *Elliott*, it seems, but two judges concurred on the point, the court being composed of four; and in *the case of *Weatherhead* v. *Douglass*, there was great contrariety of opinion among the judges, on the point of either legal or equitable connection. The question was frequently raised before the supreme court of Tennessee; but the construction of the two statutes of limitation was never considered as finally settled until 1825, when the case of *Gray* v. *Darby's Lessee* was decided (Mart. & Yerg. 396). In this cause, an elaborate review of the cases which had arisen under the statute, is taken, and the construction of both statutes was given, that it is not necessary, to entitle an individual to the benefits of the statutes, that he should show a connected title, either legal or equitable. That if he prove an adverse possession of seven years, under a deed, before suit is brought, and show that the land has been granted, he brings himself within the statutes. Since this decision, the law has been considered as settled in Tennessee, and there has been so general an acquiescence in all the courts of the state, that the point is not now raised or discussed. This construction has become a rule of property in the state, and numerous suits involving title have been settled by it. [*295

Had this been the settled construction of these statutes, when the decision was made by this court, in the case of *Patton's Lessee* v. *Easton*, there can be

no doubt, that that opinion would have conformed to it. But the question is now raised, whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court, on a question of general importance. The cases are numerous, where the court have adopted the constructions given to the statute of a state by its supreme judicial tribunal; but it has never been decided, that this court will overrule their own adjudication, establishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the state at the time, so as to conform to a different construction adopted afterwards by the state. This is a question of grave import, and should be approached with great deliberation. It is deeply interesting, in every point of view in which it may be considered. As a
*296] rule of *property, it is important; and equally so, as it regards the system under which the powers of this tribunal are exercised.

It may be proper to examine in what light the decisions of the state courts, in giving a construction to their own statutes, have been considered by this court. In the case of *McKeen* v. *Delancy's Lessee*, reported in 5 Cranch 22, this court held, that the acknowledgment of a deed before a justice of the supreme court, under a statute which required the acknowledgment to be made before a justice of the peace, having been long practised in Pennsylvania, and sanctioned by her tribunals, must be considered as within the statute. The chief justice, in giving the opinion of the court in the case of *Bodley* v. *Taylor*, 5 Cranch 221, says, in reference to the jurisdiction of a court of equity, "had this been a case of the first impression, some contrariety of opinion would, perhaps, have existed on this point. But it has been sufficiently shown, that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received in its origin the sanction of the court of appeals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions, as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country; such a principle cannot now be shaken." In the case of *Taylor* v. *Brown*, 5 Cranch 255, the court say, in reference to their decision in the case of *Bodley* v. *Taylor*, "this opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed, its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate especially, the same rule ought certainly to prevail in both courts." This court, in laying down the requisites of a valid entry, in the case of *Massie* v. *Watts*, 6 Cranch 165, say, "these principles have been laid down by the courts, and must be considered as expositions of the statute; a great proportion of the landed property of the country depends on adhering to them." In 9 Cranch 87,
*297] the court say, that "in cases depending *on the statute of a state, and more especially in those respecting titles to lands, the federal courts adopt the construction of the state, where that construction is settled and can be ascertained. And in 5 Wheat. 279, it is stated, that "the supreme court uniformly acts under a desire to conform its decisions to those of the state courts, on their local laws."

The supreme court holds in the highest respect decisions of state courts

upon local laws forming rules of property. 2 Wheat. 316. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the state tribunals. 6 Ibid. 119. The court say, in the case of *Elmendorf* v. *Taylor*, 10 Ibid. 152, "that the courts of the United States, in cases depending on the laws of a particular state, will, in general, adopt the construction which the courts of the state have given to those laws." "This course is founded upon the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government." In 7 Wheat. 361, the court again declare, that "the statute laws of the states must furnish the rule of decision to the federal courts, so far as they comport with the constitution of the United States, in all cases arising within the respective states; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of such statute law." The court again say, in 12 Wheat. 153, "that this court adopts the local law of real property, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which has become a fixed rule of property."

Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the state tribunals, respectively, in the construction of their statutes. That this has been done as a matter of principle, in all cases where the decision of a state court has become a rule of property.

In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states. *The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope. [*298

It is admitted in the argument, that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule, it does not comport either with the consistency or dignity of this tribunal, to adopt the change. Such a course, it is insisted, would recognise in the state courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a state, is the court of that state, being so constituted by the constitution and laws of the Union; and, as such, has an equal right with the state courts to fix the construction of the local law.

On all questions arising under the constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not

because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court, in the case of *Shelby* v. *Guy*, 11 Wheat. 361, "a fixed and received construction by a state in its own courts, makes a part of the statute law."

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it, in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions *which shall settle the rule. Are not the injurious effects *299] on the interests of the citizens of a state as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction. A refusal in the one case, as well as in the other, has the effect to establish in the state two rules of property.

Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law, by the state court? The exposition forms a part of the local law, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state; which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce. If the rule, as settled, should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it.

If the construction of the highest judicial tribunal of a state form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply, where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made, with more force and propriety, against the federal tribunals, for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection, that a different exposition was formerly given to the act, which was adopted by the federal court. The inquiry is, what is the settled law of the state, at the time the decision is made. This constitutes the rule of property within the state, by which the rights of litigant parties must be determined.

As the federal tribunals profess to be governed by this rule, they can *300] never act inconsistently, by enforcing it. If they *change their decision, it is because the rule on which that decision was founded has been changed. The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee, that an adverse possession of seven years, under a deed, for land that has been granted, will give a valid title. But, by the decision of this court, such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It, therefore, follows, that the occupant whose title is protected under the statutes, before a state tribunal, is unprotected by

them, before the federal court. The plaintiff in ejectment, after being defeated in his action before a state court, on the above construction, to insure success, has only to bring an action in the federal court. This may be easily done by a change of his residence, or a *bonâ fide* conveyance of the land. Here is a judicial conflict, arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a state.

In several of the states, the English statute of limitations has been adopted, with various modifications; but in the saving clause, the expression "beyond the seas," is retained. These words, in some of the states, are construed to mean "out of the state," and in others, a literal construction has been given to them. In the case of *Murray's Lessee* v. *Baker*, 3 Wheat. 540, this court decided, that the expressions "beyond seas," and "out of the state," are analogous; and are to have the same construction. But suppose, the same question should be brought before this court from a state where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it?[1] And might not the same arguments be used, in such a case, as are now urged against conforming to the local construction of the law of Tennessee. Apparent inconsistencies in the construction *of the statute laws of the states, may be expected to arise from the organization of our judicial systems; [*301 but an adherence by the federal courts to the exposition of the local law, as given by the courts of the state, will greatly tend to preserve harmony in the exercise of the judicial power, in the state and federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority.

As it appears to this court, that the construction of the statutes of limitations is now well settled, differently from what was supposed to be the rule at the time this court decided the case as *Patton's Lessee* v. *Easton*, and the case of *Powell's Lessee* v. *Harman*; and as the instructions of the circuit court were governed by these decisions, and not by the settled law of the state, the judgment must be reversed, and the cause remanded for further proceedings.

Baldwin, Justice, dissented.

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 West Tennessee, 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 remanded to the said circuit court, with directions to award a *venire facias de novo*.

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[1] See Davie *v.* Briggs, 97 U. S. 628.

*James Greenleaf's Lessee, Plaintiff in error, *v.* James Birth, Defendant in error.[1]

Ejectment.—Burden of proof.—Outstanding title.—Insolvent's deed.

A deed of indenture, duly executed, acknowledged and recorded, was given in evidence by the defendant in an ejectment, which purported to convey certain lots of ground in the city of Washington, specifying the number of the lots, referring to the title under which they were held by the grantor; the deed contained the following exception, "except as hereinafter excepted, all those hereinafter mentioned and described lots, squares, lands and tenements, situate in the city of Washington, in the district of Columbia, which the said J. G. and the said R. M. and J. N. were jointly interested in, each one equal undivided third part, on the day of the date of the indenture, the 10th July 1796." Among the lots described in the conveyance, were lots, supposed to be 239, described as those which J. G., the grantor, contracted for with Uriah Forrest and Benjamin Stoddert, by an agreement dated 15th July 1794; the lot sued for was one of those included in a conveyance made by Forrest and Stoddert to J. G. on the 24th September 1794. The exception in the deed stated the lots which it purported to apply to, as "a square, No. 506," another "square lying next to, and south of the said No. 506, and all the other ground lying next to, and south of the square last aforesaid, the said square containing, &c.," which are to remain the separate property of the grantors, and also excepting all such squares, lots, lands and tenements, as were conveyed or agreed to be conveyed by the parties to the indenture, prior to the 10th July 1795: *Held*, that this exception was valid;[2] and that the burden of proof to show that the lot for which the ejectment was brought was within the exception, was not upon the plaintiff in the action; that in many cases, the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies, is admitted; but this rule is far from being universal, and has many qualifications upon its application.

In the case before the court, the defendant has shown, *primâ facie*, a good title to recover; the defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such an outstanding title, beyond all controversy; it is not sufficient for him to show that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff; he has a right to stand upon his *primâ facie* good title; and is not bound to furnish any evidence to assist the defence; it is not incumbent on him negatively to establish the non-existence of such an outstanding title; it is the duty of the defendant to make its existence certain.[3]

Deeds for lands in the district of Columbia, executed by an insolvent debtor, under the insolvent laws of the state of Pennsylvania, and under and in conformity with the insolvent laws of the state of Maryland, not having been enrolled in the general court where the lands lie, are, in a legal sense, mere nullities, and incapable of passing the lands described in them.

Error to the Circuit Court of the District of Columbia, and county of Alexandria. *This was an ejectment, instituted in May 1818, by the plaintiff in error, in the circuit court of the county of Washington, for the recovery of a lot of ground in the city of Washington, No. 17, square 75. The case was subsequently removed to the county of Alexandria, where the same was tried, and a verdict and judgment rendered for the defendant. The plaintiff prosecuted this writ of error.

*303]

The plaintiff in error, James Greenleaf, held in fee-simple, under a patent from the state of Maryland to William Langworth, and a deed from Uriah Forrest and Benjamin Stoddert, a large number of lots and squares of ground, in the city of Washington. Afterwards, on the 13th of May

[1] For a former decision in this case, see 5 Pet. 132.

[2] See Weed *v.* Madden, 2 Cliff. 584.

[3] An outstanding title, to defeat an ejectment, must be a valid and subsisting one. Hunter *v.* Cochran, 3 Penn. St. 105; Sheik *v.* McElroy, 20 Id. 25; Riland *v.* Eckert, 23 Id. 215; McBarron *v.* Gilbert, 42 Id. 268.

1796, he conveyed, by deed of indenture, to Robert Morris and John Nicholson, in fee-simple, certain of the said lots, particularly described in the said instrument. The indenture purported to convey the said lots, "except as is hereinafter excepted;" and the exception, in a subsequent part of the same, was in the following words, "excepting, nevertheless, out of the lots, squares, lands and tenements above mentioned, all that square marked and distinguished in the plot of the city of Washington, by the number 506, and that other square lying next to and south of the said No. 506, and all that other square lying next to and south of the square last aforesaid, the said three squares containing in the whole about the quantity of 169,076¾ square feet, be the same more or less; which it is agreed by all the partiesto these presents, shall be and remain the sole and separate property of the said James Greenleaf, his heirs and assigns; and excepting also all such squares, lots, lands or tenements, as were either conveyed or sold, or agreed to be conveyed, either by all or either them, the said James Greenleaf Robert Morris and John Nicholson, or any of their agents and attorneys, to any person or persons whatsoever, at any time prior to the 10th day of July 1795." This deed was recorded in the city of Washington, according to the provisions of the laws of Maryland.

James Greenleaf having, on the 10th of March 1798, applied to the supreme court of the state of Pennsylvania, for the benefit of the insolvent laws of that state, was discharged as an *insolvent debtor by that court, on the 31st day of March 1798. At the time of this discharge, [*304 he executed a conveyance of all his estate, real, personal and mixed, to Robert Smith, Mordecai Lewis and James Yard, their heirs and assigns, for the benefit of his creditors, agreeable to the provisions of the insolvent laws of the state of Pennsylvania. Subsequently, in March 1800, on the application of the creditors of Greenleaf, Thomas M. Willing and Joseph S. Lewis were substituted as the assignees of the insolvent; and they also refusing to act, the court, on the 12th day of March 1804, appointed John Miller, jr., sole assignee of the estate and effects of Greenleaf; and Robert Smith and James Yard, who survived Mordecai Lewis, on the 16th March 1804, conveyed to John Miller, jr., all the estate and effects of the insolvent, which had been vested in them by the deed executed by him at the time of his discharge.

On the 9th of February 1799, James Greenleaf applied by petition to the chancellor of the state of Maryland, for the benefit of the insolvent law of that state, passed in 1798; and he was discharged on the 30th of August in the same year. As a part of the proceedings in the case, the petitioner executed a deed, conveying to a trustee named by the chancellor, all his property, real and personal; all the requirements of the laws of Maryland were complied with. Annexed to the schedule of the property of the petitioner for the benefit of the insolvent laws of Maryland, was a statement that all the property mentioned therein had been transferred by the petitioner to assignees appointed under the insolvent laws of Pennsylvania.

On the trial of the cause in the circuit court, the plaintiff tendered two bills of exception. The first bill of exceptions was as follows: On the trial of this suit, to maintain the issue on his part joined on the first count in his declaration, the plaintiff gave in evidence to the jury, a patent from the proprietors of the state of Maryland, to William Langworth, dated 5th

July 1686, in these words (stating the same), and proved, that the tene-
*305] ment, wooden messuage and improvements in the *plaintiff's declaration mentioned, were comprehended within the bounds of the said patent, and the legal title to the said tenement, wooden messuage and improvements was deduced from the said patentee to plaintiff, by divers mesne conveyances; and by the deed of the 20th September 1794, from Forrest and Stoddert, to J. Greenleaf, mentioned in the deed of 13th May 1796; whereupon, the defendant, to show a title out of the plaintiff, gave in evidence to the jury, a deed from the said James Greenleaf to Robert Morris and John Nicholson, dated 13th May 1796 (stating the same), admitted to have been executed by the said James Greenleaf, and offered no other evidence. Whereupon, the plaintiff's counsel prayed the court to instruct the jury, that the said deed, unaccompanied by any other evidence, did not show such an outstanding title as was sufficient to bar the plaintiff's recovering in this suit; which instruction the court refused to give; to which refusal, the plaintiff excepted, and prayed the court to sign and seal this his bill of exceptions, which was accordingly done, this 5th day of December 1829.

The second bill of exceptions stated, that, on the trial of this suit, to sustain the issue on his part joined, the plaintiff gave in evidence to the jury, a patent from the proprietor of the state of Maryland (stating the same), and the legal title under the said patent was admitted by the defendant to have been vested in the plaintiff by the said patent, and by divers mesne conveyances, on the 30th day of August 1799. Whereupon, to prove a title out of the said James Greenleaf, the defendant offered in evidence to the jury, the proceedings in the case of the said James Greenleaf, an insolvent, before the chancellor of Maryland, setting out the said proceedings, and an act of the state of Maryland of 1798, ch. 64. To the admission of which proceedings of insolvency, the plaintiff, by his counsel, excepted, but the court overruled the said exception, and permitted the said proceedings to be read in evidence to the jury, and thereupon, on the prayer of the counsel for the defendant, the court instructed the jury, that the said act of assembly, and proceedings in insolvency, did show a legal title out of the plaintiff, and did preclude a recovery in this suit on the first count in the plaintiff's declaration.

The plaintiff's counsel, thereupon, gave in evidence to the jury,
*306] *the proceedings in the case of the insolvency of the said James Greenleaf, in the commonwealth of Pennsylvania, in these words (stating the same), and the conveyances therein mentioned, not recorded in the state of Maryland, and prayed the court to instruct the jury, that under the operation of the said proceedings in Maryland and Pennsylvania, the legal title to the premises in the declaration mentioned, notwithstanding the said conveyances, was not divested from the said James Greenleaf, by anything by the defendants so as aforesaid shown; which instruction the court refused to give. To the admission of the proceedings as aforesaid, before the chancellor of Maryland, and to the instruction of the court given on the prayer of the defendant, as to the effect thereof, and of the said act of assembly, and to their refusal to instruct the jury as prayed by the plaintiff's counsel, the plaintiff, by his counsel, excepted, and prayed that this his bill of exceptions may be sealed and enrolled, which was done accordingly.

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

For the *plaintiff*, it was contended, upon the first bill of exceptions, that a defendant in the ejectment cannot protect himself under an outstanding title, with which he is in no manner connected. But if such a title could avail the defendant in this case, he was bound to show that it was a valid and subsisting title, and covered the property in question. It was for him to show, that the lot held by him was not within the exception in the deed of the 13th of May 1796, from the plaintiff in error to Morris and Nicholson. 5 Pet. 457. The exception in the deed is not void upon its face. If the exception were void, the whole deed would be void. It is sufficiently certain. If the description is such as to pass an estate, it is sufficient as a reservation. The exception does not apply to the estate, but to a description of the land conveyed by the deed. There is enough in the conveyance, and in the exception, to enable any one to ascertain what was granted, and what was withheld.

As to the second bill of exceptions, it was said, that it was admitted, that the title to the premises in controversy was, in *August 1799, in the plaintiff in error. How had that title been divested? By the [*307 laws of Maryland, all conveyances of land must be recorded in the county where the land is situated; without being recorded they do not pass any estate. These provisions of the law apply to the proceedings under the insolvent laws of Pennsylvania, and to those before the chancellor of Maryland.

The Maryland deed has not been recorded as provided by the act of assembly, which requires that the same shall be enrolled within six months, in order to make it operative. The insolvent law, in its spirit, if not in its terms, requires enrollment. The deed must be acknowledged; this is the act of the insolvent; the recording is an act to be performed by the assignee; and the act relative to the recording of deeds considers this as an ordinary conveyance. It does not require it to be recorded in the court of chancery; it is not a part of the proceedings in that court; it is not executed under the inspection of the chancellor; he is only to have a certificate of its execution from the assignee.

The premises were not conveyed by the assignment executed under the insolvent laws of Pennsylvania. The description of the property was too general to pass the estate. After that assignment, Greenleaf had only a resulting trust in the lots in Washington. If that assignment was not recorded in the county of Washington, as it was not, he had the legal title, subject to a claim of the assignees to a conveyance; and this interest would not pass under the assignment in Maryland. But he still held a mere naked legal estate, subject to the equity of his assignees and creditors. It cannot be set up by the defendant, that the title to the premises is in the assignee in Pennsylvania; that title, if it ever existed, is barred by the statute of limitations. But the plaintiff does not set up his title against any of his trustees or assignees; it is only against a mere intruder and stranger.

Key and *Swann*, contrà.—The questions in the case are: 1. Whether the premises in controversy are within the exceptions in the deed to Morris

*and Nicholson? 2. Whether the interest of the plaintiff in error passed under the Maryland insolvent law?

The decision of the first question turns on the point, who must prove the lot not in the exception. It is admitted, that the defendant must show an outstanding title; but he is released from a part of the difficulty in establishing such a title here, as the exception is altogether void from its uncertainty; it is a fraudulent trap, intended to operate secretly on the property conveyed by the deed. Upon the law of exceptions, they cited, Shep. Touch. 77; 5 Co. 12; 4 Com. Dig. tit. Fait, E, 8; 7 Co. Litt. 47 *a*; 3 Johns. 370; 8 Ibid. 394; 3 Wheat. 224; Bull. N. P. 110.

As to the second bill of exceptions, the counsel for the defendant contended, that the refusal of the circuit court to instruct the jury, that the proceedings under the insolvent laws of Pennsylvania and Maryland did not divest the title of Greenleaf, was correct. By the act of assembly of Maryland of 1798, ch. 64, §§ 5, 15, all the proceedings under the law are to be recorded. It is contended by the plaintiff, that the title did not pass under the assignment, because the deed to Mr. Cranch was not recorded in the county where the property is situated. But the recording in the court of chancery is all that is necessary. The general act relative to recording of deeds does not apply to such cases. The deed was a part of the chancery proceedings; and the provision in the insolvent law relative to the registering of the proceedings, is, so far as they would be affected by the recording law, a repeal of the same. 2 Har. & Johns. 574; 2 Har. & McHen. 46.

As to a mere intruder showing title out of the plaintiff, the distinction seems to be this—he cannot show an outstanding title in a third person; but he may show that the plaintiff has himself parted with the title. 3 Wheat. 225, 228; 9 Ibid. 516; 2 Har. & Johns. 112; 5 Burr. 2484; 4 T. R. 682; 6 Mass. 239.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia. The original action was an ejectment, brought in May 1818, by the plaintiff in error against the
*309] defendant in *error, for a certain lot of ground, No. 17, square 75, in the city of Washington, and was founded upon demises. Upon the trial (which was at December term 1829), a verdict was found for the defendant, upon which he had judgment. Two bills of exception were taken at the trial, on behalf of the plaintiff; and the questions for the consideration of this court grew out of the matter of those exceptions.

The first bill of exceptions states, that at the trial, a title to the premises in controversy was deduced from the state of Maryland, by mesne conveyances, to James Greenleaf, the lessor of the plaintiff, in September 1794. Whereupon, the defendant, to show a title out of the plaintiff, gave in evidence to the jury, a deed from Greenleaf to Robert Morris and John Nicholson, dated the 13th of May 1796, the due execution of which was admitted, and offered no other evidence. Whereupon, the plaintiff's counsel prayed the court to instruct the jury, that the said deed, unaccompanied by any other evidence, did not show such an outstanding title as was sufficient to bar the plaintiff's recovery in the suit; which instruction the court refused to give; to which refusal the plaintiff's counsel excepted. And the question before this court is, whether this exception is well founded?

Greenleaf v. Birth.

The deed of Greenleaf to Morris and Nicholson purports to grant to them in fee, as tenants in common, "except as is hereinafter excepted, all those hereinafter mentioned and described lots, squares, lands and tenements, situate in the city of Washington, in the district of Columbia, wherein the said James Greenleaf, and the said Robert Morris ond John Nicholson were jointly interested, in each one equal undivided third part, on the day of the date of the above-named articles of agreement" (the 10th of July 1796), &c. It then proceeds to specify these squares and lots contracted for by Greenleaf, with the commissioners of the city of Washington; and 3000 lots contracted for by Greenleaf, as agent of Morris, with the same commissioners; and about 220 lots, contracted for by Greenleaf, with Daniel Carroll; and about 428½ lots contracted for by Greenleaf, with Notley Young; and then proceeds, "and also all those lots situate in the said city of Washington, supposed to be about 239¼ *in number, for which the said James Green- [*310
leaf contracted with Uriah Forrest and Benjamin Stoddert, by an agreement in writing, bearing date, &c. (15th of July 1794.) The lot sued for was one of these lots, and was included in a conveyance made by Forrest and Stoddert to Greenleaf on the 24th of September 1794. Several other parcels of lots are then specified; and then comes the following exception: "Excepting, nevertheless, out of the lots, squares, lands and tenements above mentioned, all that square, marked and distinguished in the plan of the said city of Washington by the number 506, and that other square lying next to, and south of, the said No. 506, and all that other square lying next to, and south of, the square last aforesaid, the said square containing, &c., which it is agreed, &c., shall be and remain the sole and separate property of the said James Greenleaf, and his heirs and assign. And excepting also all such squares, lots, lands or tenements as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, Robert Morris or John Nicholson, or any of their agents or attorneys, to any person or persons whatsoever, at any time prior to the said 10th day of July, A. D. 1775."

It is observable, that the granting part of the deed begins by excepting from its operation all the lots, squares, lands and tenements, which are within the exceptions. The words are, "doth grant, &c., except as is hereinafter excepted, all those hereinafter mentioned and described lots, squares, lands and tenements," &c. In order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is within the exception, is excluded from the grant, according to the maxim laid down in Co. Litt. 47 *a*—*Si quis rem dat et partem retinet, illa pars, quam retinet, semper cum eo est, et semper fuit.*

It has been argued, that the second clause in the exception is utterly void for uncertainty, because it excepts "such squares, lots, &c., as were either conveyed or sold, or agreed to be conveyed," without stating to whom sold or conveyed, or agreed to be conveyed, or giving any other description, which would reduce them to certainty. And it has been intimated, that it is also void for repugnancy, because it is an exception of a part, which had been previously granted; and Co. Litt. *47 *a*, has been relied on, in [*311
support of this objection, where it is laid down, that an exception of a thing certain out of a thing particular and certain, will be void; as, if a man leaves twenty acres, excepting one acre, the exception is void. Com.

Dig. Fait, E, 7. But without stopping to inquire, in what sense, and to what extent, the rule thus laid down is law, it is sufficient to say, that there is no such repugnancy here; for the exception is not out of the thing previously granted, but is incorporated into the very substance of the granting clause.

As to the other exception, we do not think it is void for uncertainty. It refers to things, by which it may be made certain; and *id certum est, quod certum reddi potest.* No one will doubt, that the exception of squares and lots, actually sold and conveyed, would be sufficiently certain; for they may be made certain by reference to the deeds of conveyance. And as all contracts for the sale and conveyance of lands must be in writing, there seems the same certainty in reference to the lots contracted to be conveyed by the parties or their agents.

It has been suggested, that the generality of the exception might open a door to frauds and impositions upon third persons, by enabling the parties to bring forward spurious or concealed contracts, at a future time. But to this objection, it is a sufficient answer, that the present is not a case of a *bonâ fide* purchaser or grantee, whose title may be affected by any such fraud or concealment. The defendant, Birth, is a mere stranger to the title, and for aught that appears, is a mere intruder. It does not lie in his mouth to contend, that an exception, solemnly stipulated for by the parties, shall not be binding between them. They were content to take the conveyance upon these terms. There was certainly enough in the exception to satisfy them; and it would be a fraud in the grantees, to attempt to avail themselves of the general and loose expressions of the exception, to avoid the titles of parties claiming title under Greenleaf, by prior deeds or contracts of lots within the reservation. Even if the exception were void at law, a court of equity would relieve them against the claims of Morris and Nicholson, set up to their prejudice. It is not improbable, that many such titles in this city are now held under the faith of this exception; and a declaration, at the instance of a mere *intruder, that it was utterly void, might *312] work the most serious mischiefs. We see no substantial ground to support it.

But if it were othsrwise, still, the other exception of the square No. 506, and the other two squares next south of it, are sufficiently certain. This court cannot judicially know, that one of the squares next south of square No. 506 is not square No. 75; and there is nothing in the record that negatives it, for the defendant offered no evidence except the naked deed.

But it is said, that if the exception is not void, still the burden of proof is upon the plaintiff, to establish, that the lot in controversy is within the exception; because it is peculiarly within the privity and knowledge of the plaintiff's lessor, what lots were conveyed and sold, and contracted to be conveyed, and the defendant has no means of knowledge. That in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies, is admitted. But the rule is far from being universal, and has many qualifications upon its application.[1] In the

[1] If a negative allegation be an essential element of the plaintiff's case, it must be proved. Hunt *v.* Todd, 18 Penn. St. 316. And see Schlesinger *v.* Hexter, 2 J. & Sp. 499; Boyle *v.* Roche, 2 E. D. Sm. 335.

present case, the plaintiff has shown, *primâ facie*, a good title to recover. The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such an outstanding title, beyond controversy. It is not sufficient for him to show, that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff; he has a right to stand upon his *primâ facie* good title, and he is not bound to furnish any evidence to assist the defence. It is not incumbent on him, negatively, to establish the non-existence of such an outstanding title; it is the duty of the defendant, to make its existence certain.

Besides, this is the case of an outstanding title set up under a deed executed in 1796, under which, in respect to the act in controversy, the grantees are not shown either to have had, or to have claimed, any possession or right of possession. The present ejectment was brought in 1818, twenty-two years after the execution of that deed, and the trial had, in 1829, more than thirty-three years after its execution. Under such *circumstances, a very strong presumption certainly arises, that the lot was included [*313 within the exception; for it would be difficult, in any other manner, to account for such total absence of claim or possession by the grantees. An outstanding title could hardly be deemed a good subsisting title, by common presumption, under such circumstances; whereas, if the lot was within the exception, the non-claim would be natural, and fully accounted for. We are, therefore, of opinion, that the circuit court erred, in refusing the instruction prayed for by the plaintiff in the first bill of exceptions.

The second bill of exceptions, after stating, that the defendant admitted, that the legal title to the lot in question, under the patent from the state of Maryland, was vested in the plaintiff by the patent, and by divers mesne conveyances, on the 30th day of August 1799, proceeds to state, that, thereupon, to prove a title out of James Greenleaf, the defendant offered in evidence to the jury, the proceedings in the case of James Greenleaf, an insolvent, before the chancellor of Maryland, and the act of Maryland, of 1798, ch. 64; to the admission of which proceedings the plaintiff objected; but the court overruled the objection and admitted the evidence; and thereupon, on the prayer of the defendant, the court instructed the jury, that the said act of 1798, and the proceedings of insolvency, did show a legal title out of the plaintiff, and did preclude a recovery in this suit, on the first count in the plaintiff's declaration; that is to say, upon the demise of Greenleaf.

The plaintiff's counsel thereupon gave in evidence the proceedings in the case of the insolvency of Greenleaf, in the commonwealth of Pennsylvania, and the conveyances therein mentioned, not recorded in the state of Maryland; and prayed the court to instruct the jury, that under the operation of the said proceedings in Maryland and Pennsylvania, the legal title to the premises in the declaration, notwithstanding said conveyances, was not divested from Greenleaf, by anything by the defendant so shown; which instruction the court refused to give; to which refusal and instruction, and admission of evidence, the plaintiff excepted.

By the laws of Maryland (with certain exceptions not necessary to be mentioned), no conveyance is sufficient to pass any estate of inheritance or

freehold in lands, or any estate *above seven years, except the deed or conveyance be in writing, and acknowledged in the general court, or before a judge thereof, or in the county court, or before two justices of the county where the lands lie, &c., and be enrolled in the records of the county, or of the general court, within six months after the date thereof. (See act of 1715, ch. 47 ; act of 1767, ch. 14 ; act of 1783, ch. 9 ; act of 1794, ch. 57 ; act of 1998, ch. 103.) Neither the deed of assignment of Greenleaf to the trustee under the Maryland insolvency, nor the deed of assignment of Greenleaf to the trustees, under the Pennsylvania insolvency, have ever been enrolled in the general court, or in the county where the land in controversy lies. Unless, then, some exception can be found, which exempts these assignments from the general law, the omission to enrol them, renders them, in a legal sense, mere nullities, and incapable of passing any title to the land in controversy. There is no pretence of any exception, in relation to the assignment under the Pennsylvania proceedings, and therefore, that did not divest the title of Greenleaf. But in regard to the Maryland proceedings, it is said, that there is, under the act of 1798, ch. 64, respecting insolvents, a constructive exception. That act provides (§ 5), that upon the petitioning debtor's (and Greenleaf was in that predicament) executing and acknowledging a deed to the trustee to be appointed, as the act requires, conveying all his property, real, personal and mixed, &c., and the trustee's certifying the same, it shall be lawful for the chancellor to order that the said debtor shall be discharged from all debts, &c. Greenleaf was accordingly discharged, having in this respect complied with the terms of the act. The 15th section of the act provides, " that all proceedings under this act shall be recorded by the register, who shall be entitled to the same fees as are fixed by law for services in other cases, &c." Now, the argument is, that this clause operates, *pro tanto*, a repeal of the general laws, in relation to the enrolment of conveyances, so far as respects assignments by debtors under the act. But we think this is not the fair construction of the act. There is nothing in the act, which requires the assignment to be recorded ; nor does it necessarily constitute a part of the proceedings before the chancellor. On the contrary, the fifth section contemplates, that it shall be executed and acknowledged by the debtor, in the usual manner,
*315] and the trustee is to certify the same *to the chancellor. If the deed is to be acknowledged in the usual manner, then it is to be enrolled in the usual manner, for no provision is made for its enrolment elsewhere ; and the only judicial notice which the chancellor has of it, as connected with the proceedings before him, is by the certificate of the trustee. Nor is there any policy disclosed on the face of the act of 1798, which could justify the court in presuming, that the legislature intended, in respect to deeds of insolvent debtors, that the ordinary securities of enrolment should be dispensed with. We think, then, that there was error in the circuit court in admitting the proceedings under the Maryland insolvency ; and also in instructing tho jury that these proceedings showed a legal title out of the plaintiff, and precluded a recovery in the suit. For the same reasons, there was error in the refusal of the circuit court to instruct the jury, according to the prayer of the plaintiff's counsel, that under the operation of the said proceedings in Pennsylvania and in Maryland, the legal title to the premises was not divested from Greenleaf, by anything shown by the defendant.

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

MARSHALL, Ch. J., dissented from so much of the foregoing opinion as requires the defendant to show that the lot in the declaration mentioned, is not within that part of the exception contained in the deed from Greenleaf to Morris and Nicholson, which excepts therefrom "all such squares, lots, lands or tenements as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, Robert Morris and John Nicholson, or any of their agents or attorneys, to any person or persons whatever, at any time prior to the said 10th day of July 1795:" because he understood it to impose on the defendant the necessity of proving a negative; and because the fact on which the exception depends, is within the knowledge of the plaintiff, and not of the defendant.

THIS cause came on to be heard, on the transcript of the *record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there was error in the circuit court, in refusing to instruct the jury, that the deed from Greenleaf to Morris and Nicholson, in the first bill of exceptions mentioned, unaccompanied by any other evidence, did not show such an outstanding title as was sufficient to bar the plaintiff's recovery in this suit, as in the same bill of exceptions mentioned. And it is further the opinion of this court, that there was error in the circuit court, in admitting the proceeding in the case of the said James Greenleaf, an insolvent, before the chancellor of Maryland, in the second bill of exceptions mentioned; and also in instructing the jury that the act of assembly of Maryland of 1798, ch. 64, and proceedings of insolvency aforesaid, did show a legal title out of the plaintiff, and did preclude a recovery in this suit, on the first count in the plaintiff's declaration; and also in refusing to instruct the jury, that under the operation of the proceedings in Maryland and Pennsylvania, in the same bill of exceptions mentioned, the legal title to the premises in the declaration mentioned, notwithstanding said conveyance, was not divested from the said James Greenleaf, by anything by the defendant so as aforesaid shown, as in the same bill of exceptions is mentioned. It is, therefore, considered and adjudged by the court, that for the errors aforesaid, the judgment of the said circuit court be and the same is hereby reversed, and the cause be remanded to the circuit court, with directions to award a *venire facias de novo.*[1] [*316

[1] For a further decision in this case, resulting in another reversal, see 9 Pet. 292.

*Thomas Leland and others *v.* David Wilkinson.

Proof of private acts.

A paper certified by the secretary of state of Rhode Island, and by the governor, under the seal of the state, stating that certain laws were passed by the legislature of that state, and that certain matters were cognisable by the general assembly of Rhode Island, and of the practice of the assembly of Rhode Island, in cases of a particular description, is not evidence on the argument of a cause before this court. Usage and custom should be proved in the circuit court, on the trial of the case in which it may be referred to; and evidence of the same is not admissible in this court, if not found in the record.

A certificate from the secretary of state of the state of Rhode Island, also certified by the governor, under the seal of the state, was offered, to prove that certain proceedings had been had, at different times, in the legislature of Rhode Island, on private petitions, relative to the administration and sale of the estates of deceased persons for the payment of their debts; and that there have been certain usages and proceedings in the legislature of that state in regard to the same. The public laws of a state may, without question, be read in this court, and the exercise of any authority which they contain may be derived historically from them; but private laws, and special proceedings of this character, are governed by a different rule; they are matters of fact, to be proved as such, in the ordinary manner; this court cannot go into an inquiry as to the existence of such facts, upon a writ of error, if the are not found in the record.

Certificate of Division from the Circuit Court of Rhode Island. The same cause was before the court, on a writ of error, at January term 1829. (2 Pet. 267.) The case was again tried in the circuit court of Rhode Island, at June term 1830; and the points on which the judges of that court were divided, were certified to this court.

After the case had been argued by *Dutton*, for the plaintiff, with whom also was Mr. *Webster; Whipple*, for the defendant, with whom also was Mr. *Wirt*, proposed to read, as evidence of the law of Rhode Island upon the probate of wills and granting of administration, and of the other matters therein stated, the following certificate:

"State of Rhode Island and Providence Plantations: Secretary's office, January 7, 1832. I certify, that from an examination of the records of said state, it appears, that on the 1st day of March 1663, an act was passed enti-
*318] tled, 'An act for *the probate of wills and granting of administrations.' That in and by said act, the probate of wills and granting administrations was vested in the town councils of the respective towns; that an appeal lay to the governor and council, as supreme ordinary or judge of probates, who continued to exercise such jurisdiction, until June 1802, when all appeals then pending, with the jurisdiction thereof, were transferred to the supreme judicial court, by whom it is now exercised.

"I further certify, that from the year 1666 until June 1729, the general assembly took cognisance of and tried appeals from the general court of trials; which court was composed of the governor, deputy-governor and assistants. That at June session 1729, an act was passed establishing a superior court of judicature, consisting of the governor, deputy-governor and assistants. That thereby an appeal in personal actions was allowed from said superior court to the general assembly. That the general assembly continued to try appeals therefrom, until June 1741, when a court of equity was established and authorized to hear appeals in personal actions, from the superior court of judicature, agreeable to law and equity, in as full and extensive manner as the general assembly had been accustomed to do.

That in February 1743, an act was passed, abolishing said court of equity, and authorizing said superior court to review causes by them decided.

"I further certify, that the general assembly of the colony, and also of the state, have been and now are accustomed to exercise a revisory power in granting new trials, upon petition therefor. That the assembly have and now do license the sales of real estate for the payment of debts of persons deceased, upon petition of the executor or administrator; and also license the real estate of minors, upon petition of the guardian.

"Witness—HENRY BOWEN, Secretary.

"By his excellency, Lemuel H. Arnold, governor, captain-general and commander-in-chief of the state of Rhode Island and Providence Plantations: Be it known, that the name 'Henry Bowen,' to the aforesaid written attestation subscribed, is the proper handwriting of Henry Bowen, Esquire, who, at the time of subscribing the same, was secretary of the state aforesaid, duly elected and qualified according to law; *wherefore, unto his said attestation full faith and credit are to be rendered. In [*319 testimony whereof, I have hereunto set my hand, and caused the seal of said state to be affixed, at Providence, this seventh day of January, in the year of our Lord 1832, and of independence the fifty-sixth.

LEMUEL H. ARNOLD.

By his excellency's command. HENRY BOWEN, Secretary."

Webster objected to the introduction of this paper in evidence.

BALDWIN, Justice.—It is evidence of local law.

THOMPSON, Justice.—The paper is evidence of the dates of the laws, but it is otherwise inadmissible. If it is offered as evidence of a custom in Rhode Island, it should have been laid before the jury, by whom the question whether such was the custom should have been decided. The facts stated in the certificate cannot be inquired into by this court in this form.

STORY, Justice.—It is incompetent evidence. The laws must be produced to show that they are, and their dates. They may be certified by the officer. If the usage of the state of Rhode Island is to be inquired into, it should be established in the court below.

DUVALL and MCLEAN, Justices, concurred with Mr. Justice STORY.

MARSHALL, Ch. J., considered the certificate evidence that there were such laws as those stated in it; but the laws should be produced. He would have been willing that the paper should be read, unless objected to, but being objected to it was not evidence.

Whipple then offered in evidence, to show the course of legislation in Rhode Island in particular cases, a copy of the proceedings of the legislature upon petitions presented for relief in the cases stated in them. The copy of the proceedings *in each case was certified by Henry Bowen, [*320 secretary of state of the state of Rhode Island, and to the whole was subjoined, the certificate of Lemuel H. Arnold, "governor, captain-general and commander-in-chief of the state of Rhode Island and Providence Plantations," under the seal of the state, that "Henry Bowen was secretary of the state," duly elected and qualified according to law.

The paper thus certified and offered in evidence, contained a copy of a petition to the legislature of Rhode Island, dated New York, 29th November 1784, signed by "Grace Babcock, of Philipsborough, in the state of New York, widow, relict of Luke Babcock, clerk." The petitioner prayed the legislature to authorize her to dispose of a mortgage held by her husband, at the time of his decease, on one-fourth part of a lot and dwelling-house in New York. Luke Babcock left three minor children. On the 3d March 1785, the prayer of the petition was granted; and by resolution, it was declared, that a deed of the mortgaged premises should "convey to the purchaser all the right and title of said Luke Babcock, at the time of his decease, in and unto the said premises."

2. Also the petition of John Read, of the county of Bristol, in the state of Massachusetts, presented on the last Monday in June 1785. John Read was the executor of William Read, of the same county and state, deceased. The petition stated, that the property of the deceased had, on the report of a commissioner, been adjudged capable of paying no more than twelve shillings and sixpence in the pound. That an attachment had been issued against the real estate of the deceased in Newport, and against his heirs and devisees, by one of the creditors, for money alleged to be due to him, and a judgment obtained thereon. The petition prayed, that the action so brought might be stayed, the demand of the plaintiff should be "examined; and for such sum as should be found due to him, he may be admitted to receive his proportion with the other creditors of the said estate;" and that such part of the real estate of William Read, situate in the county of Newport, should be sold, as should be sufficient to pay his debts, under the direction, and with the approbation, of the judge of probate for the city of Newport, or the town council in which the estate laid; and that the deed or
*321] deeds for the *same should convey to the purchaser a good and indefeasible estate of inheritance in fee-simple. The legislature, by a resolution passed July 1st, 1785, granted the prayer of the petition; and also "resolved, with the consent of the attaching-creditor, that the proceeding on his aforesaid action be stayed."

3. Also the petition of Lucy Jenks, "widow and relict of Gideon Jenks, of Brookfield, in the county of Worcester, Massachusetts, deceased, and administratrix to the said deceased's estate." The petition stated, that "there were debts against the estate of the deceased, amounting to 228*l.* 16*s.* 6*d.*, and that selling the personal estate to discharge them, would greatly distress the petitioner and her children, being eleven in number, all in their minority excepting one daughter." The petitioner prayed leave to dispose of all the real estate of the deceased, in North Providence, in the county of Providence, to be appropriated towards the payment of the said debts, as recommended by the judge of probate for the county of Worcester aforesaid. On the 8th September 1790, the legislature voted, "that the petition be received, and the prayer thereof be granted."

The proceedings of the legislature of Rhode Island, in six other cases, on the petitions of individuals in matters of a private nature, were also certified in the same manner.

Webster, for the plaintiffs, objected to the admission of the papers as evidence. They were private acts; and if they are to be given in evidence,

it would be necessary and proper for the plaintiffs to have an opportunity to examine into the facts of the cases to which the laws refer.

Wirt, for the defendant, contended, that the evidence was legal. There is no written constitution in Rhode Island, and the proceedings now offered are adduced to show the law and practice of the state by her highest tribunal, in the full and undoubted exercise of the powers intrusted to it.

The judges having severally expressed their opinion, MARSHALL, Ch. J.; said, the evidence objected to is understood to be offered to prove that certain proceedings have *been had, at different times, in the legislature of Rhode Island, on private petitions, of a similar nature with [*322 that before the court; and that there have been certain usages and proceedings in the legislature of Rhode Island, in regard to the administration and sale of the estates of deceased persons for their debts, which will establish, that it has, for a long period, by usage, and rightfully, exercised the authority contended for by the defendant. The public laws of a state may, without question, be read in this court; and the exercise of any authority which they contain, may be deduced historically from them; but private aws, and special proceedings of the character spoken of, are governed by a different rule. They are matters of fact, to be proved as such, in the ordinary manner. This court cannot go into an inquiry as to the existence of such facts, upon a writ of error, if they are not found in the record. The evidence, if not objected to, might have been heard; but since it is controverted, the matter of fact must be ascertained in the circuit court.

BALDWIN, Justice. (*Dissenting.*)—By the first section of the fourth article of the constitution of the United States, it is ordained, that, "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." In the execution of this power, congress enacted, in 1790, "that the acts of the legislature of the several states shall be authenticated, by having the seals of their respective states affixed thereto." "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk of the court and seal of the court annexed, together with the certificate of the presiding judge," &c. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. (1 U. S. Stat. 122.) In 1804, a similar law was passed, declaring that, "all records and exemplifications of office-books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office, in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with the certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor or the keeper of the great seal

of the state, that such attestation is in due form, and by the proper officer, and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made; and the said records and exemplifications. authenticated as aforesaid, shall have such faith and credit given to them in every court and office in the United States, as they have by law or usage, in the courts or offices of the state from whence the same shall be taken." The same provisions are applied to the public acts, records, office-books, and judicial proceedings, courts and officers of the territories, as those of the states. (2 U. S. Stat. 298.) By the 34th section of the judiciary act, the laws of the several states, except where the constitution, laws or treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (1 U. S. Stat. 92.) These papers, now offered and rejected, are certified by a person styling himself the secretary of state, and the governor, under the great seal of the state, certifies, that the attesting officer is secretary of state, and "wherefore, unto his said attestation, full faith and credit are to be rendered."

This case mainly, if not wholly, depends on the validity of a law passed by the legislature of Rhode Island in 1792; the state had no written constitution, the powers of legislation were to be ascertained by the charter from the crown, and usage by the common consent of the people of the state. 2 Pet. 655–57. Such, too, was the situation of Connecticut. The powers of government were there like those of parliament. By the revolution, the duties, as well as the powers of government, devolved on the people of the several states. It is admitted, that among the latter, was comprehended the transcendent power of parliament, as well as that of the executive department. 4 Wheat. 192, 651; s. p. 8 Ibid. 98; 12 Ibid. 254; 2 Pet. 591. In 3 Dall. 387, 398, PATERSON, Justice, says: "The constitution of Connecticut is made up of usages. This usage makes part of the constitution of Connecticut, and we are bound to consider it as such, unless it be inconsistent with the constitution of the United States. True it is, that the awarding of new trials falls properly within the province of the judiciary, but if the legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must, in such cases, respect their decisions as flowing from a competent jurisdiction or constitutional organ; and, therefore, we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so, there is an end of the question. For if the power thus exercised, comes more properly within the description of a judicial, than a legislative power, and if, by usage, or the constitution, which, in Connecticut, are synonymous terms," etc., *Calder* v. *Bull*, 3 Dall. 395, 396; s. p. by CHASE, Justice, p. 392–3; by IREDELL, Justice, p. 398; and by CUSHING, Justice, p. 400, 401. Usage, then, forms the supreme law of Connecticut. "By the charter of Rhode Island, the power to make laws is granted to the general assembly in the most ample manner, so as such laws, &c., be not contrary and repugnant

unto, but as near as may be agreeable to the laws, &c., of England, considering the nature and constitution of the place, and people there; what is the true extent of the power thus granted must be open to explanation, as well by usage as by construction of the terms in which it is given." *Wilkinson* v. *Leland*, 2 Pet. 657. So that usage is part of the constitution or supreme law of Rhode Island, and so it is universally admitted to be that of England.

I have not examined through the decisions of the English courts, in order to ascertain whether the acts, rolls and records of parliament, attested by the officer who keeps them, accompanied by the official certificate of the lord chancellor, under the great seal of the kingdom, "that unto his said attestation full faith and credit ought to be given," would be deemed a sufficient authentication of their laws, usages and proceedings, so as to authorize them to be read in the court of chancery, king's bench or house of lords, on appeal or writ of error; or whether these courts would suspend their judgment, and remove the cause for trial at the bar of any court, or a judge at *nisi prius*, and wait for the verdict of a jury to ascertain, as a matter of fact, what was the law of parliament, or the constitution of the kingdom. That task will be left to those who would assimilate the fundamental law of a sovereign state of this Union to a local custom, or a fact, which this court cannot notice or know, until found by a jury, trying an issue under the direction of an inferior court of the United States.

In England, all the customs of cities, ancient boroughs, &c., are confirmed by *Magna Charta*, ch. 9: "The city of London shall have all the old liberties and customs which it hath used to have." Keble's Statutes at Large 2. If the custom is denied, it shall not be tried by an inquest, but by the certificate of the mayor, by the mouth of the recorder (2 Inst. 126), and a writ goes to the mayor to certify, except when the city is concerned in interest (5 Day's Com. Dig. 12, 16, London, E. Recorder); or it may be proved by affidavit. 4 Burr. 2032–33. If the constitution of a state cannot be judicially known in this court, by its legislative acts, certified as these are, and offered to our consideration under the injunctions of the constitution and laws; if the certicate of the secretary and governor, under the seal of the state, are not as high evidence of the custom and usage of Rhode Island, as an affidavit made in the king's bench, during the pendency, of a motion for a prohibition, or the certificate of the recorder of a city corporation; it would seem to have been more agreeable to the rules of the common law, at least, to have directed our writ to some other officer, if not more competent, at least as competent as those who have given these certificates, and under at least as high evidence of authority as the great seal of the state, ordering him to certify to us the custom and usage of the legislature of Rhode Island, as its supreme law, the legislative power. It is settled law in England, that a court will not award an inquest to ascertain the custom of a corporation which is denied. I will examine what have been the rules of this court on this and similar subjects. *Calder* v. *Bull* came before this court on a writ of error to the supreme court of Connecticut, under the 25th section of the judiciary act; the question depended on the usage of the legislature of Connecticut, to act in a judicial capacity, in granting new trials, not as a question of fact, but of law, and the court decided it on evidence of their legislative acts, and the best evidence that could be obtained, showing their usage. 3 Dall. 386, 401.

In *McKeen v. Delancy*, the question was, whether the exemplification of a deed should be read in evidence at the trial? It depended on the usage and practice of the courts in Pennsylvania under the state recording act, and was a preliminary question for the court and not for the jury in the court below. In this court it was a pure question of law. The chief justice observed, "if no cases are reported, the court will take other information as to the construction given to the law by the courts of Pennsylvania." "If such have been the uniform decisions of their courts at the time, as there are no reports of cases, if the counsel agree as to the construction given by the courts, the court can receive it as evidence of those decisions." In giving the opinion of the court, they observe, It is also recollected, that the gentlemen of the bar who supported the conveyance, spoke positively as to the universal understanding of the state on this point, and that those who controverted the usage on other points, did not controvert it on this." "But what is decisive with the court is, that the judge who presided in the circuit court for the district of Pennsylvania reports to us, that this construction was universally received. On this evidence, the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles depend." 5 Cranch 22, 29, 33.

In *Hinde* v. *Vattier*, this court decided that the copy of a patent from the United States, for land in that state, contained in a volume of land laws, published by the authority of the legislature, was evidence of the grant; the judge who tried the cause in the circuit court declaring that it was received as evidence in the courts of that state. 5 Pet. 400. In *Green* v. *Neale*, at this term (6 Pet. 292), the statement of the judge of the circuit court, and the certificate of the gentlemen of the Tennessee bar, as to the decision of the supreme court of that state, in construing their limitation laws, were held sufficient evidence of local law and usage since 1825, though not found by verdict or proved by any exemplification of any records or judgments of the supreme court of the state; on which this court annulled two of its own solemn direct opinions, and at least one indirect judgment, on the same statute, and in opposition to two decisions of the same state court, made in 1815, and reported in 1 Wheat. 481–2; 2 Pet. 241–2; 11 Wheat. 331.

In the case of *Gardner* v. *Collins*, which came before this court, on a certificate of decision from the circuit court of Rhode Island, they declared; "If this question had been settled by any judicial decision, in the state where the land lies, we should, upon the uniform principles adopted by this court, recognise that decision as evidence of the local law. But it is admitted that no such decision has ever been made. If this had been an ancient statute, and a uniform course of professional opinion and practice had long prevailed in the interpretation of it, that would be respected as almost of equal authority." The court took it up and considered it as an open question, to be settled by the true construction of the statute itself, on which the case wholly depended. 2 Pet. 84–6.

Thus, we find the settled course of this court for thirty-three years to be, to ascertain the usage of a state legislature, acting under a charter of the crown and state usage, from the legislative acts themselves, and the best sources of information in their power, in order to judicially know the extent

of the legislative power of a state under its charter or unwritten constitution, as the supreme law. If they wish to judicially know, and adjudicate in the last resort on the statute laws of a state, the construction and usage of their courts, or the universal understanding of the profession and the state, they resort to the records or reports of state courts, the statements or certificates of members of the bar, and to the certificate of a judge of this court presiding in the federal court within the state, as decisive evidence of the local usage. They will then yield their own construction, and construe a state law according to such usage decisively proved. If these sources of information are insufficient, if they fail in their resort to "the fountains and rivulets of the law," the question is open on the construction of the statute itself, but this court has never before remanded a cause to the circuit court, in order to be informed by a jury, as a matter of fact, what is the constitutional, the statute, or the common law of a state.

I next proceed to consider whether these papers were evidence of the acts certified to have been done by the legislature of Rhode Island, considered as the public acts of a state, within the words of the constitution and acts of congress, or as laws or legislative proceedings of a state of this Union, according to the settled rule of this court. In the *United States* v. *Amedy*, a question arose on the admission in the evidence of an act of incorporation by the legislature of Massachusetts, the papers were printed copies of the acts, with certain erasures and interlineations in writing, and so the copy was annexed, a separate attestation in these words, "a true copy —attest, Edward B. Bangs, secretary." The copies were attached together, exemplified under the great seal of the state, with the following certificate annexed. "Commonwealth of Massachusetts, secretary's office: I certify, that the printed copies of the acts following, &c., have been compared by me with the original acts on file in this office, and that the same are now true copies of the said original acts; in testimony whereof, I hereunto set my hand, and have affixed the seal of the commonwealth, the day and year above mentioned.—Signed, Edward B. Bangs, secretary of the commonwealth." On this question, the language of the court is as follows. "It is matter of most serious regret, that an exemplification so loose and irregular should have been permitted to have found its way into any court of justice. As it has, it is our duty to decide upon its legal sufficiency. It is under the seal of the state, and verified by the certificate of the secretary. It is said, this is not enough, and that it ought to be shown that the secretary had authority to do such acts. This objection must be determined by the act of congress of 24th May 1790;" after reciting it, the court remarked, "no other or further formality is required, and the seal itself is supposed to import absolute verity; the annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof, and competent authority to do the act." We know, in point of fact, that the constitution of Massachusetts has declared "that the records of the commonwealth shall be kept in the office of the secretary." But our opinion proceeds upon the ground that the act of congress requires no other authentication than the seal of the state. 11 Wheat. 2106–7.

In the *United States* v. *Johns*, Judge WASHINGTON, in construing this act of congress, says: "It does not require the attestation of any public officer, in this case, although in all the cases afterwards provided for, such an

attestation is required. There is good reason for this distinction. The seal is, in itself, the highest act of authenticity, and leaving the evidence upon that alone, precludes all controversy as to the officer authorized to affix the seal, which is a regulation very different in the different states. The exemplification of the law of Maryland, in this case, was under the great seal, but not attested by the governor, or any other principal officer of the state. 4 Dall. 415–16. In *Young* v. *Bank of Alexandria*, on a motion to quash a writ, of error, this court admitted a printed paper purporting to be an act of assembly of Virginia, incorporating the bank, and said, "the opinion of the court is very strong, that this is a public act, and that if it were not, its being printed by the public printer by order of the legislature, agreeable to a general act of assembly for that purpose, it must be considered as sufficiently authenticated." 4 Cranch 384, 388. In *Patterson* v. *Winn*, decided at last term, this court declared: "We think it clear, by the common law, as held for a long period, that an exemplification of a public grant, under the great seal, is admissible in evidence, as 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." (5 Pet. 241.) In *Kelly* v. *Jackson*, at this term, the court held that an extract of the proceedings of the house of assembly, copied from the journals, was admissible evidence of the public legislative proceedings of the state (*post*, p. 630).

It did not occur to the court, in any of these cases, that it was necessary to remand the cause to the circuit court, to ascertain the verity of a public act of a state, authenticated by its great seal, or that to authorize its being given in evidence to a court, it required a verdict of a jury, as on a plea of *non est factum*. The rule of law, that it is sufficient proof of the by-laws of a corporation, that they are certified under its corporate seal, is recognised by this court. The books of a corporation, proved by the present clerk to be in the handwriting of the deceased clerk, and the president of a board of trustees, incorporated for public purposes, are the best evidence of their acts, and ought to be admitted wherever these acts are to be proved (*Owings* v. *Speed*, 5 Wheat. 423–4); so, of the tax-books of the corporation of this city, made up by its officers. *Ronkendorff* v. *Taylor*, 4 Pet. 358, 360. I need pursue this branch of inquiry no further.

As the court has decided that the acts of the legislature of Rhode Island must be proved as foreign laws, I shall next examine that point through some of the decisions of this court.

"That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, in respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of a common concern to all nations, promulgated by the governing power of a country, can be noticed as law, by a court of law of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced; on the contrary, several have been quoted (and such seems to have been the general practice), in which the marine ordinances of a foreign nation, are read as law, without being proved as facts. It is said, this is done by consent," &c.

"If it be correct, yet this decree having been promulgated in the United States as the law of France, by the joint act of that department which is intrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts. It is, therefore, the opinion of the court, that the decree should be read as an authenticated copy of a law of France, interesting to all nations." *Talbot* v. *Seamen*, 1 Cranch 38.

"It is very truly stated, that to inqure respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usuages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in all other cases, no testimony will be required, which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed, that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact should appear to the court; nor can it be presumed, that any difficulty exists in obtaining a copy. Indeed, in this very case, the very testimony offered would contradict such a presumption. The paper offered to the court, is certified to be a copy compared with the original. It is impossible to suppose, that this copy might not have been authenticated by the oath of the consul, as well as his certificate. If it be true, that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *primâ facie* evidence of the verity of what was so certified." *Church* v. *Hubbert*, 2 Cranch 237–8. "The commission, therefore, of a public ship, when duly authenticated, so far, at least, as foreign courts are concerned, imports absolute verity, and the title is not examinable." "If signed by the proper authorities of the nation to which she belongs, it is complete proof of her national character." "Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he had not conceded the jurisdiction, and where it would be inconsistent with his own supremacy." *The Santissima Trinidad*, 7 Wheat. 335–6. If this is the rule as to the acts of the government of Buenos Ayres, I should think it applicable to the case of sending a cause back to the circuit courts, to try by a jury, under the direction of one of the judges of this court, as a fact, the existence of a usage which was part of the supreme law of a sovereign state of this Union. But if, on deciding on that usage or law, this court should refuse to give credence to its public acts, authenticated by the great seal of the state of Rhode Island, it would be placing them, as a matter of evidence, on a footing with the unacknowledged governments of South America. Their seal is repudiated. The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits of, and the fact that a vessel or person is employed by them, may be proved as a fact, without proving the seal. *United States* v. *Palmer*, 3 Wheat. 635; s. p. *The Estrella*, 4 Ibid. 304.

I next consider these papers as evidencing a judicial proceeding by the

legislature of Rhode Island. If they are to be considered as the supreme judicial tribunal of the state, and the transcripts of their records and proceedings, so certified, are not full evidence and absolute verity in all the courts of the United States (showing their decisions and adjudications in the cases referred to), under the provisions of the constitution and laws, they are, at least, of as high authority as the tradition and understanding of the members of the bar, or their statements presented for our consideration, books of reports, or the statement and certificate of a judge of this court, the last of which is decisive in this court. 3 Cranch 33. If they are foreign judgments, "they are authenticated in three ways: 1. By an exemplification under the great seal: 2. By a copy proved to be a true copy: 3. By the certificate of an officer authorized by the law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party; other testimony, inferior in its nature, might be received." 2 Cranch 238–9.

When a sentence of a judgment of a foreign court of admiralty is thus proved, it is conclusive proof of its own correctness. *Maley* v. *Shattuck*, 3 Cranch 488. If it is a sentence of condemnation, it "is conclusive as to the offence for which the vessel was condemned,"—"so conclusive of the facts decided, that they cannot be controverted, directly or collaterally, in any other court having concurrent jurisdiction;" "conclusive between the same parties, upon the same matter, coming incidentally in question in another court for a different purpose;" "conclusive of the right it establishes, and the fact which it directly decides." *Croudson* v. *Leonard*, 4 Cranch 435–6, 443. "The question, therefore, respecting its (the sentence or judgment) conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry." *Williams* v. *Armroyd*, 7 Cranch 423; s. p. *Hudson* v. *Guestier*, 6 Ibid. 283–4. A decree of a court of competent authority of the highest jurisdiction, is conclusive and final in cases of capture, as much as the decision of this court upon a writ of error from a circuit court. *Penhallow* v. *Doane*, 3 Dall. 96; s. p. 9 Cranch 143; *Gelston* v. *Hoyt*, 3 Wheat. 314–15.

The same effect is given to the judgments of the state courts; they have the same effect, credit and validity, in every other court in the United States, which they have in the state where it was pronounced; whatever pleas would be good to a suit thereon, in such state, and none other, can be pleaded in any other court in the United States, under the constitution and laws thereof. *Hampton* v. *McConnell*, 3 Wheat. 235; *Mills* v. *Duryee*, 7 Cranch 483–4; s. p. *Hopkins* v. *Lee*, 6 Wheat. 109, 113; *Mayhew* v. *Thatcher*, 6 Wheat. 129–30. "The judicial department of every government is the rightful expositor of its own laws, emphatically, of its supreme law. If, in a case before a court, a legislative act conflicts with the constitution, the court must exercise its judgment on both, and the constitution must control the act. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason." *Bank of Hamilton* v. *Dudley*, 2 Pet. 524. "There is nothing in the constitution of the United States, which forbids the legislature of a state to exercise judicial functions." "It may safely be affirmed, that no case has ever been decided in this court, upon a writ of

error to a state court, which affords the slightest foundation to this objection." *Satterlee* v. *Matthewson*, 2 Pet. 413.

Such were the principles and rules established by this court, in relation to the laws, edicts and decrees of foreign nations, and the constitution, laws and judicial proceedings of the states of this Union, which were applied to the very proceedings now in question, and in this case, when it was before this court in 1829, and turned on the validity and effect of the act of 1792, in relation to the property then and now in controversy. "If that act was constitutional, and its terms, when properly construed, amount to a legal confirmation of the sale and proceedings thereon, then the plaintiff is entitled to judgment, and the judgment below was erroneous. If otherwise, then the judgment ought to be affirmed. *Wilkinson* v. *Leland*, 2 Pet. 655. The objection to the act is, that it is void for the want of authority, and that its terms do not give validity to the sale. We must decide this objection, however, not upon principles of public policy, but of power; and precisely as the state court of Rhode Island itself ought to decide it. Ibid. 656; S. P. 5 Ibid. 410. We do not think, that the act is to be considered as a judicial act; but as an exercise of legislation, it purports to be a legislative resolution and not a decree." Ibid. 660. "The present case is not as strong in its circumstances as that of *Calder* v. *Bull*, 3 Dall. 386, or *Rice* v. *Parkman*, in both of which, the resolves of the legislature were held to be constitutional." Ibid. 661. "This is a legislative act, and is to be interpreted according to the intention of the legislature apparent on its face." Ibid. 662. It is not an act of confirmation by the owner of the estate; but an act of confirmation of the sale and conveyance, by the legislature, in its sovereign capacity. The judgment was reversed." Ibid. 663.

It must then be taken as the settled declared law of this case, that the proceedings of the legislature of Rhode Island in relation to the sale of the estate of deceased debtors, are acts of legislation in its sovereign capacity, in other words, they are the laws of the state. It follows, that as the proceedings in evidence are of the precise nature and character as those contained in the act of 1792, they must also be considered as laws of the state in its sovereign capacity, if they are authenticated according to the constitution, the law of congress, or the decisions of the supreme court of the United States in their construction. Taking them as the laws of the state, authenticated under its great seal, "full faith and credit shall be given to them," as the "public acts and records of the state;" in the words of the constitution, "as the acts of legislatures of the several states;" in the words of the act of 1790, or in the words of this court, as the "laws, edicts or decrees of a foreign nation, or as an authority to the administrator to sell, in the nature of a commission to a privateer;" they are evidence in all the courts of the United States, as the acts of foreign governments, whose great seal imports absolute verity to them, as records.

If, on the other hand, these proceedings are judicial, the seal and certificate annexed to them, give them the same effect as the judgments or decrees of the highest judicial tribunal in the state, on the validity of which this court must decide precisely as the courts of Rhode Island must do. So, if taken as the sentences, judgments or decrees of a court of a foreign nation, authenticated by its great seal, they are final and conclusive

on all matters adjudicated, or facts decided; not to be controverted, or inquired into directly or collaterally.

Such would be the effect of these proceedings, so certified from any state of this Union or any foreign state, but they assume a higher character than ordinary acts of legislation by states, by congress, or the highest courts in the nation or state, where all the powers of government are limited by written constitutions. The charter and legislative usage of Rhode Island are its only constitution; the acts of its legislature are its usage; the evidence of its supreme law, as recognised by the people of the state through all time; when, therefore, its great seal stamps absolute verity on every other proceeding, whether legislative or judicial, it is strange, that it does not justify this court, to look at a series of legislative acts, in one uniform course, for forty-three years, on the same subject now before us, as any, even *primâ facie*, evidence of its legislative usage, and as such, the constitution and supreme law of the state. On refusing to hear the proceedings read to the court, as evidence of such law, the cause is remanded to the circuit court, and a jury to ascertain, as a matter of fact, the very fact which is certified to them under the great seal, the fact of "the usage of the state," "a custom in Rhode Island," or "private laws and special proceedings," as "matters of fact, to be proved in the ordinary way."

A very different character was assigned to such proceedings, when this cause was before this court in 1829; they were then legislative acts, to be construed by the intention apparent on their face, acts of the legislature in its sovereign capacity. 2 Pet. 662–3. Admitting them to have been private laws, no one ever pretended, that a copy, certified by the secretary of state, under the great seal, was not sufficient evidence of its enactment; in the case of *Amedy*, the law was a private act of incorporation, 11 Wheat. 406; so, in the case of *Johns*, 4 Dall. 415; so, in *Young* v. *Bank of Alexandria*, in which this court held it sufficiently proved as a private act, by producing a paper, printed by the public printer, by the order of the legislature, or agreeable to a general act of assembly for that purpose. 4 Cranch 288. In the former cases, the seal imported absolute verity to the copies of private acts; now, these proceedings are called "private laws," the great seal, so far from verifying the copies conclusively, is not even presumptive or *primâ facie* evidence of their verity, so as to put the party objecting to their admission, to any rebutting proof; the papers offered are, of course, mere blanks, and no faith or credit is given to them as the "public acts or records of a state," as "acts of the legislature, or judicial proceedings," and they are rejected as mere nullities.

When the cause goes to the jury, to ascertain the matter of fact, whether such "special proceedings" as are now certified did, in fact, take place, whether the legislature did, in fact, pass those "private laws," and whether, in fact, there was in the state a "usage or custom" such as must necessarily exist, if such laws had actually been enacted during a period of more than forty years, the jury will be in the same predicament as this court now is. The circuit court must charge the jury on the law, precisely as the court of the state ought. They must tell them, that these papers must have the same effect in the courts of the United States as those of Rhode Island. if they are nullities in the one, they are equally so in both, if they import absolute verity as records, in the state courts, they import the same verity in

the federal courts; or if they are *primâ facie* evidence, as a presumption that the fact was as is certified by the great seal, such presumption shall prevail till the contrary is proved. If they are nullities, the "fact" must be proved by better evidence than the papers as certified; if the decisions of this court are to furnish the test of better evidence, it consists in the certificate of a judge, of members of the bar, their declaration of the usage of a state, the general understanding of the profession, as in 5 Cranch 22–3; 2 Pet. 84–5; a paper printed by the public printer, 4 Cranch 288; a book of land laws of a state, 5 Pet. 400; *à fortiori*, by showing that the legislature had passed similar acts before and after, as in *Calder* v. *Bull*, 3 Dall. 395. Such evidence has hitherto been deemed satisfactory to this court, without a reference to a jury, and if competent to the court, it is so to the jury, for what is matter of law, is equally binding on both. There appears, therefore, no reason why the court should remand the cause, to ascertain a question of local law, which can better be decided here, on the same evidence which has been so often held sufficient. The judge of the circuit court and members of the bar are present, and can certify the usage of the state; the proceedings can be returned to the state, and when reprinted by the public printer, can be sent back "sufficiently authenticated." On the other hand, if the jury are instructed to take the certified papers as absolute verity, an issue is equally useless; for a verdict could give no additional sanction to that which was verity itself, and which neither court nor jury could falsify or inquire into. Or, if the papers are only presumptive evidence of the facts certified, and those facts, *per se*, constitute a local law or usage, they stand as evidence here, or in the circuit court, until disproved by something entitled to higher credence than the great seal. Nay, if the states of this Union are of equal rank with the corporations of cities, or even ancient boroughs, this court ought not to award an inquest; the governor of the state, who may be considered as the mayor, and the secretary as the recorder, have duly certified the by-laws and customs of the corporation, under its corporate seal, 2 Inst. 126, and may be willing to superadd an affidavit to what they so certified. 4 Burr. 2032.

For these reasons, I am clearly of opinion, that the papers offered are not only evidence, but conclusive proof, of the law, usage and constitution of Rhode Island, which we are bound by the constitution, laws, and our own most solemn, repeated and uniform adjudications, to receive and respect. As I consider the decision of the court in this case by far the most important which has ever been made, I could not content myself with the hasty opinion delivered yesterday; it seems proper, in such a case as this, to give the reasons and the authority on which my opinion has been formed, in opposition to the course now taken by the court. I cannot refrain from so doing, when I reflect, that I am sitting here under a constitution of government to which Rhode Island is a party; and although I have, in the course of this opinion, in answering the positions taken in opposition, considered the effect of her legislative acts authenticated under the great seal of the state, yet it must be distinctly understood, that I utterly deny and solemnly protest against the doctrine, that the states of this Union, the people whereof gave life and being to this court, and under whose delegation we exercise all our powers are to be considered and treated by us as foreign states, or that their fundamental laws must be first ascer-

tained as facts, by a trial by jury, in the circuit court, in order to give us judicial information of the truth of an attestation made conformably to the constitution.

Upon these opinions, the parties consented to remand the cause to the circuit court for further inquiry into the facts. But on the case coming on for trial, no verdict was there taken on the "facts," in relation to the usage of the state, but the judges certified a difference of opinion, on the validity of the act of 1792, and the deed made pursuant thereto; and the cause was finally decided by the unanimous decision of the court, that under that law and the deed, the grantees took an absolute title to the property in controversy. 10 Pet. 294, 297.

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*323] *STATE OF NEW JERSEY *v.* PEOPLE OF THE STATE OF NEW YORK.

Appearance by a state.

At January term 1831, an order was made, giving the state of New York leave to appear in this case, on the second day of this term, and answer the complainants' bill; and if there should be no appearance, that the court would proceed to hear the cause on the part of the complainants, and to decree on the matter of the bill. On the first day of the term, a demurrer to the complainants' bills was filed, which was signed, "Greene C. Bronson, attorney-general of New York;" no other appearance was entered on the part of the defendants. The demurrer filed in the case by the attorney-general of New York, he being a practitioner in this court, is considered as an appearance for the state; if the attorney-general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court.

The demurrer being admitted as containing an appearance by the state of New York, it amounts to a compliance with the order of the court.

A demurrer is an answer in law to the bill, though not, in a technical sense, an answer, according to the common language of practice.

Frelinghuysen, with whom was Mr. *Wirt*, stated, that at the last court, an order was made, giving the state of New York leave to appear on the second day of this term, and answer the bill of the complainants; and if there should be no appearance, the court would proceed to hear the cause on the part of the complainants, and to decree on the matter of the bill. (5 Pet. 291.) Instead of appearing, the state of New York has demurred; and this mode of proceeding is resisted in a written argument, which is now handed to the court.

Beardsley stated, that he had filed and served the demurrer for the attorney-general of New York. He was not counsel in this cause for New York, nor was any counsel, to his knowledge, in the city, who represented that state. The attorney-general was not expected, until the argument of the demurrer should come on. As he had filed the demurrer, as agent for the attorney-general, he would, with the permission of the court, make a few suggestions.

He asked, if the court would entertain a motion of this kind, without notice. The application is, to take a paper off the files of the court, not to prevent it being filed. It has been filed. *The attorney-general of
*324] New York, no doubt, considers the demurrer as an appearance in the cause; although it contains a suggestion that the court has no jurisdiction. Such a suggestion must at all times be unobjectionable, but in this case, it was peculiarly proper; as this court, in granting the order of the last term,

observed, that "the question of proceeding to a final decree would be considered as not conclusively settled, until the cause should come on to be heard in chief." The demurrer must have been intended as an appearance; and is one, in its terms, as will be seen by a reference to it. It may be, that no appearance has been formally entered on the minutes of the clerk; he had not looked at those minutes. The entry of an appearance was mere form; and the filing of a demurrer was ample authority for making such entry, if at all necessary.

In England, the filing a demurrer is considered as an appearance in the cause. Upon this, the authorities, he supposed, were uniform. The terms of the demurrer show that it constitutes an appearance. It asserts, that the People of New York are not bound to appear, and insists, that they should not be prejudiced by appearing. The conclusion prays "judgment," and "judgment whether any further answer should be required." This is placing the case upon the judgment of the court; and must be considered, from the very force and meaning of the terms, as an appearance in the cause, and an authority to enter an appearance with the clerk.

The order of this court, which was granted at last term, was that the People of the State of New York shall "appear" and "answer the bill of the complainant." That is, that they shall appear and defend; and the court, by granting that rule, did not intend to decide on the jurisdiction of the court in the case, or to preclude the defendants from putting in a demurrer, if they thought proper to do so. The order was not intended to discriminate, strictly, between an answer and a demurrer.

No rules have been established for regulating the course of proceedings in such cases; the English rules may, therefore, be appealed to and invoked. Why shall not this court permit a demurrer to be filed? And why may not this form be pursued, as well as a plea or answer, setting up matter of fact? *The order of the court was not intended to prevent the proceedings in the case being in any form which might be thought proper, in order to present the question of jurisdiction and the merits of the case. A demurrer admits all facts well stated in the bill. Why require an answer, if the defendants are willing to admit the facts alleged? Certainly, the plaintiff should not object. In New York, when a bill is filed, and process duly served, the order is to appear and answer; and not that he answer, demur or plead; such he supposed was the order in the English chancery. No one was ever defaulted in such case, by reason of his filing a demurrer or plea, instead of an answer. A demurrer is, indeed, an answer in law, and so strictly and literally within the order. [*325

If this is the interpretation of the rule granted at last term, the demurrer is a sufficient compliance with the rule. If it requires the signature of a solicitor of this court, as such, it will no doubt have such a signature; it is contended, however, that the signature of the attorney-general, known by the records of the court to be one of its solicitors, is sufficient, although he has not in terms signed as solicitor. In a case like this, the signature of the attorney-general, as such, ought to be abundantly sufficient; and indeed, it is the only way in which a defence can properly be made. He is the law-officer of the state; the sole law-officer of the state. Process in this cause was served on him, as such law-officer. Certainly, then, the plaintiff should not object, that he is not authorized to appear for New

York; or that he should have signed as solicitor, and not as attorney-general. He has been recognised by the plaintiff, and by the court, as the proper law-officer of New York, to appear and defend this cause.

But if, by the strict rules of English practice, the filing of the demurrer in its present form is not sufficient, as this is a new and a special case, the court will not enforce the rule, without notice; no disrespect on the part of the attorney-general could have been intended. By the English authorities, it will be seen, that a defendant failing to appear, may appear and demur, as well as answer, at any time until affected by process of contempt. 3 Bro. C. C. 372; 10 Ves. 444.

Mr. Beardsley said, he had thus interfered, without having been authorized to act for the state of New York. Having been *requested by
*326] the attorney-general of New York to deliver the demurrer to the clerk of the court, he had done so; and from his knowledge of the views of the attorney-general, he felt himself at liberty to say, that he designed to appear and argue the demurrer, when reached on the calendar; although he could not at all have anticipated an application like the present. As he had not perused the written argument which had been handed to the court, he could not suppose, he had furnished an answer to all its views; he, however, would not trouble the court further.

Frelinghuysen.—The demurrer which is before the court is an insulated paper. No one has been directed by the authorities of New York to appear in this court: and no solicitor has appeared in the cause. In truth, the very gist of the question which is presented to the court is, whether there has been an appearance in the case. Three years have passed since the institution of this suit; and the first notice which was taken of the proceeding by the state of New York, was, by a communication addressed to the court, by the attorney-general of the state, informing the court that the state would not appear. (3 Pet. 461.) Now, the period for an appearance and answer has gone by; and instead of an appearance, a paper is filed, stating that the state of New York is not bound to appear. The attorney-general of New York is not known as such to this court. It can only know the parties or their solicitors; and although he may be a solicitor of the court, yet he cannot be known as a solicitor in the case, unless by his special acknowledgment that he is such. If the gentleman who has addressed the court on behalf of the attorney-general will enter his appearance in the case, the whole of the difficulty will be removed. It is admitted, that a demurrer, signed by a solicitor of the court, is an appearance in the cause in which it is filed; but this is not that case. This court can only know what was intended, by what has been done; and New York having failed to appear and answer, by the time fixed in the rule, the case must now be put on its merits.

*327] Marshall, Ch. J., delivered the opinion of the court.—*The court have had the return made in this case under consideration. It considers the demurrer filed in this case by the attorney-general of New York, as being an appearance for the state, he being a practitioner in this court; and therefore, that the demurrer is regularly filed. If the attorney-general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court. We say this now, that the attorney-

general may have due notice, if he did not intend to enter any appearance for the state; it being otherwise a paper not to be received.

The demurrer, then, being admitted as containing an appearance by the state, the court is of opinion, that it amounts to a compliance with the order at the last term. In that order, the word "answer" is not used in a technical sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. A demurrer is an answer, in law, to the bill, though not, in a technical sense, an answer, according to the common language of practice.

The court, therefore, direct the demurrer to be set down for argument, on the first Monday of March of this term, according to the motion of the plaintiffs.

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*Daniel Boardman and others, Plaintiffs in error, *v.* The Lessees [*328 of Reed & Ford, McCall and others, Defendants in error.

Evidence.—Hearsay.—Land-law of Virginia.—Tax sales.—Parol evidence.

In an ejectment, a witness was called to prove, that a person who was dead had, at a former trial between the plaintiffs and some of the defendants, to recover the land in controversy, testified, that an anciently marked corner tree was found by him, at a particular point, of a different kind of timber from that called for in a patent to one Young; no part of the survey of Young was involved in the controversy in this suit; and with several other surveys, it was only laid down by the surveyor, as, by showing certain connections, it might conduce to identify the land claimed by the plaintiffs. As the evidence was not given between the same parties, this testimony could only be received as hearsay; and was not admissible.

That boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity or propriety of which is not questioned; some difference of opinion may exist as to the application of this rule, but there is none as to its legal force.

Land-marks are frequently found, of perishable materials, which pass away with the generation in which they are made; by the improvement of the country, and from other causes, they are often destroyed. It is, therefore, important, in many cases, that hearsay or reputation should be received, to establish ancient boundaries; but such testimony must be pertinent and material to the issue between the parties; if it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.

In an ejectment for land in the state of Virginia, the district court for the western district of Virginia instructed the jury, "that the grant to the plaintiffs, which was given in evidence, was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired, were cured by the grant." There can be no doubt of the correctness of this instruction; this court have repeatedly decided, that no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defect of an entry or survey cannot be taken advantage of at law; the patent appropriates the land, and gives the legal title to the patentee.

Titles acquired under sales for taxes depend upon different principles; where an individual claims land under a tax-sale, he must show that the substantial requisites of the law have been observed. But this is never necessary where the claim rests on a patent from the commonwealth; the preliminary steps may be investigated in chancery, when an elder equitable right is asserted; but this cannot be done at law.[2]

If the grant appropriates the land, it is only necessary for the person who claims under it to identify the land called for; whether the entry was made in legal form, or the survey was executed agreeable to the calls of the entry, are not matters which can be examined at law. When, from

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1 Spencer *v.* Lapsley, 20 How. 264.

the evidence, the existence of a certain fact may be doubtful, either from want of certainty in the *proof, or by reason of conflicting evidence, a court may be called upon to give instructions in reference to supposable facts; but this a court is never bound to do, where the facts are clear and uncontradicted. *329]

That certain calls in a patent may be explained, or controlled by other calls, was settled by this court in the case of Stringer's Lessee *v.* Young, 3 Pet. 320; if the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt.

The entire description of the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used; if there be a repugnant call, which by the other calls of the patent clearly appears to have been made through mistake, that does not make void the patent; but if the land granted be so inaccurately described, as to render its identity wholly uncertain, it is admitted, that the grant is void.

The meaning of the parties to written instruments must be ascertained by the tenor of the writing, and not by looking at a part of it; and if a latent ambiguity arises from the language used, it may be explained by parol.[1]

An entry of land in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls within the new county.

Error to the District Court of Western Virginia. This was an ejectment, brought in the district court of the United States for the western district of Virginia, by the defendants in error, against the plaintiffs in error, for the recovery of 8000 acres of land, in the now county of Lewis, within the said district.

The premises in question were parcel of a large connection of surveys, made together, for Reed and Ford, for Thomas Laidley and John Young, and others; some in the name of one, and some in the names of others of the owners. The whole connection of surveys was represented by the connected diagram made out and reported by the surveyor of Harrison county, pursuant to an order made in the cause, and appearing in the record. On that diagram, the premises in question were particularly represented. The plaintiffs below counted on a number of separate demises from the defendants in error; all of which were stated on the record as having been made by citizens of Pennsylvania, on the 1st of January 1820.

On the trial, the defendants below tendered the following bill of exceptions: Upon the trial of this cause, a draft and report, returned by a surveyor, in obedience to an order of survey made in this cause, was given in evidence to the jury, which draft and *report are in the words following, viz. (setting out the same). The plaintiff, in order to show the title of the lessors to the land in controversy, represented by the red lines on said draft, gave in evidence the patent under which they claim, in these words, viz. (setting out the same). This patent is dated the 9th of May 1786. It was issued to Messrs. "Reed and Ford," and describes the lands thus: *i. e.*, "a certain tract or parcel of land, containing eight thousand acres, by survey bearing date the 23d day of December 1784, lying and being in the county of Monongalia, near a large branch of French creek, adjoining lands of George Jackson on the south side, and bounded as follows, to wit, beginning at a maple, and running thence S. 10° E., 1000 poles, to a poplar; S. 80° W., 1280 poles, to a white oak; N. 10° E., 1000 poles, to two white oaks; N. 80° S., 1280 poles, to the beginning." The bill of exceptions then stated, *330]

[1] Bradley *v.* Steam-packet Co., 13 Pet. 89; Salmon Falls Man. Co. *v.* Goddard, 14 How. 447; Peisch *v.* Dickson, 1 Mason 9; Cleveland *v.* Smith, 2 Story 278; Catlett *v.* Pacific Ins. Co., 1 Paine 595; Pomeroy *v.* Marvin, 2 Id. 476.

that the plaintiffs, for the purpose of showing the identity of the land in controversy with the land granted by said patent, gave in evidence a copy of the plat and certificate of survey on which the said patent was founded, and the plats and certificates of survey of the various other tracts represented on said draft. After the plat and certificates had been given in evidence, the copies of the entries on which the said surveys were founded, were also given in evidence.

It appeared from the parol evidence introduced in order to identify the land in controversy, that the same, at the date of the patent under which the lessors claimed and at the date of the said plat and certificate of survey on which the said patent was founded, was situate in the county of Harrison, and not in the county of Monongalia, as stated in the patent and certificate of survey, but that the said land, at the date of the entry on which the survey was founded, was in the county of Monongalia, and became part of the county of Harrison, by virtue of the act of assembly establishing the county of Harrison. The act of assembly was dated 8th May 1784, and took effect the 20th of July of the same year.

The bill of exceptions further stated, the evidence was relied on, on the part of the defendants, for the purpose of proving that the various marked lines represented by the said draft and report of the surveyor, and claimed by the plaintiff to be lines *of the land in controversy, and of various other tracts designated on the said draft, were not actually run or [*331 marked as lines of the land in controversy, and of the other tracts aforesaid; but had been run and marked by Henry Fink, a deputy-surveyor of Monongalia, but who then resided in the county of Harrison, with a view of laying off the greater part of the country represented on said draft, into surveys of about 1000 acres each; that he was employed and paid for that purpose, by the persons for whom the said plats and certificates of survey were afterwards made; that after said lines had been so marked and run, the said plates and certificates were made out by protraction; not by the said Henry Fink, but by some other person or persons, not authorized by law; that said plats and certificates of survey were never recorded in the surveyor's office of Monongalia county, nor there filed, but were surreptitiously returned to the register's office and patents obtained thereon. It was contended on the part of the defendants, that the marked lines represented on said draft, as lines of the lands in controversy, were not the lines thereof, and that the evidence in the cause did not justify the jury in regarding them as such, in preference to other marked lines represented on said draft. Evidence was given on the part of the plaintiffs, that the marked lines aforesaid were actually run, and marked by said Fink as lines of the said 8000 acres, and of the various other tracts represented upon said draft; and that plats and certificates of survey were made out by him, in conformity with the lines so run and marked, and were by him delivered to the agent of the patentees, who gave them to the principal surveyor to be recorded, who afterwards delivered the same to the patentees, who returned them to the land-office, on which plats and certificates, so returned, patents issued, and copies of which were before recited. It was further contended on the part of the defendants, that the land in controversy was not embraced within the calls of the patent under which the lessors claimed; that the natural objects, lines and adjacent lands called for in said patent, were not those represented on

said draft, in designating thereupon the land in controversy, and that the marked lines represented on said draft as the lines of the land in controversy, were, in fact, the lines, not of the plat and certificate of survey on which the
*332] plaintiffs' patent issued, but of other plats and *certificates of survey; and that there are no calls in said patent justifying the locating said patent on the lands in controversy, as contended for by the plaintiffs. For the purpose of identifying the said land in controversy with that granted by the said patent, parol and other evidence was introduced by the plaintiffs, in order to establish several marked trees, as corners of other tracts represented on said draft—the boundaries of which tracts, it was contended, tended to establish the identity of the lands in controversy, with that granted by said patent. For the purpose of showing that one of said marked trees was not a corner of one of the said tracts, that is to say, was not the corner on the said draft represented by the letter A, as a corner of John Young's 4000 acres, the counsel of the defendants offered to introduce a witness, to prove, that on the trial of a former action of ejectment, brought by the present lessors of the plaintiff against some of the present defendants, to recover the lands now in controversy, a witness, who was since dead, swore that an ancient marked corner tree was found by him at said point A, of a different kind of timber from that called for in Young's patent; but the evidence aforesaid was rejected by the court as inadmissible.

After the evidence had been closed, and the cause had been argued before the jury, the plaintiffs' counsel moved the court to give the following instructions to the jury, to wit: that the grant aforesaid was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired, were cured by the emanation of the said patent. The said counsel further moved the court to instruct the jury, that the said grant was a title from its date, and was conclusive against all the world, except those deriving title under a previous grant; and further, that it did not affect the validity of the patent, if it should appear that the entry on which the plaintiffs' survey was made, contained other or different lands from that actually surveyed.

After the above instructions had been moved for by the plaintiffs' counsel, the counsel for the defendants moved the court to give to the jury the following instructions, to wit:

1. The name of the county being mentioned in the plaintiffs' patent, as
*333] that in which the lands thereby granted were *situated, the plaintiff is not at liberty to prove by parol, that the land was, in fact, in a different county.

2. As the patent states the lands to lie in the county of Monongalia, the patentees, and those claiming title under them, can only recover lands in that county, and cannot, by force of the other terms of description contained in the patent, recover lands lying in the county of Harrison, at the date of the patent.

3. It appearing from the plat and certificate of survey on which the patent is founded, that the survey thereby evidenced was made in the county of Monongalia, and it appearing from the evidence introduced on the part of the plaintiffs to identify the said land, that it was situated, at the time of the survey, in the county of Harrison; the patent is void, because the survey was made without lawful authority.

4. If various marked lines are found, corresponding with the same calls in the patent, the mere coincidence of any one of those marked lines with the calls of the patent, does not establish that line as one of the lines called for in the patent.

5. If there are no calls in the patent, justifying the location of the land granted, as contended for by the plaintiffs, they cannot succeed in establishing their claim, by relying upon extrinsic evidence.

6. Proof that the land claimed in this action was surveyed for the patentees, by evidence contradicting the calls of the patent, does not establish the right of the patentees, and of those claiming under them, to the lands claimed as aforesaid.

7. An entry in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls into the new county.

The parties respectively objected to the instructions moved for. The instructions moved for by the plaintiffs, were given by the court. All those required by the defendants were refused, except the first, which was modified by the court and delivered to the jury in the following terms: "If a land-warrant be entered in the office of the surveyor of a particular county, and before the same be surveyed, the territory in which the land located lies, shall be erected into a new county, and the survey and grant afterwards effected, describe the lands to be situated in the former county, the grant is not void, and the plaintiffs may show, by parol evidence, extrinsic of the grant, *and not inconsistent with its other descriptive calls, that the land lies within the new county." The exceptions were taken to the [*334 rejection of the testimony offered respecting the corner at A, and to the instructions given as moved for by the plaintiffs, and the rejection of those moved for the defendants.

The jury found a verdict for the plaintiffs, for the lands in the declaration mentioned, and described in the plat and report of Thomas Haymond, made in pursuance of an order of court made in the cause. On this verdict, judgment was rendered for the plaintiffs below, defendants in error; and this writ of error is brought to reverse that judgment.

The case was argued by *Maxwell*, for the plaintiffs in error, and by *Doddridge*, for the defendants.

Maxwell declined discussing the first, second and third instructions to the jury in the circuit court, which are stated in the bill of exceptions; the points in the same having been decided by this court, in the case of *Stringer* v. *Young*, 3 Pet. 320.

He contended, that a patent for land cannot be more than *primâ facie* evidence of title. 4 Wheat. 77; 1 Munf. 134; 7 Wheat. 22; 3 Call 499. In 11 Wheat. 181–2, and 384, it is decided, that courts may inquire into the authority to make a grant. Also, 4 Munf. 310, 141, 143, 144; 1 Wash. 203; 3 Cruise's Dig. 563. A patent is not conclusive evidence of title. 2 Wash. 106; 6 Munf. 234; 2 Dall. 304. Fraud in obtaining a patent may be inquired into at law; and there was evidence of this nature in this case. 1 Hen. & Munf. 303; 6 Bac. Abr. 111; 3 Co. 77.

As to the fifth instruction, and to maintain the principles claimed by the defendants in the circuit court, he cited 1 Pet. 221; 5 Munf. 191; 4 Hen. &

Munf. 137. Upon the sixth instruction, the counsel for the plaintiffs in error cited 6 Munf. 531 ; 3 Ibid. 191 ; 4 Cranch 62 ; 7 Ibid. 242. On the seventh instruction, he cited 5 Ibid. 92 ; 4 Wheat. 466.

The evidence rejected should have been admitted by the court. It was in relation to boundaries ; and courts are very liberal in admitting such evi-
*335] dence. 1 Pet. 496 ; *2 W. C. C. 140 ; 1 Ibid. 123 ; 1 Phil. Evid. 152, 199, 200 ; 6 Binn. 59 ; Metcalf's Dig. 140 ; *Beard's Lessee* v. *Talbot*, Cooke 142 ; 5 Johns. 544. To show the evidence as to the corner was admissible, he cited 3 Pet. 321 ; 5 Munf. 191.

Doddridge, for the defendants in error.—This case is substantially governed by that of *Stringer* v. *Young*, 3 Pet. 320, in this court. The court is referred to the argument in that case, and all the authorities there cited ; and more especially to the opinion of this court sustaining, and more than sustaining, that argument. In support of the opinion then delivered, the defendants rely upon a statute of Virginia, then unknown to the counsel, which will be found in 12 Henning's St. at Large, p. 81. This statute, reciting the facts on which its provisions are founded, confirms all such surveys as the one now in question, whether made in Monongalia, Harrison or Greenbriar counties.

The exceptions taken on the trial of this cause, in the court below, do not, in law, differ from those taken in the case decided in 3 Pet. 320. There is, indeed, an attempt to vary them ; but this attempt has only succeeded as to form. The court, in this case, on the request of the plaintiff's counsel, instructed the jury : 1. That the grant was a complete appropriation ; and vested in the patentee a title ; and any defects in the preliminary steps by which it was acquired, are cured by its emanation. 2. That such grant is a title from its date, and is conclusive against all the world, except those claiming a title under a previous grant. 3. That it does not affect the validity of the grant, if it should appear that the land surveyed was not the same that was entered.

The first of these instructions contains a proposition which was not only settled in the case of *Stringer* v. *Young*, and the cases there cited ; but is one which has so long been the settled rule of this court, and the courts of Virginia and Kentucky, as to have become a rule of property, which the judiciary are bound by, and cannot overturn. As to the second and third instructions, each of them is a plain *sequitur* from the first, and but an
*336] *elaboration of it, and certainly requires no elucidation. There is, therefore, no error in the instructions asked by the plaintiffs below. As the counsel for the plaintiffs admit, that the decision of this court, in *Stringer* v. *Young*, 3 Pet. 320, has settled the law upon the questions presented by some of the instructions, it is not considered necessary to discuss the matters contained in them.

The sixth instruction required the judge to say, in substance, that in the case then depending, the plaintiff could not identify his lands as being in Harrison county, by testimony contradicting the calls of the petent. This is its plain meaning ; and what is the answer? The plaintiff may so identify his lands by parol evidence, contradicting the grant as to the name of the county, but not inconsistent with its other descriptive calls ; and that this evidence may, and must be extrinsic of the grant.

Seventh. The question here propounded was one foreign to the matter in hearing; and was, therefore, an abstraction, which a judge, on the trial of an ejectment, was not bound to answer. This question would be proper and important on the trial of a cause to prevent the emanation of a grant. A direct answer could not aid, but might mislead the jury. When the rule of property was settled, that at law you cannot go behind the grant; that a grant is a title from its date: when, whatever may have been, at the time, the legal character of the survey in question, there was one express statute confirming it—of what avail could the inquiry be, whether, upon the division of a county in 1785, the surveyor could go on and execute surveys upon entries made with him before the division, anterior to the year 1788, when the law passed, requiring such entries to be certified to the surveyor of the new county? An inquiry whether the warrant was lodged with the surveyor, as his authority for making the entry, would have been precisely as important. The answer given by the judge, that a grant founded on such a survey was not void at law, if the party could identify the land, was all that the question warranted.

If the fourth instruction is to be considered by itself, and unexplained by the evidence set forth in the bill of exceptions, it is either a mere abstract proposition, or it is not. If the former, the court was not bound to answer it; if the latter, the court was *bound to overrule it; that is, was bound to refuse to give it; so that in refusing to give it, the court committed no error. The counsel did not ask the judge to say, that in the case put by him, the coincidence described conclusively established the line. Had that been the question, and had it been a proper question, growing out of the case as it stood at the time when propounded, it is admitted, that the answer should have been in the negative. The conclusion of fact resulting from the coincidence described, would be but a presumption; which, however strong, might be repelled by evidence. The record does not show, that any evidence was offered, or intended to be offered, to repel that presumption. The naked question, then, which was propounded, was this: when various lines are found marked on the ground, corresponding with the lines called for in the grant, does this coincidence in the case of one of those lines, establish it? The answer should have been in the affirmative, if given at all; and by refusing to give the instruction asked in this particular, it was properly overruled. [*337

If this view of the matter is not right, permission is asked to run out the opposite position to its consequences. Suppose, the grant to call for a hundred lines, each of which it describes as commencing at a particular corner, and running a given course and distance to another; and suppose, that a hundred lines, marked and bounded as called for in the grant, are found on the ground; then, if, under such circumstances (the other lines being called for, and found as described), the coincidence spoken of in the case of any one of them, does not establish that particular one, no one of the lines is established. After the death of the surveyor, and of all those who were present at making a survey, its identity could never be established. The very diagram, however intricate, and by however great a number of lines and corners contained, may be found on the ground; and yet, this universal agreement will not prove the whole survey; because, according to

the exception, the presumption arising from it, if applied distributively to each part, does not establish that part.

Fifth. This, too, is, if unconnected with the evidence set out, an unqualified abstraction, and, as applicable to the case, perfectly incomprehensible.

*338] By such questions as that *propounded, a judge might be compelled to outstrip, in his opinions, Blackstone's Commentaries, or any other book. There could be no end to a trial. If a judge was bound to answer this question as an abstract one, there is not a position or principle growing out of the Virginia land-law of 1779, either as practised on in Virginia or Kentucky, on which a judge might not be called on to charge a jury. But if this question be considered with reference to the evidence stated in the bill of exceptions, a more useless, inoperative, and therefore, inadmissible one, could not be suggested. The principal evidence in the case was the report of the surveyor, made under an order of court in the cause. By this report, it appeared, that the land in question was a tract of 8000 acres, being part of a large connection of surveys, containing together between fifty and one hundred thousand acres of land, divided into several distinct surveys, and so patented ; the whole constituting one body of land, mostly owned by the same individuals, though patented in different names. This body of land, the surveyor's report shows to be contained in a general diagram, having one straight line for its northern boundary, and another, parallel thereto, for its southern boundary. The eastern boundary composed of two lines, varying a few degrees in their departure, and the western boundary of two lines, respectively parallel with the latter. The report shows, that the survey in the name of John Young, the subject of the case of *Stringer* v. *Young*, lies in the north-east corner of this connection ; and that it calls for a white oak at the north-east corner. The report further shows, that the surveyor found this corner, standing, marked and cornered in the proper direction, and of the proper age ; that he found, in like manner, the whole northern front marked, and its western termination bounded as called for in the respective grants, with parts of the western and southern, and all the eastern boundaries, and more than half the interior marks. This being the official evidence in the cause, contained in the surveyor's report, shown on his diagram and explained by his notes, what could have been the real meaning and intention of the fifth instruction, moved by the defendant's counsel ?

*339] But there is yet another question raised by the bill of *exceptions, which deserves attention. On a former trial of an ejectment for the same lands, on the demise of the same lessors and against some of the present defendants, a witness, since dead, swore, that at a corner at the point A, on the diagram, being the north-east corner of the whole diagram, and of Young's survey, an ancient marked tree was found by him, of a different kind of timber from that called for in Young's patent. This testimony was rejected by the court. Young's patent calls for a white oak corner tree at A, from which it calls for a course nearly west to the south west corner, and also for a course nearly south to the south-east corner of his survey, each of which produced constitutes a northern and eastern boundary of the whole tract. The surveyor reported that he found the white oak corner at A standing, with the proper corner marks pointing west and south, and of the proper date ; the lines proceeding from it also of the proper date, and

terminating each at the corner trees called for, and these also properly marked and of the proper date. The surveyor, therefore, found the corner at A, called for at A, the north-east corner of Young's patent, and of the whole diagram. With this explanation in view, let us look at the testimony offered. This testimony was not that of a witness to prove a boundary by general reputation, nor by particular reputation, a general question of boundary—of parcel or not parcel, not even the deceased witness's knowledge derived from his personal presence at making it, or from the possession, occupation, use or declarations of others ; but a separate, independent and wholly immaterial fact, viz., that at A, and he does not state when, nor whether by accident, private mark, or on the execution of an official survey, he saw an ancient marked tree of a different kind of timber. He does not state what that timber was, nor how marked ; whether as a corner to the survey in question, or to some other survey ; or whether it may not have been marked as a pointer to A. It is to be remarked, that this testimony is not offered to contradict the report of the surveyor, that the white oak at A is now standing, and therefore, it is not offered for any legitimate purpose. It was not pretended, that it could have any tendency to explain or contradict the fact, that the white oak *corner at A, is still existing, [*340
and the object of our senses. This testimony, therefore, could only tend to confound.

Besides all this, the rules by which testimony could be received, as laid down in 1 Stark. Evid. 279–80, would be set at naught. The court is respectfully asked to say, whether it is not a settled rule, that the verdict rendered on the trial of one ejectment cannot be received as evidence on the trial of another? If it is not so settled as to the judgment? We know this to be the case, and the reason determines the present question. The lease, entry and ouster are not the same, and therefore, what is done, founded or adjudged on one trial, can have no influence on another. All this is certain ; and if the verdict rendered in one ejectment for the same land, between the same lessor and the same defendants, sanctioned by judgment, cannot be evidence in a second ; how can a parcel of the evidence inducing that verdict be received? But here the parties are not in fact the same.

McLean, Justice, delivered the opinion of the court.—An action of ejectment was brought by McCall and others against Boardman and others, in the district court of the United States for the western district of Virginia, to recover 8000 acres of land. On the trial, certain exceptions were taken to points adjudged by the court in behalf of the plaintiffs, and against the defendants ; and these points are now brought before this court by writ of error.

The first exception taken by the plaintiffs in error, is found in the following statement in the bill of exceptions. "For the purpose of showing that one of said marked trees was not a corner one of said tracts, that is to say, was not the corner represented on the said draft by the letter A, as a corner of John Young's 4000 acres, the defendants' counsel offered to introduce a witness, to prove that on the trial of a former action of ejectment, brought by the present lessors of the plaintiffs, against some of the defendants in the present action, to recover the land now in controversy, a witness examined on that trial, who is since dead, swore that an anciently marked

corner tree was found by him at said point A, of a different kind of timber from that called for in Young's patent; *but the evidence, as offered, *341] was rejected by the court as inadmissible."

No part of the survey of Young is involved in the present controversy; and with several other surveys, it was only laid down by the surveyor, as by showing certain connections, it might conduce to identify the land claimed by the plaintiffs. As the testimony of the witness referred to was not given between the same parties, his statement, if admissible, could only be received as hearsay. That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Land-marks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from other causes, they are often destroyed. It is, therefore, important, in many cases, that hearsay or reputation should be received, to establish ancient boundaries; but such testimony must be pertinent and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.

In the present case, the plaintiffs supposed, that by exhibiting the plat of Young's survey, in connection with others, it might tend, in some degree, to identify the land claimed by them; and the corner designated on the plat by the letter A, is one of the corners of Young's survey. The official return of the surveyor, in which the corner trees were specified, and the lines with which the corner is connected were laid down, being before the jury, was relied on by the plaintiffs to establish this as the corner called for in Young's survey. The hearsay testimony was offered, not to contradict any fact stated in the return of the surveyor, but to prove that on a certain occasion, a person, in his lifetime, but deceased at the trial, had said, that he found an anciently marked corner tree at the point A, of a different kind of timber from that called for in Young's patent. This individual did not say that he was acquainted with the lines claimed as Young's survey, nor that this was his corner. *If the fact as to this tree had been admitted, what effect *342] could it have had in the cause? It did not disprove a single fact relied on to establish the corner. How near this tree stood to the trees found by the surveyor, does not appear. It may have been marked as pointing to the corner, as is often done by surveyors; or it may have been a corner to an adjoining or conflicting survey. The existence of this marked tree may be accounted for in various ways; and its existence is, in no respect, so far as appears from the bill of exceptions, incompatible with the facts proved by the plaintiffs. How then can the fact be considered as material? It sheds no light on the matter in controversy. Disconnected as the mere fact of a marked tree, not called for in Young's patent, at the point A, seems to have been with the testimony in the cause, it is not perceived how it could have tended to influence the verdict of the jury. From the isolated fact, the jury could have drawn no inferences against the facts proved by the plaintiffs. There, was, therefore, no error in the rejection of the evidence offered.

The court instructed the jury, that the grant to the plaintiffs, which was given in evidence, was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects in the preliminary

steps by which it was acquired, were cured by the grant. There can be no doubt of the correctness of this instruction. This court have repeatedly decided, that at law, no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry or survey cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee. The district court said nothing more than this; and it was justified in giving the instruction, by the uniform decisions of this court. Titles acquired under sales for taxes, depend upon different principles; and these are the titles to which some of the authorities cited in the argument refer. Where an individual claims land under a tax-sale, he must show that the substantial requisites of the law have been observed; but this is never necessary, when the claim rests on a patent from the commonwealth. The preliminary steps may be investigated in chancery, where *an elder equitable right is asserted; but this cannot be done at law. [*343

At the request of the plaintiffs, the court also instructed the jury, "that a grant is a title from its date, and conclusive against all claimants whose rights are not derived under a previous grant to that of the lessors of the plaintiffs;" "and that it does not affect the validity of said grant, if it appears that the entry, on which the survey upon which the grant purports to have been issued, contained other or different land from that actually surveyed." This instruction involves the same principle as the one which precedes it. If the grant appropriate the land, it is only necessary for the person who claims under it, to identify the land called for. Whether the entry was made in legal form, or the survey was executed agreeable to the calls of the entry, is not a matter which can be examined at law. Had the defendants relied on the statute of limitations, this instruction would have been erroneous; but no such defence was set up by them.

The defendants' counsel requested the court to give the following instructions: 1. The name of the county being mentioned in the aforesaid patent, as that in which the land thereby granted was situated, the plaintiffs are not at liberty to prove by parol, that the land lies in a different county. 2. As the said patent states the land granted to lie in the county of Monongalia, the patentees, and those deriving title from them, can only recover land in that county; and cannot, by force of the other terms of description used in the patent, recover land in the county of Harrison at the date of the patent. 3. It appearing from said plat and certificate of survey, upon which the patent is founded, that the survey was made in the county of Monongalia, and it appearing from the evidence introduced on the part of the plaintiffs to identify the land, that it did lie, at the time of the survey, in the county of Harrison; the patent is void, because the survey was made without authority. 4. If various marked lines are found, corresponding with the same call of the patent, the mere coincidence of any one *of those marked lines with the call of the patent, does not establish that line, as a line called for in the patent. The points raised by these [*344 instructions, having been substantially decided by this court in the case of *Stringer's Lessee* v. *Young*, 3 Pet. 320, they are abandoned by the counsel for the plaintiffs in error. In that case, these questions were fully investigated, and they need not be again examined.

The following instructions were also requested of the court by the defendants' counsel, and refused.

5. If there are no calls in the patent, justifying the location of the land granted, as contended for by the plaintiffs, they cannot succeed in establishing their claim, by relying on extrinsic evidence. This instruction was refused, and this court think rightfully. It asked the court below to presume against the facts in the case, and to found an instruction upon the presumption thus raised. The calls of the patent, and the official survey and report of the surveyor were before the jury. By these, it appears, that corner trees were called for, and the land was stated to lie near a large branch of French creek, and to adjoin lands of George Jackson on the south. The course and distance from corner to corner were also laid down on the plat, and the trees called for as corners. Was the district court, then, bound, in opposition to these facts, to instruct the jury, hypothetically, that "if there were no calls in the said patent, justifying the location of the land granted," &c. There were such calls in the patent, and it was in evidence before the jury; any instruction, therefore, hypothecated on the absence of such calls, could only tend to confuse or mislead the jury, and the court committed no error in refusing it. Where, from the evidence, the existence of certain facts may be doubtful, either from want of certainty in the proof, or by reason of conflicting evidence, a court may be called to give instructions, in reference to a supposed state of facts. But this a court is never bound to do, where the facts are clear and uncontradicted.

6. Proof that the land claimed in this action was surveyed for the patentees, by evidence contradicting the calls of the patent, does not establish the right of the patentees, and of those claiming under them.

*345] *This instruction, taken as an abstract proposition, may be true; and yet the court did not err in refusing to give it. The contradiction supposed was in the admission of proof that the land covered by the patent is in the county of Harrison, when the patent calls for it to lie in the county of Monongalia. That certain calls in a patent may be explained or controlled by other calls, was settled, and in reference to this very point, by this court, in the case of *Stringer's Lessee* v. *Young*, before referred to. If the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt. The entire description in the patent must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted, that the grant is void. This, however, was not the case of the patent under consideration. Its calls are specific, and, taking them all together, no doubt can exist as to the land appropriated by it. The call for the county may be explained, either by showing that it was made through mistake, or that, under the circumstances which existed at the time of the survey, it was not inconsistent with the other calls of the patent. This would not be going behind the patent to establish it, for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies, under some circumstances, to the construction of all written instruments. The meaning of the parties must be ascer-

tained by the tenor of the writing, and not by looking at a part of it; and if a latent ambiguity arise from the language used, it may be explained by parol.

7. An entry in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls in the new county. If this instruction laid down the law correctly, yet it does not show that the plaintiffs below had no legal right to recover. The point raised by it, is behind the patent; and that, as before stated, cannot be investigated in an action of ejectment. To *entitle the plaintiffs to a recovery in the action of ejectment, they had nothing to do but to [*346 identify the land called for in their patent. This being done, it is not competent for the defendants, by way of invalidating the plaintiffs' legal right, to show irregularity in the entry or survey on which the patent was issued. In the case of *Stringer's Lessee* v. *Young*, the entry and survey were made as stated in this instruction, and yet this court sustained the patent.

The court below, it seems, did instruct the jury, that "if a land-warrant be entered in the office of the surveyor of a particular county, and, before the same be surveyed, the territory in which the land located lies shall be erected into a new county, and the survey and grant afterwards effected describe the lands to be situated in the former county, the grant is not void; and the plaintiffs may show by parol evidence, extrinsic of the grant, and not inconsistent with its other descriptive calls, that the land lies within the new county." This instruction is sustained substantially on the principles laid down by this court, in the case above cited. There are, indeed, very few points raised in this cause, which were not decided in the case of *Stringer's Lessee* v. *Young*. The questions in that cause arose under Young's patent; which was issued under precisely the same circumstances as the one under which the plaintiffs claim.

But if this point had not been settled in the case referred to, all doubt would be removed, by a reference to an act of the Virginia legislature, passed in 1785, entitled an "act concerning the location of certain warrants upon waste and unappropriated lands in the counties of Greenbriar, Harrison and Monongalia." In this act, it is provided, by the third section, "that all surveys heretofore made in either of the aforesaid counties, by virtue of the first location, shall be good and valid; any act to the contrary notwithstanding."

In the bill of exceptions, it is stated, that evidence was relied on by the defendants, to "prove that the various marked lines, represented by the draft and report of the surveyor, and claimed by the plaintiffs to be lines of the land in controversy, and of various other tracts designated on the draft, were not actually run or marked as lines of the land in controversy, and *of the other tracts laid down, but had been run and [*347 marked by Henry Fink, a deputy-surveyor of Monongalia, who then resided in the county of Harrison, with the view of laying off the greater part of the country represented on the plat into surveys of about one thousand acres each; and that he was employed and paid for that purpose by the persons for whom the said plats and certificates of survey were afterwards made; that after the said lines had been so marked and run, the said plats and certificates were made out by protraction; not by the said Henry Fink, but by some other person or persons not authorized by law; that said plats and cer-

tificates of survey were never recorded in the surveyor's office of Monongalia county, nor there filed; but were surreptitiously returned to the register's office, and patents obtained thereon." It does not appear from the bill of exceptions, that any evidence was offered by the defendants, which was rejected by the court, to sustain this allegation of fraud. Nor does it appear, that any specific instructions were asked of the court, on any evidence before the jury, conducing to prove the facts here alleged. The statement can only be understood to refer to the course of argument which the defendants' counsel, in the court below, deemed it their duty to pursue before the jury; and which forms no part of the case now before the court.

Other parts of the bill of exceptions contain a statement of various grounds taken in the defence below; but as no instructions to the jury were requested on the points thus made, they form no ground for a revision of the proceedings by a writ of error.

On a careful consideration of the points made in the bill of exceptions, this court are of opinion, that there is no error in the judgment of the court below; and that the judgment must, therefore, be affirmed, with costs.

Judgment affirmed.

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*348] *Hugh Boyle, Plaintiff in error, *v.* Zacharie and Turner, Defendants in error.

Constitutional law.

The judges of this court, who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Mr. Justice Johnson, in the case of Ogden *v.* Saunders, 12 Wheat. 213; that opinion is, therefore, to be deemed the opinion of the other judges, who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court.

Error to the Circuit Court of Maryland.

Before this case came on for argument, *Wirt*, in behalf of the plaintiff (the original defendant), inquired of the court, whether the opinion of Johnson, Justice, delivered in the case *Ogden* v. *Saunders*, 12 Wheat. 213, was adopted by the other judges who concurred in the judgment in that case.

Marshall, Ch. J., said:—The judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Mr. Justice Johnson in the case of *Ogden* v. *Saunders*. That opinion is, therefore, to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion, are to be considered no longer open for controversy, but the settled law of the court.

Judgment affirmed.

*Richard M. Scott, Plaintiff in error, *v.* Ezra Lunt's Administrator, Defendant in error.

Jurisdiction in error.

The plaintiff claimed in his declaration the sum of $1241, and laid his damages at $1000; a general verdict having been given against him, the matter in dispute is the sum he claims, *ad quod damnum*. The court cannot judicially take notice, that by computation, it may possibly be made out, as matter of inference, from the plaintiff's declaration, that the claim may be less than $1000; much less can it take such notice, in a case where the plaintiff might be allowed interest by a jury, so as to swell the claim beyond $1000.

Error to the Circuit Court of the District of Columbia and county of Alexandria. The plaintiff in error brought an action of covenant, on a deed for certain premises in the city of Alexandria, by which the same were granted to Ezra Lunt, the defendant's intestate, reserving a yearly rent-charge of $73.

The declaration stated, that the plaintiff became entitled to demand and have of the said Ezra, in his lifetime, and of the defendant after his death, the said annual rent of $73; "and the said plaintiff, in fact saith, that after the death of the said Ezra, there became due and owing to him, from the defendant, as administrator aforesaid, for the rents aforesaid, from the 8th day of August 1812, to the 8th day of August 1824, the sum of $1241, which said sum of $1241, the said defendant, since the death of the said Ezra Lunt, has altogether failed to pay to the said plaintiff; and so the said plaintiff saith, that the said defendant, as administrator aforesaid, hath broken the covenant aforesaid, whereby the said plaintiff hath been injured, and hath sustained damage to the value of $1000, and therefor he brings suit."

The defendants pleaded a re-entry on the premises for non-payment of the rent, by virtue of the condition of re-entry contained in the deed, before the day specified in the declaration for the payment of the same; and that the plaintiff held and occupied the premises vested in him by the re-entry. Upon this plea, issue was joined, and a verdict and judgment were rendered in favor of the defendant. *Bills of exception to the ruling of the court on matters of law, were tendered by the plaintiff, and this writ [*350 of error was prosecuted by him.

Jones, for the defendant, moved to dismiss the case for want of jurisdiction. The declaration shows that the plaintiff's claim does not amount to the sum of $1000. The action is for a rent-charge of $73 per annum, which is alleged to be due from the 8th day of August 1812, to the 8th day of August 1824, a period of twelve years; and therefore amounting to no more than the sum of $916. The act of congress authorizing writs of error to this court, in suits instituted in the district of Columbia, requires that the value of the property, or the sum in controversy, shall be $1000. By the plaintiff's own showing, there is no jurisdiction. The assertion that the ground-rent amounts to $1241 is contradicted by the statement that the rent is in arrear for twelve years, and no more, from 8th August 1812, to 8th August 1824. No interest is allowed on a rent-charge in arrear.

Where the declaration does not show a *primâ facie* claim to an amount which will give jurisdiction, it is admitted, that this may be proved *aliunde*.

But here there is nothing more than the pleadings; and they establish that the actual claim is less than $1000.

Swann, for the plaintiff in error, argued, that the court will take, as the rule for jurisdiction, the amount stated in the declaration. 2 Dall. 352; 5 Cranch 13. It is there represented as $1241, and the damages are claimed to be $1000. The defendant sets up the defence of a re-entry; and thus the whole of the right of the plaintiff to the rent-charge of $73 per annum was in issue. It is this right which is now before this court on the writ of error, and its value far exceeds $1000. If the court will look at the amount of the rent in arrear, and add the interest upon the same, there is a sum much
*351] greater than $1000 claimed. The recovery here can *only be from the administrator, of the amount of assets; but if the court dismiss the writ of error, the plaintiff cannot go against the land for the residue of the arrears.

Marshall, Ch. J., delivered the opinion of the court.—Upon an inspection of the record, it appears, that the plaintiff claims in his declaration the sum of $1241, as remaining due to him, and he has laid the *ad damnum* at $1000. Under such circumstances, a general verdict having been given against him, the matter in dispute is, in our opinion, the sum which he claims in the *ad damnum*. The court cannot judicially take notice, that by computation, it may possibly be made out, as matter of inference from the declaration, that the plaintiff's claim, in reality, must be less than $1000; much less can it take such notice, in a case where the plaintiff might be allowed interest on his claim by the jury, so as to swell his claim beyond $1000. The motion to dismiss for want of jurisdiction is overruled.

Motion denied.

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*352] *United States *v.* Thomas S. Reyburn.

Evidence.

Indictment against the defendant, charging him with having "issued" a commission, in the United States, for a vessel, to the intent that she might be employed in the service of a foreign people, to cruise and commit hostilities against the Emperor of Brazil, with whom the United States were at peace, against the act of congress, &c.; the second count charged the defendant with "having" delivered a commission to John Chase, for the like purpose and intent; the fourth count charged him with having "issued a commission" to Chase, for the like purpose. Evidence was given, to prove that the vessel was built and fitted out for Chase, in Baltimore, that she changed her name, hoisted the Buenos Ayrean flag, at St. Eustatius, and made a cruise, under the command of Chase, capturing vessels belonging to the subjects and government of Brazil; also, that Chase had been indicted for "accepting," in the district of Maryland, a commission to cruise, and cruising with the said privateer, against the subjects and government of Brazil; and that a bench-warrant had been repeatedly issued for him, but that he could not be found. The counsel for the United States asked a competent witness, whether he saw a commission on board the privateer? *Held*, that such evidence was admissible.

The evidence falls within the rule that where the non-production of the written instrument is satisfactorily accounted for, satisfactory evidence of its existence and contents may be shown; this is a general rule of evidence, applicable to criminal as well as to civil suits; and a contrary rule not only might, but probably would, render the law entirely nugatory; for the offender would only have to destroy the commission, and his escape from punishment would be certain.

United States v. Reyburn.

The rule as to the admission of secondary evidence does not require the strongest possible evidence of the matter in dispute; but only that no evidence shall be given, which, from the nature of the transaction, supposes there is better evidence of the fact attainable by the party. It is said in the books, that the ground of the rule, is a suspicion of fraud; and if there is better evidence of the fact, which is withheld, a presumption arises, that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they are designed.[1]

CERTIFICATE of Division from the Circuit Court of Maryland.

Thomas S. Reyburn, the defendant, was indicted under the provisions of the third section of the act of congress, passed April 20th, 1818, entitled, "an act in addition to the act for the punishment of certain crimes against the United States, and to repeal the acts therein mentioned." The indictment contained four counts; the questions on which the judges of the circuit court were divided, were presented under the first and second.

*The first count charged, that Thomas S. Reyburn, the defendant, [*353
on the 1st day of July 1828, at the district of Maryland, within the territory and jurisdiction of the United States, with force and arms, did issue a commission for a certain vessel called the Jane, otherwise called the Congresso, to the intent that such vessel might be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were and still are at peace, against the form of the act of congress in such case made and provided, and against the peace, government and dignity of the United States.

The second count was as follows: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Thomas S. Reyburn, on the day and year aforesaid, at the district aforesaid, within the territory and jurisdiction of the United States, and within the jurisdiction of this court, did, with force and arms, deliver a commission for a certain other vessel, called the Jane, otherwise called the Congresso, to the intent that such vessel might be employed in the service of a foreign people, that is to say, the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, against the subjects and property of his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were and still are at peace, against the form of the act of congress in such case made and provided, and against the peace, government and dignity of the United States.

On the trial of the cause, the United States offered evidence, that the privateer referred to in the indictment was built and fitted out in the port of Baltimore, in the district of Maryland, for a certain John Chase, also

[1] S. P. United States v. Wood, 14 Pet. 430. Where the non-production of a written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be given. United States v. Laub, 12 Pet. 1. An original paper, in the hands of a person who cannot be reached by process, may be proved by parol. Ralph v. Brown, 3 W. & S. 395. It is sufficient for the admission of secondary evidence of a lost record, that it appear to be the best which the party has it in his power to produce. Cornett v. Williams, 20 Wall. 226. And see Minor v. Tillotson, 7 Pet. 99; McPhaul v. Lapsley, 20 Wall. 264.

therein mentioned; that the Jane was dispatched from the port of Baltimore, to St. Barts, thence to St. Eustatius, in the West Indies, and the crew was shipped in said port of Baltimore, at the request of Franklin Chase, a brother of said John Chase, the said Franklin Chase being the only person known to the shipper of the crew; *that she sailed from the said port to the West Indies, under the name of the Jane, that at St. Eustatius, the said vessel hoisted Buenos Ayrean colors, changed her name to that of the Congresso, and performed a cruise, under the command of the said John Chase, exercising therein acts of hostility against the subjects and government of Brazil. The United States further gave in evidence, from the records of this court, that the aforesaid John Chase stood indicted for a misdemeanor, for accepting, in the district of Maryland, a commission to cruise, and for cruising with the said privateer, against the government and subjects of the empire of Brazil; that a bench-warrant had been repeatedly issued out against said Chase, but that he could not be found, and the process was always returned *non est inventus.* Whereupon, the counsel for the United States proceeded to inquire of a legal and competent witness, whether he saw a commission on board the said privateer? But the traverser, by his counsel, objected to the admissibility of any evidence relative to the character or the contents of the said commission, because the commission was not produced by the United States, nor obtained from any witness, nor a copy procured from the public archives of Buenos Ayres, nor its destruction proved, nor any efforts to procure it, shown by the United States.

*354]

And the judges of the aforesaid court, being opposed in opinion upon the admissibility of the said evidence, do, at the request of the attorney of the United States for the district of Maryland, state and certify their said opposition in opinion to the supreme court of the United States, according to the act of congress in such case made and provided.

The case was argued for the United States, by *Williams*, district-attorney of the United States for the Maryland district, and *Taney*, Attorney-General of the United States; and a written argument on behalf of the defendant, was submitted to the court by *McMahon* and *Glenn*.

For the *United States*, it was argued, that the material facts in the case were, that the commission, of the contents of which the United States proposed to give evidence, without producing it, was seen on board of the privateer, in the service of Buenos Ayres, commanded by Captain John Chase. *No exertions of the United States and no process of the court could compel its production. And Chase himself, who was in possession of it, if within the reach of the process of the court, would not be bound to produce it; because it would tend to criminate himself, and convict him on an indictment then pending against him. It is a case, then, in which no exertions of the party, and no process from the court, would enable them to produce the commission itself. It was absolutely out of their power to obtain it. The rule of evidence is, that in a case of this sort, the written evidence must itself be produced, if it is in the power of the party, by any reasonable exertions on his part, to procure it. But if he is not in fault, and no reasonable exertions on his part will enable him to obtain the writing itself, he may then offer parol evidence of its contents. Indeed, the rule may justly be stated still more generally. And where the

*355]

highest and best evidence the nature of the case admits of, is out of the reach of the party, without his fault, he may resort to secondary evidence.

Where a subscribing witness to an instrument is dead, or out of the reach of the process of the court, his handwriting may be proved. 1 Stark. Evid. 338. And where a witness becomes incapacitated, so as to put it out of the power of the party to obtain the testimony. 2 Esp. 697. The witness had married the plaintiff. It may be said, that these cases merely apply to instrumental witnesses. The principle is the same. It is, that secondary evidence is received, because it is not in the power of the party to offer the best. The best evidence would be the witness himself; but as that testimony could not be procured, the secondary evidence, proof of his handwriting, is received. The same rule applies to the instrument itself. The writing is the best evidence; but if it is not in the power of the party to produce it, he may offer secondary evidence, that is, parol evidence of its contents. Parol evidence may be given of instruments in the possession of the party. 1 Stark. Evid. 361; Arch. Plead. & Evid. 72; 13 Johns. 90; 1 Phill. Evid. 39; 1 Leach's C. C. 330; 17 Johns. 330. It is not the notice that makes the evidence admissible. The notice is *required to prevent fraud and surprise. The secondary evidence is admitted, because [*356 it is out of the power of the party to procure it. He cannot by any exertions compel the production of it.

This being the case with instruments in possession of the adversary, why will not the same rule apply to instruments in the possession of any other person; provided the party requiring them is equally incapable of procuring them? There is no distinction in principle, and the authorities show that there has been no distinction in practice. 9 Petersd. 159 note. Whenever the instrument is out of the power of the party, secondary evidence may be produced. On an indictment for detaining a bill of exchange, under pretence of getting it discounted for the party; it was proved to be in the hands of another party, who refused to produce it; parol evidence was received of its contents. 9 Petersd. 162; 1 Leach's C. C. 330 (272); *Commonwealth* v. *Snell*, 3 Mass. 85. This was an indictment for passing a forged note, and a copy was received in evidence. The rule is there laid down, "that if an instrument cannot be produced, the prosecutor being in no fault, the next best evidence will be admissible." A copy of an obligation made at Caraccas and certified by a notary, was received in evidence. *Mauri* v. *Heffernan*, 13 Johns. 58. In this case, no doubt is expressed about the propriety of receiving secondary evidence. The only doubt was, whether the notarial copies should form a part of the secondary evidence. A written contract, deposited with a third person in the state of Ohio by the parties, may be proved by the depositary, without producing the original: a copy was proved by him, under a commission. *Bailey* v. *Johnson*, 9 Cow. 115. The following case recognises the authority of the cases before referred to; but seems to make it necessary that the third party should have the possession from or under the person against whom it is proposed to use it. Judge Tilghman's opinion supports substantially the principle contended for. The evidence was refused on the ground of policy. Judge Yeates's opinion appears to narrow the principle. *Gray* v. *Pentland*, 2 Serg. & Rawle 31.

*Notice in this case would have been an idle ceremony; the [*357 defendant could not produce it, and the evidence of the United

States shows that they could not produce it. It would be absurd, to notify him to do what it is admitted he could not accomplish. 13 Johns. 58; 3 Mass. 85; 9 Cow. 115. But in this case, notice would not have been necessary, even if the defendant had been in possession of the commission. 14 East 274; 13 Johns. 93; 3 Mass. 85; 9 Petersd. 159 note; Ibid. 162.

It is objected, that no efforts were made to procure it. Exertions are required only where there is a reasonable prospect of success; not where it is previously known that they must be unavailing. What means could the United States use to get this commission? What process would have brought Captain Chase before the court? If he was before the court, would any court compel him to produce the commission? As all efforts would have been unavailing, the law will not require that which can accomplish nothing. It does not require that which must be but a vain effort, and can produce no result.

It is also objected, that a copy might have been procured from the government of Buenos Ayres. 1. Had we a right to demand a copy? Were the government bound to give it to us? 2. Was there any reason to suppose, that it would have been given as a matter of comity? Would they give it to assist a prosecution, in a foreign country, to punish one of their own commanders? 3. If they gave a copy of a commission to that vessel and that officer, how would that prove it to be a copy of the one seen by the witness? How would it prove that it was a copy of one issued in Baltimore? 4. There is no evidence, that those commissions are recorded in any office in Buenos Ayres. 5. From the nature of the transaction charged in the indictment, they cannot be supposed to be recorded; for if they are issued in Baltimore, they must be sent to an agent in blank; for the name of the vessel and the captain could not be known to the government, and the government would hardly give a copy, to prove itself guilty of such conduct. 6. But suppose a copy under seal to be produced, the seal would not prove itself; it must be proved by parol. *United States* v. *Palmer*, 3 Wheat. 610. See the *objection in that case, in page 615. *The Estella*, 4 Wheat. 304.

*358] If, therefore, a copy under seal could have been procured, the verity of it must have depended on parol evidence. It would be proved by parol, that the contents of the original were the same with the copy produced. If the witness proves the contents in any other way, is it not equally admissible? The copy certified, would not be a copy examined by a witness. The truth of it would depend on the certifying officer. And before an examined copy is required, there must be grounds for asserting that a copy is there; and there must be reasonable grounds for supposing, that an examined copy would have been furnished for the purposes of this indictment.

It would seem, that the commission of a privateer, or the character of a vessel, may be proved, without producing the commission or a copy under seal. 3 Wheat. 615, 635. And where the commission is proved to be lost, the court has admitted parol testimony of its character and contents, without insisting on endeavors to procure a copy. *The Estella*, 4 Wheat. 298, 303.

The counsel for the *defendant* contended, that the evidence offered in this cause, concerning which the judges of the court below differed in opinion, was inadmissible. 1. Because the evidence so offered was of a secondary character. 2. Because the facts proved did not present a proper case

for the admission of secondary evidence. 3. Because the evidence offered was not the next best evidence, of which the nature of the case admitted.

1. The offence imputed to the traverser, as described in all the counts of this indictment, is defined by the act of congress of 20th April 1818 ; and to the establishment of the offence as there defined, it should appear, that the traverser, with a view to the employment of the vessel in question, in the manner and for the purposes charged, had issued or delivered for such vessel, a written warrant or authority for such employment, emanating in fact from the government of the United Provinces of Rio de la Plata. The word "commission," *ex vi termini*, imports a written authority from a competent source, given to any person as his warrant for the *exercise of [*359
the powers which it delegates. The act of "issuing or delivering" the commission, being the offence, the statute manifestly relates only to a written, or to what is the same thing, a printed authority ; and entirely excludes the notion that a mere verbal authority is within its provisions. The nature and objects of the act of 1818, also clearly indicate, that the commission, to be such, must emanate from a government competent to give it ; and must, in fact, authorize the employment of the vessel in the manner charged. That act has for its objects the preservation of our neutral relations, and the strict enforcement of the obligations of all persons being within the limits of our country to respect its neutral character ; and in the instance under consideration, to effect these objects, it prohibits belligerent nations, or their agents, from commissioning any persons within our territory, for the prosecution of their warfare. The delivery of a mere pseudo-commission, whatever it may be, is no violation of neutrality, within the meaning of this act ; nor is the offence here charged established, as has been contended, by the mere use of a paper purporting to be a commission, in the manner and for the purposes charged. This offence consists in, and is complete by the act of issuing or delivering the commission, for the purposes charged ; without reference to the use which may afterwards be made of it, and even if it never be used. It rests solely upon the nature and efficacy of the commission alleged to have been issued or delivered, and the intent in issuing or delivering it. The written document, the commission itself, must, therefore, be produced, that it may appear or be proved to be what it is alleged to be.

The case at bar is also clearly within the general rule of the criminal law. "That written instruments, where they form the gist, or a part of the gist, of the offence charged, must be set forth or recited in the indictment, and that if not so set forth, the reason for such omission must appear upon the face of the indictment." Illustrations of this general rule will be found in the cases of forgery, for which see 1 East 180 ; 3 Leach's C. C. 657, 808 ; 2 East's P. C. 975 ; *Commonwealth* v. *Houghton*, 8 Mass. 107 ; and cases of libels, threatening letters and challenges ; of indictments for not obeying the orders or warrants of justices of the peace, 2 Chitty's *Cr. Law *[360
(Eng. ed.) 263, 283 ; of indictments for selling foreign lottery-tickets ; in the cases of *State of Maryland* v. *Scribner* and *Same* v. *Barker*, 2 Gill & Johns. 252, the rule, its reasons and the exceptions to it, are perspicuously stated. If, then, this case be one in which it is necessary that the indictment should have set forth the commission, or have assigned some sufficient reason for the omission, the commission itself is clearly the primary testimony, and should have been produced at the trial, if that were practicable.

These remarks upon this point have been deemed necessary, only because the contrary doctrine was strenuously contended for in the court below.

2. The general rule as to the admission of secondary evidence of the contents of a written instrument is, that such evidence may be received, where the written instrument has been lost or destroyed, or there is proof to warrant the presumption of its loss or destruction; or where it is in the possession of the defendant, and notice has been given to him to produce it, or the action or indictment charges him with the possession of it. The present case is without this rule. There is no evidence of loss or destruction of the commission; and the character of the instrument, as one highly important to the persons exercising it, forbids the presumption, in the absence of all proof, that it has been lost or destroyed. In this instance, the secondary evidence is alleged to be admissible, because the commission is supposed to have been traced to the possession of a third person, not charged by this indictment, whose attendance as a witness to produce the commission, or prove its loss or destruction, cannot be procured. It may, therefore, be questioned, whether it is not more properly a case of defective proof, than one of secondary evidence. *Jackson ex dem. Livingston* v. *Frier*, 16 Johns. 193.

But conceding the case to be analogous to those in which secondary evidence has been admitted, in the absence of the attesting witness, to prove the execution of a bond, &c., and to which it has been assimilated, there should have been full proof of diligent efforts on the part of the government to procure the attendance of third person, to whose possession it is said to have been traced. Such evidence is necessary to let in the proof either of the existence or of the contents of the *commission. *King* v. *Inhabitants of Castleton*, 6 T. R. 236; *Williams* v. *Younghusband*, 1 Stark. 139. It should have been proved, either that the witness was without the jurisdiction of the court, as in the cases of *Prince* v. *Blackburn*, 2 East 250, and *Hodnett* v. *Toman*, 1 Stark.; or that diligent efforts had been made to find him, which had failed. *Cunliffe* v. *Sefton*, 2 East 183. In this case, no such proof was offered, nor was even a *subpœna* issued to procure the attendance of Chase. The government relies solely upon the pendency of an indictment against Chase, and the return of *non est inventus* to the process upon that indictment. The rule in question, however, requires the proof of due diligence to procure the attendance of the witness, in the particular case; and the want of it cannot be supplied by the proof, that such diligence, used in another case, has failed to procure his attendance. Had Chase been wanted as a witness, in any cause in which no *subpœna* had been issued, nor any efforts made to procure his attendance, the fact that he had been summoned in other causes, and that his attendance could not be procured in those causes, would have furnished no ground for the continuance of the cause in which he had not been summoned. Diligence used in one cause, cannot be reflected upon another, so as to excuse negligence in the latter. Where proof of diligent efforts to procure a witness is necessary, it must, as well in cases where secondary evidence is to be let in, as in those where the trial is to be suspended, because of his absence, apply to the particular case. A contrary doctrine might lead to the grossest abuses. In the present instance, the proof offered is used to raise a presumption, where the fact to be presumed, if it did exist, might have been

*361]

fully established. Chase was a resident of Baltimore, and there fitted out the vessel in question. The court will not presume, that he was without the jurisdiction of the court below, or that his attendance could not have been procured by diligent efforts, from the mere return of process in another case; when with due diligence in this case, the facts to be presumed, if they existed, might have been expressly established. It is submitted also, in connection with this branch of the subject, that the evidence offered, goes only to the fact that a *commission was seen in the vessel. There is no proof that it was Chase's property, and none tracing it to his possession, then or at any other period. *Non constat*, that it was then, has been since, or is now in his possession; and until this shall appear, there is no foundation for the introduction of this testimony, because of his alleged absence. [*362

3. The evidence offered is not the proper secondary evidence, because it is not the next best evidence of the existence and contents of the commission, of which the nature of the case admits. The paper in question is a written act of state, emanating from a foreign and recognised government, and one of which the court will presume, in the absence of all proof to the contrary, there remains with the government issuing it, a record or duplicate. The rule as to the proper proof of foreign written laws, will here apply. Such laws must be proved by the production of an authenticated copy; or if that cannot be had, of a sworn copy. *Hulle* v. *Heightman*, 4 Esp. 75; *Clegg* v. *Levy*, 3 Camp. 166; *Miller* v. *Heinrick*, 4 Ibid. 155; *Consequa* v. *Willing*, Pet. C. C. 225; *Robinson* v. *Clifford*, 2 W. C. C. 2. And the courts will not presume that an authenticated copy, or a sworn copy, cannot be had, until proof made, that due efforts were used to obtain it, which had failed. *Seton* v. *Delaware Insurance Company*, 2 W. C. C. 176; and also *Church* v. *Hubbart*, 2 Cranch 236–9. The same principle is applicable to the acts of state of a foreign government: Note *a*, to *Buchanan* v. *Rucker*, 1 Camp. 65. It is a general rule, that when an original document is lost, the next best evidence of it is an authenticated or examined copy, which, if it exists, and can be found, must be produced. *United States* v. *Britton*, 2 Mason 468. So, where two or more parts of a deed have been executed, the loss or destruction of all the parts should be proved, before secondary evidence of its contents can be received. Bull. N. P. 254; 6 T. R. 236. If, therefore, it was proved, that there was a record or duplicate of the commission in the archives of the government of Buenos Ayres; before parol evidence could be offered of its contents, it would be necessary to prove that an authenticated or examined copy could not be had. In this case, the court will presume that there is such a record; it *being the usage of all governments to preserve some record of their public acts and commissions. The courts have presumed as to laws, from their nature and objects, that they were written, and that copies of them could be procured. Cases above cited from 2 W. C. C. 176. [*363

The rules here stated, as to the introduction of secondary evidence, apply as well to criminal as to civil cases; nor is the necessity for producing Chase as the witness, in whose possession the commission is said to have been, or for using due efforts to procure his attendance, dispensed with, by the suggestion, even if founded in fact, that the production of that commission might tend to criminate Chase himself. The privilege of refusing to

answer on that ground, is one personal to Chase himself, of which he may avail himself or not, at his pleasure; and does not affect his competency as a witness, nor establish the presumption, that the primary testimony could not be obtained, by producing him as a witness.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the district of Maryland, on a certificate of division of opinion, touching the admission of testimony offered, on the part of the United States, in support of the prosecution.

The indictment against the prisoner contains several counts. The first charges him with having, on the 1st day of July 1828, at the district of Maryland, within the territory and jurisdiction of the United States, "issued" a commission for a certain vessel called the Jane, otherwise the Congresso, to the intent that such vessel might be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, his Imperial Majesty the constitutional Emperor and perpetual defender of Brazil, with whom the United States were at peace, against the form of the act of congress in such case made and provided. The second count charges him with having "delivered" a commission for the Jane, with the like intent. The third charges him with having "delivered a commission to one John Chase," for the Jane, for the like purpose and with the like intent. *The fourth charges him with having "issued a commission" to John Chase, for the Jane, for the like purpose and with the like intent. There are some other counts, laying the offence in different ways, which are unimportant for the present question.

*364]

In support of the prosecution, it was proved, that the privateer referred to in the indictment was built and fitted out in the port of Baltimore, for a certain John Chase. That the Jane sailed from the port of Baltimore, for the West Indies, and at St. Eustatius, she hoisted Buenos Ayrean colors, changed her name to that of the Congresso, and performed a cruise under the command of John Chase, exercising therein acts of hostility against the subjects and government of Brazil. It was also given in evidence on the part of the United States, that the said Chase stood indicted in that court for a misdemeanor for "accepting," in the district of Maryland, a commission to cruise, and with cruising with the said privateer, against the subjects and government of Brazil. That a bench-warrant had been repeatedly issued out against the said Chase, but that he could not be found, and the process was always returned *non est inventus*. Whereupon, the counsel for the United States proceeded to inquire of a competent witness, whether he saw a commission on board the said privateer? But the traverser, by his counsel, objected to the admissibility of any evidence relative to the character or contents of the said commission, because the commission was not produced by the United States, nor obtained from any witness, nor a copy procured from the public archives of Buenos Ayres, nor its destruction proved, nor any efforts to procure it, shown by the United States. Upon the admissibility of the said evidence, the judges were opposed in opinion, and the question comes here for decision.

The objections to the admissibility of the evidence have been sub-

mitted to the court under the following heads. 1. Because the evidence so offered was of a secondary character. 2. Because the facts proved did not present a proper case for the admission of secondary evidence. 3. Because the evidence offered was not the next best evidence of which the nature of the case admitted.

*It is undoubtedly true, that the evidence offered was of a secondary character. The primary evidence would have been the commission itself. The word commission, *ex vi termini*, imports a written authority; and the offence under this part of the act of congress (3 U. S. Stat. 447, § 3) consists in issuing or delivering a commission for any ship or vessel, with intent that she may be employed, &c.; and there is no doubt, it must be shown to have been a commission emanating from the government of the United Provinces of Rio de la Plata, as alleged in the indictment, and it must at least purport to be a valid subsisting commission, and intended as the authority under which the vessel was to cruise. But all these inquiries relate to the sufficiency of the evidence to establish these facts, not to its competency. The former belongs to the jury to decide; the latter to the court. Whether it could have been shown, that the commission about which the inquiry was made, was a document coming within the indictment, and necessary to be proved, in order to establish the offence, does not come within the question sent up to this court. The argument, however, against the admissibility of the evidence, goes the length of contending, that nothing short of the commission itself will furnish the necessary evidence. [*365

We think the objection in this respect not well founded; but that the case falls within the rule, that when the non-production of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown. This is a general rule of evidence applicable to criminal as well as civil suits. And there can be no reason why it should not apply to cases like the present. And, indeed, a contrary rule not only might, but probably would, render the law entirely nugatory, for the offender would only have to destroy the commission, and his escape from punishment would be certain.

Under this head of the objection, it has been argued, that the commission should have been set out or recited in the indictment, or the reason for the omission should appear on the face of the indictment. If there is any ground whatever for this objection (which we are far from intimating), the point cannot be made here, under the question sent up from the circuit court. If well founded, it must be presented in some *other form. We are now confined to the question on which the opinions of the judges were opposed, and the sufficiency of the indictment forms no part of that question. The objection went to the admissibility of any evidence relative to the character or contents of the commission; because it was not produced, or its non-production sufficiently accounted for: and this brings us to the second head of inquiry, viz., whether the facts proved presented a proper case for the admission of secondary evidence? [*366

The facts which had been proved were, that the privateer was built and fitted out in the port of Baltimore for John Chase. The crew was shipped at Baltimore by Franklin Chase, the brother of John Chase. That she sailed from the port of Baltimore for the West Indies, under the name of the Jane, and at St. Eustatius, she hoisted Buenos Ayrean colors, and

changed her name to that of the Congresso ; and performed a cruise under the command of the said John Chase, exercising therein acts of hostility against the subjects and government of Brazil. That Chase stood indicted in the same court for a misdemeanor, for accepting a commission, and cruising with the said privateer, against the government and subjects of Brazil ; and that a bench-warrant had been repeatedly issued against him, but he could not be found. This evidence established very clearly, that the vessel was fitted out and cruising in violation of the law of the United States, and that she was under the command of John Chase. It is reasonable, therefore, to presume, that the commission on board the privateer was the authority under which Chase acted. He was the person most interested in retaining the possession of the commission ; and the law will presume it to be in his custody, when there is no proof to the contrary ; and to him, therefore, application should be made for it. The law points to him as the depositary of this document, and search for it in any other place would not amount to that due diligence to procure the primary evidence which would be necessary in order to let in the secondary evidence.

But if all reasonable diligence has been used to find it, at the place where the law presumes it to be, no more can be required, for the purpose of letting in the secondary evidence. Has that been done ? The person whom *367] the law charges with *the custody of the paper, stands indicted for an offence against the same law ; process has been repeatedly issued against him to have him apprehended, without effect. This was all the effort to find him that could reasonably be required. A *subpœna* to compel his attendance as a witness would have a availed nothing, and the law does not require the performance of an act perfectly nugatory. But suppose, Chase had been within the reach of a *subpœna*, and had actually attended the court, he could not have been compelled to produce the commission, and thereby furnish evidence against himself. All the means, therefore, that could have been used to produce the commission itself, were exhausted.

But it has, in the third place, been argued, that admitting enough had been shown, to lay the foundation for the admission of secondary evidence, that which was offered was not the best evidence of which the nature of the case admitted. The rule of evidence does not require the strongest possible evidence of the matter in dispute, but only that no evidence shall be given which, from the nature of the transaction, supposes there is better evidence of the fact attainable by the party. It is said in the books, that the ground of the rule, is a suspicion of fraud, and if there is better evidence of the fact, which is withheld, a presumption arises, that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice ; and must be so applied as to promote the ends for which they are designed. It has been said, that according to this rule, recourse should have been had to the records of the Buenos Ayrean government, for a copy of the commission. If it should be admitted, that a record is there to be found of this instrument, and that on application, a copy of it might have been procured, it would be carrying the rule to pretty extravagant lengths, to require the application to be made. But there is nothing in this case showing that any such record exists. Nor can this court presume, as matter of law, that a record of such commission, as filled up, would be found there. And, indeed, from the nature of the

transaction, the contrary is the reasonable presumption. It is not unlikely, that the Buenos Ayrean government may have some record of the names of persons to whom commissions had been issued. But *the course of [*368 the transaction almost necessarily implies, that the commissions issued here were sent out in blank, as to the names of persons and vessels, and the mere formal parts of the commission would have furnished no evidence whatever. So that there is no reasonable ground to conclude, that a record of this commission existed, from which a copy might have been made. But if that should be admitted, it does not bring the case within the rule. The evidence must be attainable, or within the power of the party who is called upon to produce it; and from the nature of this transaction, there is no reason to conclude, that such was the case here; but the contrary is fairly to be inferred. It must have been a voluntary act on the part of the foreign government, to have permitted a copy to be taken; and it is unreasonable to suppose, that such permission would have been given. It would have been voluntarily furnishing evidence against its own agents, employed to violate our laws; and no comity of nations could have required this.

We are accordingly of opinion, that the evidence offered was admissible, and direct it to be so certified to the circuit court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, 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, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the evidence offered was admissible. Whereupon, it is ordered and adjudged by this court, that it be certified to the said circuit court that the evidence offered in this cause was admissible.

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*James Hughes, Plaintiff in error, *v.* The Trustees of the Town [*369
of Clarksville, Defendants in error.

Private act.—Estoppel.

Construction of the act of the legislature of Virginia, entitled "an act for the locating and surveying the one hundred and fifty thousand acres of land granted by a resolution of the assembly to George Rogers Clark, and the officers and soldiers who assisted in the reduction of the British post in the Illinois," passed on the 18th of October 1790, of the act of 1783, entitled, "an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the grant," and also of the act entitled, "an act to amend an act entitled an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the grant," passed in 1790.

Construction of the act of the legislature of Virginia, passed in December 1783, ceding the territory north-west of the river Ohio to the United States; and of the deed of cession of the same territory, executed on the first of March 1784.

That a lessee will not be allowed to deny the title of his lessor, is admitted; but it is not admitted, that a contract executed for the purpose of conveying and acquiring an estate in fee, but wanting that legal formality which is required to pass the title, may be converted into an agreement contemplated by neither party; and by this conversion, estop the purchaser, while it leaves the seller free to disregard the express stipulation.

Error to the District Court of the United States for the district of Indiana.

The case was argued by *Coxe* and *Bibb*, for the plaintiff in error; and by *Howk*, for the defendants. The facts are stated in the opinion of the court.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of ejectment, originally brought by Joseph Bartholomew and others, trustees of the town of Clarksville, in the circuit court for the county of Clark, in the state of Indiana, and removed, on the petition of the original defendant, into the court of the United States for that district. The parties agreed on a case in the following words:

John Doe, *ex dem.* Joseph Bartholomew, &c., Trustees of the Town of Clarksville *v.* James Hughes.

*370] The lessors of the plaintiff derive their title to the lands in *the declaration mentioned, from the state of Virginia, by virtue of an act of the general assembly of said state of Virginia, passed in the year 1783, and entitled, "an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;" and also of another act of the general assembly of the state of Virginia, passed in the year 1790, entitled, "an act to amend an act entitled an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;" which said acts are in the words and figures following, to wit:

"An act for the locating and surveying the one hundered and fifty thousand acres of land granted by a resolution of assembly, to Col. George Rogers Clark, and the officers and soldiers who assisted in the reduction of the British post in the Illinois. Be it enacted by the general assembly, that William Fleming, John Edwards, John Campbell, Walker Daniel, gentlemen, and George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd and William Clark, officers in the Illinois regiment, shall be and they are hereby constituted a board of commissioners, and that they, or a major part of them, shall settle and determine the claims to land under the said resolution. That the respective claimants shall give in their claims to the said commissioners, on or before the 1st day of April 1784, and if approved and allowed, shall pay down to the commissioners, one dollar for every hundred acres of land, such claim to enable them to survey and apportion the said lands. The said commissioners shall appoint a principal surveyor, who shall have power to appoint his deputies, to be approved by the said commissioners, and to contract with him for his fees. That from and after the first day of April 1784, the said commissioners, or a major part of them, shall proceed with the surveyor, to lay off the said hundred and fifty thousand acres of land on the north-west side of the Ohio river, the length of which shall not exceed double the breadth; and after laying out one thousand acres, at the most convenient place therein, for a town, shall proceed to lay out and survey the residue, and divide the same, by fair and equal lots, among the claimants; but no lot or survey shall exceed five hundred acres. That the said commissioners, in their apportionments

*371] *of the said land, shall govern themselves by the allowances made by law to the officers and soldiers in the continental army. That the said commissioners shall, as soon as may be, after the said one hundred and forty-nine thousand acres shall by surveyed, cause a plat thereof, certified

on oath, to be returned to the register's office, and thereupon, a patent shall issue to the said commissioners, or the survivors of them, who shall hold the same in trust for the respective claimants; and they, or a major part of them, shall thereafter, upon application, execute good and sufficient deeds for conveying the several portions of land to the said officers and soldiers.

"And be it further enacted, that a plat of the said one thousand acres of land laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof recorded, and thereupon, the same shall be and is hereby vested in William Fleming, John Edwards, Walker Daniel, John Campbell, George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd and William Clark, gentlemen, trustees, to be by them, or any five of them, laid off into lots of half an acre each, with convenient streets and public lots, which shall be, and the same is hereby established a town by the name of Clarksville. That, after the said land shall be laid off into lots and streets, the said trustees, or any five of them, shall proceed to sell the same, or so many as they shall judge expedient, at public auction, for the best price that can be had, the time and place of sale being previously advertised two months, at the court-houses of the adjacent counties; the purchasers, respectively, to hold their said lots subject to the condition of building on each a dwelling-house, twenty feet by eighteen, at least, with a brick or stone chimney, to be finished within three years from the day of sale; and the said trustees, or any five of them, are hereby empowered to convey the said lots to the purchasers thereof, in fee-simple, subject to the condition aforesaid, and the money arising from such sale, shall be applied by the said trustees, in such manner as they shall judge most beneficial for the inhabitants of said town. That the said trustees, or the major part of them, shall have power, from time to time, to settle and determine all disputes concerning the bounds of said lots, and to settle such rules and orders for the regular building *thereon, as to them shall seem best and most convenient; and in case of death, [*372
removal out of the county, or other legal disabilitiy, of any of the said trustees, the remaining trustees shall supply such vacancies, by electing others, from time to time, who shall be vested with the same powers as those particularly nominated in this act. The purchasers of the said lots, so soon as they shall have surveyed the same, according to their respective deeds of conveyance, shall have and enjoy all the rights, privileges and immunities which the freeholders and inhabitants of other towns, in this state, not incorporated, hold and enjoy. If the purchaser of any lot shall fail to build thereon, within the time before limited, the said trustees, or a major part of them, may thereupon enter into such lot, and may either sell the same again, and apply the money towards repairing the streets, or in any other way for the benefit of the said town, or appropriate such lot to the public use of the inhabitants of the said town."

"An act to amend an act, entitled, 'an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant,' passed the 10th of December 1790. Be it enacted by the general assembly, that so much of the act entitled, 'an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant,' as requires that one thousand acres of land for a town shall be laid off into half-acre lots, and each to be improved by

building, subject to the condition of building on each a dwelling-house, twenty feet by eighteen at least, with a brick chimney, to be finished within three years from the day of sale, is hereby repealed. The trustees of the said town are hereby directed to convey to those who have already purchased a lot or lots in said town, titles in fee-simple, although the said lots may not have been improved agreeably to the requisitions of the said recited act.

"And be it further enacted, that the said trustees, or any five of them, are authorized and required to sell at public auction, the residue of the said one thousand acres of land, for the best price that can be had for the same, at twelve months' credit, in lots not exceeding twenty acres, nor less than half an acre, taking from the purchasers bond, with approved security, for
*373] the payment thereof, and when received, to be applied to the *benefit of the said town; notice of the time and place of such sale being previously advertised two months successively in the Kentucky Gazette.

"And be it further enacted, that the said trustees shall convey to the said purchasers titles in fee; and that the said lots shall not be liable to forfeiture on account of any failure in improving the same, but that the titles thereof shall be absolute and unconditional, anything in the said recited act to the contrary notwithstanding."

In pursuance of the act first above recited, the board of commissioners thereby constituted, appointed William Clark principal surveyor, and proceeded to lay off the 150,000 acres of land, and laid off for a town the said 1000 acres of land, a plat of which was, by the said surveyor, returned to the court of the county of Jefferson, to be by the clerk thereof recorded, which survey and return is in the words and figures following, to wit, and of which survey the annexed map is substantially a copy, upon which the land in controversy is correctly represented between the letters X and Y, and between two dotted lines upon the margin of the river.(*a*)

"Surveyed one thousand acres of land on the north-west side of the Ohio river, for the town of Clarksville, agreeably to an act of the assembly, entitled, 'an act for the surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant.' Beginning on the bank of the Ohio river, at a small white thorn, white oak and hickory, a little below the mouth of Silver creek; running thence north, crossing Silver creek twice, 170 poles, to a sweet gum, beech and sugar tree; thence east, crossing said creek again, 326 poles, to three beeches; thence south 40° east, 86 poles, to a beech and sugar tree; thence 176 poles to a large sweet gum, sugar tree and dog-wood, on the bank of Mill creek; thence south, crossing said creek, 180 poles, to a sugar and two ash trees; thence east, 158 poles, to three beeches; thence south, crossing Pond creek, 280
*374] poles, to *the Ohio, at two white ashes and two hickory trees; thence down the Ohio river, with its meanders, to the beginning.

W. Clark, P. Surveyor."

The said trustees, named in the above-recited act, entered upon the said one thousand acres of land, and had the same laid off into streets and lots, and sold a part of the same; and as vacancies occurred by death, removal out of the county, or otherwise, the remaining trustees supplied such vacan-

(*a*) The plat is omitted.

cies, by electing others, from time to time; so that on the first day of July 1827, the said lessors of the said plaintiff, to wit, Joseph Bartholomew, John Prather, Willis W. Goodwin, Andrew Fite, John Weathers, William D. Beach, Charles Fuller, Orlando Raymond, Isaac Howk and Peter Bottorff, were the trustees of Clarksville, by being duly elected, from time to time, under the provisions of the above-recited act.

At a meeting of the board of trustees of the town of Clarksville, on the 18th of March 1803, the following resolution was adopted by the board and entered on the book of their proceedings, to wit: "The trustees, taking into consideration the great advantage that would result to the trustees of the town of Clarksville, and the public in general, by opening a canal round the falls of the Ohio, on the application of George Rogers Clark, it is resolved by the board, that the rights, privileges and advantages of the ground between the front lots on the Ohio, and the Ohio from the upper line of the town of Clarksville, adjoining Isaac Bowman's lot, No. 1, in the Illinois grant, to the mouth of Mill creek, be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of said slip of land, on which to erect mills, wharfs, store-houses, or any kind of water-works that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels, &c., reserving, however, between the south and eastwardly line of said front lots and the canal, the distance of thirty feet; for which privilege, the said William Clark, his heirs and assigns, are to pay the trustees, or their successors, one per cent. on the production of all water-works that may be erected on said canal, and five per cent. on the toll of all kind of craft that may pass through the said canal. Provided, however, that the said William Clark, his heirs and assigns, do complete the said *canal for the erection of water-works, within seven years from this day." [*375

At a meeting of the trustees of the town of Clarksville, on the 5th day of December 1807, the following order and resolution was adopted by said trustees, and also entered on their book of proceedings, to wit: "A memorial from William Clark, praying that the trustees will prolong the time for his complying with the conditions of a grant made to him by a former board of trustees, on the 18th day of March 1803, of a slip of ground from the upper part of the town to the mouth of Mill run, was read. On motion, it was resolved, that a further time of three years be allowed for complying with the condition of said grant, on condition that the said William Clark, his heirs, &c., shall relinquish, under the former grant, the distance of thirty feet, reserved for a street between the front lots and any canal that may be opened, making a space of sixty feet the whole distance between such canal and said front lots, and that the former grant shall not extend further than to the lower basin, and that the said William Clark, his heirs, &c., shall bind himself, his heirs, &c., to build and keep up good and sufficient bridges across said canal, at the intersection of every cross street, and to erect, within the period mentioned, to wit, by the 18th of March 1813, a mill or mills, to be of public utility, or open a canal agreeably to the conditions of the former grant, and to reserve to the trustees the stone in the river not necessary for the uses of effecting and continuing the improvements therein contemplated."

On the 21st November 1810, an act of the general assembly of the terri-

tory of Indiana was passed, in the words and figures following, to wit: "An act for the relief of Daniel Fetter, James Hughes and Solomon Fuller. Whereas, it has been represented to the general assembly of this territory, by sundry petitions and other documents, that by the act of the state of Virginia, incorporating the town of Clarksville in this territory, the trustees thereof were authorized to dispose of the land upon which said town was laid off in half-acre lots, at public auction or otherwise, as they might think proper, and whereas, the said trustees, by their orders and resolutions, did dispose of a certain part of said town to General William Clark, in fee conditional, who transferred the *same to the aforesaid Fetter, Hughes and Fuller; and whereas, it seems to have been the intention of the legislature of Virginia, to subject the lots and land whereon the said town of Clarksville was laid off, to the control and disposition of the trustees of the said town, who for the benefit of the proprietors therein, and for the interest of the public at large, did dispose, *en masse*, in the manner aforesaid, of a number of lots, and it appearing by the memorial of the said Fetter, Hughes and Fuller, that the intention is to erect, for the public utility and convenience, mills and other water-works on the said ground:

*376]

"§ 1. Therefore, be it enacted by the legislative council and house of representatives, and it is hereby enacted by the authority of the same, that the said Daniel Fetter, James Hughes and Solomon Fuller, their heirs and assigns, be, and they are hereby considered, and shall be taken, deemed and holden, as the legal and equitable proprietors of the lots and land contained in the orders and resolutions of the said board of trustees, and the deed of transfer thereof from the said William Clark, subject nevertheless to the terms and conditions upon which the same was granted by the said board of trustees to the said William Clark." Passed November 21st, 1810.

The said William Clark, prior to the passage of the act last above recited, had transferred his interest in and to the said slips of land, mentioned in said resolutions of the said trustees of Clarksville, to the said Fetter, Hughes and Fuller; and some of the persons composing the board of trustees of Clarksville, at that time, individually signed the petition of said Fetter, Hughes and Fuller, to the said general assembly, for the passage of the above recited act.

Fetter, Hughes and Fuller entered upon the said slip of land, under the aforesaid orders and resolutions of said trustees, and erected thereon, on the margin of the Ohio river, a saw-mill, with a pair of mill-stones for grinding, in the fall of the year 1810, which mill was shortly after swept away by the floods. That in the year 1812, they erected and put into operation a grist-mill, of public utility, on the same slip of land, and on the margin of the Ohio river, which remains unto this day; that to furnish a head of water for said mill, they cut through a ridge of rock in the bed of said river, lying between a channel of said river, next the shore and an outer channel, *by which the water from the outer channel was brought into the channel next the shore; and that they expended in making said improvements from twelve to twenty thousand dollars.

*377]

At a meeting of the board of trustees of the town of Clarksville, on the 17th day of December 1816, the following resolution was adopted, and entered on the book of said trustees, to wit: "On motion of Willis W. Goodwin, resolved, that the clerk of this board be directed to call on Messrs.

Fetter and Hughes, assignees of William Clark, and inform them, that it is the request of this board, that they do make out and exhibit, at our next meeting, an accurate statement of all the productions of the water-works, mills, canals, &c., erected on the slip of ground granted them by the trustees of Clarksville, since their commencement to the present date, and that the same be supported by affidavit." At a meeting of the said board of trustees, on the 18th day of August 1817, the following entry and order were made by said trustees, on the book of their proceedings, to wit: "Messrs. Fetter and Hughes produced to this board a statement of the quantity of flour manufactured at their mills, on the slip of ground granted to them by the trustees of the town of Clarksville, from the commencement to the 1st day of January 1817, showing the net proceeds thereon, by which it appears they are indebted to the trustees the sum of $69.10½; and it was ordered, that they pay the same to the clerk of this board."

Shortly after the making of the order last above recited, the said Fetter and Hughes paid to the clerk of the said board of trustees the sum of $69.10½, in pursuance of said order. The said Fuller duly transferred his interest in said slip of land and appurtenances to said Fetter and Hughes, and said Fetter transferred his interest in the same to said Hughes, defendant herein, who, at the time of the commencement of this suit, was in possession of said slip of land and appurtenances; the said slip of land is a part of the one thousand acres laid off for a town, as above stated, and delineated on the map aforesaid, and is the land in the plaintiff's declaration mentioned; and the said trustees of the town of Clarksville, on the first day of September 1826, duly notified the said defendant to quit the possession of said slip of *land and appurtenances, on or before the 18th day of March then next, and defendant refused, and still refuses to quit possession thereof. It is agreed, that the parties and the court shall not be precluded by this statement of facts from inferring the existence of such other facts as may reasonably and properly be deduced from those stated. [*378

The district court rendered judgment in favor of the plaintiffs in the ejectment; and that judgment is now before this court on a writ of error.

Questions both new and intricate have arisen in this cause; and the doubts we have entertained respecting some of them were not easily removed.

The plaintiffs in error deny that the act of 1783, from which the trustees derive their title, could pass any legal estate to them in the lands which are the subject of it. The act appoints commissioners who are to proceed, with the surveyor, from and after the 1st day of April 1784, to lay off the said 150,000 acres of land, on the north-west side of the Ohio river; and after laying out 1000 acres at the most convenient place therein, for a town, shall proceed to lay out and survey the residue, and to divide the same by fair and equal lots among the claimants. A plat of the survey of the 149,000 acres thus to be divided is, when completed, to be returned to the register's office; "and thereupon, a patent shall issue to the said commissioners, or the survivor or survivors of them, who shall hold the same in trust for the respective claimants." They are directed to execute deeds, &c. This act empowers the commissioners to receive the claims of the several officers and soldiers of the Illinois regiment, and to cause the survey to be made; but no legal estate passes to them, until the patent shall be issued on the

survey. The date of the patent does not appear, but the survey on which it was to be issued could not be made until after the 1st of April 1784; and consequently, the patent must have been issued on a subsequent day. The law further enacts, that a plat of the said one thousand acres, directed to be laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof, recorded, and thereupon the
*379] same shall be, and is *hereby, vested in William Fleming, &c., trustees, to be by them, or any five of them, laid off into lots, &c. The time when this plat was returned is not stated, but it must have been after the 1st of April 1784.

Previous to that day, in December 1783, Virginia passed an act ceding the territory she claimed north-west of the river Ohio, to the United States; and the deed of cession was executed on the 1st of March 1784. This deed contains the following among other reservations: "that a quantity not exceeding 150,000 acres of land, promised by this state, shall be allowed and granted to the then colonel, now General George Rogers Clark, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskia and St. Vincent were reduced, and to the officers and soldiers that have been since incorporated into the said regiment, to be laid off in one tract, the length of which not to exceed double the breadth, in such place on the north-west side of the Ohio, as a majority of the officers shall choose; and to be afterwards divided among the said officers and soldiers in due proportions, according to the laws of Virginia."

The plaintiff in error contends, that as the state of Virginia had conveyed all her territory north-west of the river Ohio to the United States, before any legal title was vested in the commissioners or trustees appointed by the act of 1783, the title at law was vested in the United States, and could pass only from them. That the reservation in favor of Clark's regiment, is not an exception of so much land from the deed of cession; but a stipulation that congress shall comply with the promise made by Virginia to that regiment. Consequently, that the plaintiffs in ejectment had no legal title. Had the court been required to expound these laws, immediately after the deed of cession was executed, it is probable, that the construction made by the plaintiff in error would have been adopted. But the opposite construction has prevailed, and all the titles in that reserve depend upon it. It is too late to controvert it.

The title of the plaintiffs in ejectment has been contested on another ground, which is more tenable. The act directs the plat for the town to be returned to the office of Jefferson, to be recorded, and declares that "there-
*380] upon *the same shall be, and is hereby, vested in William Fleming, &c., trustees, to be by them, or any five of them, laid off into lots of half an acre each, with convenient streets and public lots, which shall be, and the same is hereby, established a town, by the name of Clarksville." The act proceeds to prescribe the duties and the powers of the trustees; they are to sell the lots in the manner and on the conditions required by the law; to convey them to the purchasers; to determine all disputes concerning their bonds; and to settle rules and orders for regular building thereon. This enumeration of duties and powers is concluded with the following provision: "and in case of death, removal out of the country, or other legal disability of any of the said trustees, the remaining trustees shall

supply such vacancies, by electing others, from time to time, who shall be vested with the same powers as those particularly nominated by this act." It is also enacted, that "If the purchaser of any lot shall fail to build thereon within the time before limited, the said trustees, or a major part of them, may thereupon enter into such lot, and may either sell the same again," "or appropriate such lot to the public use of the inhabitants of the said town."

The legal title is undoubtedly vested in William Fleming and the other persons who are named as trustees of the town. The possession of this legal estate, however, would not have enabled them to perform the various acts which were necessary to the accomplishment of the object of the legislature. The thousand acres intended as a town, is to be laid out by these persons, in their character of commissioners; and after the plat thereof shall be recorded, it is vested in them by name, after which the law prescribes their duties and powers. These are expressly enumerated; they do not grow out of the estate, but are conferred by the words of the act. Had the title been vested in other persons, the same powers might have been conferred on, and exercised by the trustees of the town. No one of their powers depends on their possessing the legal title. They might lay off the town in lots and streets, sell and convey the lots, determine their boundaries, and settle rules and orders for the regular building thereon, although the mere title should reside in others. The legal title is not identified with these powers, or connected with them, by the words of *the law. The grantees are made trustees, but they receive the grant as [*381 individuals; and the mere legal estate must descend according to the law of descents, unless otherwise directed by the particular statute.

No one of the persons in whom the land is vested by the act, nor any person claiming title under any one of them, is a party to this ejectment. The inquiry then is, has the legal title, which was vested in William Fleming and others, been divested by the act, and transferred to the defendants in error? This must be determined by the act itself. The words are, "in case of death, &c., of any of the trustees, the remaining trustees shall supply such vacancies, by electing others, from time to time, who shall be vested (not with the same estate, but) with the same powers as those particularly nominated in this act." If the estate be not indispensable to the existence or exercise of the powers, and we think it is not; if the powers do not grow out of the estate, but are conferred by special words in the act, no necessity is perceived for supplying words which are not used in the act, and implying a transfer of the estate which the legislature has not made. It is unquestionable, that no inconvenience would result from such a construction; and we may conjecture, that had it occurred to the legislature, that the transfer of the estate to the new trustees might be useful, it would have been directed; but we cannot do that which the law has not done; we cannot take a trust estate from William Fleming and others, and vest it in their successors as trustees, when the law does not make the transfer.

It is probable, that the legislature contemplated the immediate execution of the powers conferred by the act, which would transfer the legal estate to the purchasers. They do not appear to have contemplated the permanent residence of the legal estate in the body of the trustees, for the purposes of the act. If the trustees were to do anything in virtue of the estate, and not of their special powers, we might expect it to be a re-entry for breach of the

condition contained in the deeds they made. Yet, after providing for their continuance, even this power is expressly given to them. The legislature appears to have lost sight of the legal estate, and to have relied entirely on the powers given to the trustees and their successors, for the accomplish-
*382] ment of their object. The powers are given to the *trustees and their successors; the estate is not given to their successors. We do not think, the grant of the powers draws after it the estate. If any use is to be made of the estate, which cannot be effected by the employment of the powers, it still remains, we think, in the original grantees or ther heirs. If any part of the 149,000 acres has not been conveyed, the title to such part remains in the same persons. The inconvenience of resorting to the holders of the legal title is the same in both cases.

The court has not come to this conclusion, without considerable doubt and difficulty; but, pursuing the words of the statute, and finding in them no transfer of the estate, we must consider it as remaining where it was placed by the legislature.

The trustees contend, that the defendants below were estopped from denying their title, by the agreement of the 18th of March 1803. The legal effect of that agreement, they say, was to create a tenancy from year to year; and consequently, to establish the relation of landlord and tenant between the trustees and those who claim under it. That a lessee will not be allowed to deny the title of his lessor, is admitted; but it is not admitted, that a contract executed for the purpose of conveying and acquiring an estate in fee, but wanting those legal formalities which are required to pass the title, may be converted into an agreement contemplated by neither party; and by this conversion estop the purchaser, while it leaves the seller free to disregard his express stipulations.

The resolutions entered into by the board of trustees, on the 18th of March 1803, constitute a contract which was intended by all parties to invest William Clark with a permanent estate. The trustees resolve, "that the rights, privileges and advantages of the ground," described in the resolution, "be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of the said slip of land, on which to erect mills, wharfs, storehouses, or any kind of water-works that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels, &c." For this privilege, the trustees reserved "one per cent. on the production of all water-works that may be erected on the said canal, five per cent. on the toll of all kind of craft that may pass through
*383] said canal." To this *grant was annexed this provision: "Provided, however, that the said William Clark, his heirs and assigns, do complete the said canal for the erection of water-works within seven years from this day." This time was afterwards extended to ten years. The assignees of William Clark took possession of the premises under this agreement, and sold to others, who have expended from one to two thousand dollars on the work; and have erected a saw-mill, which has been carried away; and a grist-mill, which is now in operation, and of great public utility.

It is impossible to doubt the intention of the parties to this contract. The grant for which the trustees stipulate is to William Clark, his heirs and assigns. A tenancy from year to year is directly repugnant to this stipulation. The money to be expended on the great works in contemplation, is

entirely inconsistent with any other than a permanent estate. The views of the parties are entirely defeated, the contract is annulled, by treating it as one which the trustees might determine at their will, or at the end of any year. Had the contract been clothed with legal form, by the execution of a deed, such deed would have conveyed an estate to William Clark, his heirs and assigns. The reservation of the per-centage on the building and canal, as the consideration of the grant, instead of a sum in gross, could not affect the permanence of the estate. The trustees could not have maintained an ejectment, after the execution of such deed, unless some one of the conditions contained in it, on which a right to re-enter was reserved, should be broken; which breach it would be incumbent on the plaintiffs in ejectment to show. Had these resolutions, then, amounted to a deed, or had the trustees placed the purchaser, in point of law, in the situation in which both parties intended by the contract to place him, this ejectment could not have been maintained, on any other principle than the breach of some condition in the deed which authorized a re-entry.

But a legal title has not been made, and those who claim under the contract cannot defend their possession by it, in this action. The trustees themselves deny its validity for this purpose, and assert a title in opposition to it. While they would turn the purchaser out of possession, because this *contract has no legal operation in this action, they would give it a legal obligation on the defendant in the ejectment, which is to restrain him from making a defence which would protect his equitable rights under it. The contract binds him, but leaves them at perfect liberty. The moral policy of the law cannot permit this. It is forbidden by the clearest principles of justice. The case of *Blight's Lessee* v. *Rochester*, 7 Wheat. 535, asserts this doctrine, in a case nearly resembling this. The plaintiff claimed under John Dunlap, whose title was not valid, but he insisted, that the defendant must trace his title up to Dunlap, and therefore, could not contest it. The court said, "if he claims under a sale from Dunlap, the plaintiffs themselves assert a title against this contract; unless they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant, in good faith, to acknowledge a title which has no real existence." Upon the authority of this case, and upon the sound principles of morality and justice which belong to the law, we do not think that the plaintiffs, while asserting a title against their contract, can be permitted to insist, that the same contract binds the defendant to admit their title. [*384

This opinion is founded on the idea that the action is brought to obtain possession, against the contract, not for any failure to perform its conditions. The trustees themselves do not place their right to re-enter and hold the premises, on that ground. The case does not state a re-entry for conditions broken; nor does it show expressly that any condition has been broken. If it be admitted, that William Clark or his assignees would, in this case, be bound to acknowledge the title of the trustees, provided the trustees, on their part, acknowledge the obligation of their resolutions on themselves, it becomes necessary to inquire, whether the conditions contained in those resolutions have been broken. What are those conditions?

The resolutions are not drawn with such distinctness as to make the object of the parties clearly intelligible; or to show the extent of the

engagements into which Clark entered, so as not to be misunderstood. They are introduced by a preamble, stating the "advantages that would result," "by opening a canal round the falls of the *Ohio." They *385] then proceed to say, "on the application of George Rogers Clark, it is resolved by the board, thot the rights, privileges and advantages of the ground between the front lots on the Ohio, and the Ohio from the upper line of the town of Clarksville," &c., "to the mouth of Mill Creek, be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of said slip of land, on which to erect mills, wharfs, storehouses, or any kind of water-works that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels, &c."

The preamble undoubtedly indicates that the trustees contemplated "the advantage which would result from a canal round the falls," but whether they meant to bind Clark to make the whole of that canal, is to be determined by the resolutions declaring the purposes of the grant to him. The canal which Clark was to make, was, it is presumed, to be made through the ground ceded to him by the trustees. This extends to the mouth of Mill creek. The case does not state whether Mill creek empties into the Ohio below the falls; if it does not, this fact would go far in the construction of the resolutions; if it does, the fact, or something equivalent, should be shown in the case.

The resolutions add, that the rights, &c., exclusively granted, "are to be appropriated to the use of opening a canal through any part of the said slip of land, on which to errect mills, wharfs, storehouses, or any kind of water-works that may be of public utility." This canal is "to pass through any part of the said slip of land;" but is not required to pass through the whole of it, and to empty into the river at the mouth of Mill creek. Its expressed purpose is to erect mills, wharfs, &c., but the erection of all of them is not required, nor is the grantee himself required to erect any of them. The canal is to be adapted to the purpose, and if it be so adapted, the requisition of the resolution is complied with. An alternative application of the canal is allowed. The resolution proceeds to say, "or for the erection of gates, locks, &c., for the passage of boats, vessels, &c." These two members of the resolutions are not connected by the copulative "and," but by the disjunctive "or." *The resolution does not require that *386] the canal should be fitted for both purposes, but is satisfied, if it be fitted for either.

The limitation of time is, "provided, however, that the said William Clark, his heirs and assigns, do complete the said canal, for the erection of water-works, within seven years from this day." Clark and his assignees are within the requirement of the proviso, if they complete the canal for the erection of water-works within seven years; though no works of any description should be erected. At a meeting of the trustees, held in December 1807, this subject was again taken up. A further time of three years was allowed, on condition, among other things, that the former grant shall not extend farther than to the lower basin, and that the said William Clark shall bind himself, his heirs, &c., "to build and keep up good and sufficient bridges across said canal, at the intersection of every cross street, and to erect, within the period mentioned, to wit, by the 18th of March 1813, a mill

or mills to be of public utility, or open a canal agreeably to the conditions of the former grant, &c." The alternative is given to Clark and his assigns, either to build a mill or mills to be of public utility, or open the canal.

The case states that the mill was erected, which remains to this day. It also states, that in December 1816, the trustees called on the assignees of William Clark for a statement of the production of the water-works, which account was rendered, and the money appearing to be due on it was paid. We are not informed, that there was any subsequent failure in the payment of the money which became due under the contract. We are not, therefore, at liberty to suppose, that the conditions of the contract have been broken on the part of Clark's assignees. The trustees, then, to sustain this ejectment, must consider themselves as absolved from the contract. Acting upon this principle, they cannot set it up against the plaintiffs in error. They cannot be permitted, while denying its obligation on themselves, to enforce it on others. Both are free, or both are bound. We are of opinion, that the plaintiffs in error were at liberty, in this case, to controvert the title set up by the trustees in the court below.

The assignees of Clark have relied upon an act of the territorial legislature of Indiana, passed in November 1810, *supplying the want of a conveyance; and declaring the assignees of the said Clark to be [*387 "the legal and equitable proprietors of the lots and land contained in the orders and resolutions of the said board of trustees," "subject, nevertheless, to the terms and conditions upon which the same was granted." We do not mean to deny the right of the legislature to modify the future exercise of the powers possessed by the trustees of the town of Clarksville, provided they do not impair vested rights; but we are not prepared to decide this case on an act which changes the character and operation of a contract, after it has been made.

This case has been decided in the state court of Indiana, and is reported in 1 Blackf. 422. This court has considered that decision, with the respect to which it is justly entitled. In that case, the court did not examine and decide on the legal title of the trustees, because legal effect was given to the contract, so far as to defeat the action. The relation of landlord and tenant, therefore, was preserved between the parties, and bound both. That relation defeated the plaintiff's action, though it estopped the defendant from controverting his title. Notwithstanding the plain meaning of the contract made by the resolutions of March 1803, to grant a permanent estate; yet that contract, though incapable of passing an estate at law, to the extent intended, was capable of passing at law an estate from year to year, and in that action might be so construed. The necessary effect of this construction was the admission of the title of the lessor; but in this action, no legal effect whatever is given to the contract, and it cannot, therefore, estop the defendant from contesting the title asserted in hostility to it. We do not consider the case as depending on local law.

We are of opinion, that the plaintiff below did not show title to the possession of the premises claimed in the declaration; and that there is error in the judgment of the court for the district of Indiana in this favor. That judgment is reversed, and judgment entered for the defendant.

Baldwin, Justice, dissented.

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 Indiana, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the plaintiff below did not show title to the possession of the premises claimed in the declaration, and that there is error in the judgment of the court for the district of Indiana in his favor; whereupon, 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, with directions to that court to enter judgment for the defendant below.

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*389] *William W. Watts and Arthur Watts's Executors, and William W. Watts, Arthur Watts, Joseph Scott and Elizabeth, his wife, heirs and legal representatives of John Watts, deceased, Appellants, *v.* William Waddle and Alexander Waddle's Administrators, and Alexander Waddle, and William, John, Lucy, Edward and Argus Waddle, infants, by Benjamin G. Leonard, their next friend, children and heirs of John Waddle, deceased, and William Lamb.

Specific performance.—Relief.

A decree for the specific performance of a contract to purchase a tract of land refused, in consequence of delay and a defect of title.

The aid of a court of chancery will be given to either party who claims specific performance of a contract, if it appear, that in good faith, and within the proper time, he has performed the obligations which devolved upon him.

It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another; this principle is too clear to admit of doubt.[1]

In the argument before this court, a new ground of relief was assumed, which had not been made in the circuit court; that if the court should not decree a specific performance of the contract to purchase the land, yet as the purchaser had been in the possession thereof, the complainants were entitled to a decree for the rents and profits of the land, while he was in possession. There is no rule of court or principle of law which prevents the complainants from assuming a ground in this court which was not suggested in the court below; but such a course may be productive of much inconvenience and some expense.

Although there is no specific prayer in the bill, to be paid the rents and profits, yet the court think, that under the general prayer, this relief may be granted. Under this prayer, only relief may be given for which a basis is laid in the bill; in this case, the possession of the land by the defendants is alleged, and the demand for rents and profits would result from this fact.[2] There is no pretence, that this demand was taken into view in the action at law; as it consisted of unliquidated damages, it was not a proper subject for a set-off.

Appeal from the Circuit Court of Ohio. (Reported below, 1 McLean 200.) In the circuit court, John Watts, a citizen of the state of Kentucky, filed a bill in chancery, against John Waddle and William Lamb, the appellees, to obtain a perpetual injunction to stay proceedings by John Waddle on a judgment obtained in the circuit court against him, for damages for the non-performance of a contract made by him with John Lamb, in

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[1] See Brine *v.* Insurance Co., 96 U. S. 635.

[2] So, in a bill to enjoin the violation of a copyright, the court, under the prayer for general relief, may decree an account of the profits. Stevens *v.* Gladding, 17 How. 447. And under a similar prayer, a substituted security, issued after the commencement of the suit, may be followed. Texas *v.* Hardenburg, 10 Wall. 68.

November 1815, which contract had been signed *by him to John Waddle; and also to compel Waddle or Lamb to a specific execution of the contract.

The contract was for the sale of certain lots of ground in the town of Chillicothe, to William Lamb, for which John Watts agreed to give a good and sufficient general warranty conveyance, by the 1st day of February 1816, or as soon as a final decree should be rendered in the circuit court of the United States, in a suit instituted to compel Nathaniel Massie and others, to make a conveyance to the complainant, of the legal title to the said lots, the elder equitable title thereto being in the complainant. William Lamb, or his assignee John Waddle, was in possession of the premises, at the time of the contract, and continued to hold the same, until and after the judgment for the damages. Numerous and continuing obstacles, arising, as was alleged, from other causes than the fault or *laches* of John Watts, interposed and prevented the conveyance of the premises by a sufficient legal title, until 1826.

In 1824, William Lamb assigned the contract between him and John Watts to John Waddle, who thereupon instituted the suit against John Watts, he having been found in Ohio; and obtained a judgment for damages for the non performance thereof, amounting to $7745.50. In 1826, John Watts tendered to John Waddle, as the assignee of John Lamb, a deed of conveyance of the lots, in conformity, as was alleged, with the contract of 1815, which was refused by him.

The circuit court of Ohio dismissed the bill of the complainants; and the executors and legal representatives of John Watts thereupon prosecuted this appeal. The facts of the case are stated more particularly in the opinion of the court.

For the appellants, *Creighton* and *Clay* contended, that the decree of the circuit court ought to be reversed on the grounds:

1. That the said circuit court ought to have decreed a specific execution of the contract between Watts and Lamb; Watts having throughout manifested a *bonâ fide* intention to fulfil his covenant, and having, for that purpose, done all that was *incumbent upon him to possess himself of the legal title, which he tendered, as soon as he acquired it, to Waddle; [*391 and neither Lamb or Waddle, who have constantly remained in quiet possession of the property, having ever demanded a deed, or sustained any injury in consequence of not receiving one.

2. But if the court below ought to have refused to compel Waddle now to receive a title from Watts, it ought to have made Lamb and Waddle liable for the rents and profits of the estate, from the date of Watts's covenant to the termination of the suit; inasmuch as they had recovered a judgment for principal and interest of the purchase-money, and had peaceably enjoyed the possession, and reaped the fruits of the property, up to this time. And this allowance, for rents and profits, ought to have been applied by the court in abatement of the amount of the judgment as law. They cited 5 Pet. 264; 1 Wheat. 179, 196; 6 Ibid. 528; 6 Cranch 148.

Leonard, for the appellees, argued: 1. That according to the contract, the deed was to have been delivered in 1816, when the appellant obtained a final decree in the circuit court, in the suit against Massie and others; and

not being at that time able to make a legal and sufficient title, the complainant could not, in 1826 or afterwards, call on the appellees to accept of the title. The right of the appellees to damages for the breach of the contract of 1815, could not he impaired by the subsequent ability of the appellant, if it existed, to make the title. Sugd. on Vend. 249 ; 1 Harrison's Chan. tit. Decree, 424–6 ; 1 Madd. Ch. 430.

2. The rents and profits could not be set of in the action for damages ; nor should this court now give the appellant the benefit of the claim to them, against the judgment of circuit court. Coop. Eq. 13, 14, 333 ; 2 Atk. 3, 141, 325 ; 12 Ves. 48 ; 17 Ibid. 114, 118 ; 2 Ves. sen. 225 ; 2 Pet. 612 ; 1 Wheat. 179 ; 7 Ibid. 535.

McLean, Justice, delivered the opinion of the court.—This suit was brought into this court by an appeal from the decree of the circuit court for the district of Ohio. The bill was filed in that court by the complainant, to compel the specific *execution of a contract, entered into with the *392] defendant Lamb, on the 1st day of November 1815 ; by which the complainant bound himself to convey certain out-lots and other land, adjacent to the town of Chillicothe, to the said Lamb, for the consideration of $4716.66⅔. The conveyance was to be made on the 1st day of February ensuing, or so soon as a final decree should be rendered by the United States circuit court for the district of Ohio, in the suit then pending in said court, wherein the said Watts was complainant, and Nathaniel Massie and others, defendants. That suit had been brought by Watts against Massie and others, including the above defendant, Lamb, to recover 1000 acres of land, which included the land sold by the above contract, to which Watts derived title from Ferdinand O'Neal, who claimed under an entry made by virtue of a warrant which had been granted to him for military services. To recover this tract of land, Watts first brought a suit against Massie, in the federal court of Kentucky, charging him with having fraudulently surveyed the lands of O'Neal, so as to throw it within the lines of a survey, in the name of Powell, which was owned by Massie, or in which he had an interest. In this suit Watts prevailed, and an appeal being taken to the supreme court, the decree of the circuit court was affirmed. (6 Cranch 148.) To carry this decree into effect, in the state of Ohio, suit was instituted by Watts in the circuit court ; and this was the suit referred to in the contract between Watts and Lamb.

By the decree in Kentucky, which was affirmed by the supreme court, O'Neal's entry, No. 509, was made to embrace the land specified in the contract ; and the decree required Massie to convey to Watts all the land covered by the survey of the above entry, although within entries No. 503 and 2462, amounting to one thousand acres ; and Watts was required to convey one thousand acres, which were within the calls of entry No. 509. Neither of these conveyances has been executed.

A final decree was obtained in this suit, in the circuit court for Ohio, in favor of Watts, in January 1818. Neither Lamb nor Massie took an appeal in this case to the supreme court ; but it was appealed by some of the defendants, who, it is stated, had no interest in the land now in dispute. A final decree in *favor of Watts was entered in the supreme court, in *393] September 1822. (7 Wheat. 158.)

In the year 1818, it was ascertained, that no patent had been granted on O'Neal's warrant, and, consequently, that Massie did not possess the legal title; but, on application, a patent was issued to Watts, on the 1st of March 1826. It appears, however, that a patent had issued to the heirs of Powell; on an entry No. 503, on the 4th of November 1818, which covered a part of the land that Watts had sold to Lamb. Finding that the legal estate was vested in Powell's heirs, Watts commenced a suit against them in the circuit court of Kentucky, and obtained a decree for the land contained in their patent, which interfered with his title, in the fall of the year 1826. Lamb having assigned the covenant to his co-defendant, Waddle, in January 1824, he commenced a suit against Watts for the recovery of the consideration paid; and at July term 1826, obtained a judgment in the circuit court for $7745.50, damages and costs. On the 3d of July, before the judgment, Watts tendered to Waddle a deed in fee-simple for the land in the contract agreed to be conveyed, with the costs of the suit, which he refused. A bill was then filed by Watts to enjoin the judgment, and compel the defendants to accept of a deed. The bill contains also a prayer for general relief. By the decree of the circuit court, this bill was dismissed, from which the complainant appealed to this court. Watts having died since this suit has been pending in this court, it is now prosecuted by his heirs.

The complainants insist, that, under all the circumstances of the case, they are entitled to a specific execution of the contract. Of this there can be no doubt, if it shall appear that there has been a substantial compliance with the covenant on the part of their ancestor. The aid of a court of chancery will be given to either party who claims a specific execution of a contract, if it appear that, in good faith, and within the proper time, he has performed the obligations which devolved on him. It is insisted, that the delay which occurred in making a *deed was unavoidable, and is in no manner attributable to negligence or want of good faith in [*394
Watts. That it grew out of facts which were alike unknown to him, and the defendant Lamb, at the time the contract was made. That the defendant Lamb, and his assignee, Waddle, have had the unmolested possession of the land purchased, enjoying the rents and profits of it; and that no circumstance has been proved, which goes to show that the defendants, or either of them, have suffered any injury from the delay in making the deed. Various facts are adverted to, which go to prove vigilance on the part of Watts, in prosecuting different suits, and in other respects, in order to obtain the legal title, that he might make the conveyance. And that so soon as he was enabled to do so, he lost no time in tendering the deed, duly executed, and also the costs which had accrued in the action at law.

On the part of the defendants, it is contended, that as the contract was the result of a compromise, they are entitled to a strict execution of it. Under a purchase which Lamb had previously made of Massie and others, he was in possession of the land embraced by the contract, at the time it was concluded. And he was, no doubt, induced to enter into the contract with Watts, under the impression that he had the equitable, and would soon possess himself of the legal, title. The suit then pending had been brought for that purpose, and as Lamb was one of the defendants, and had no title, either legal or equitable, he was desirous of obtaining a title from Watts. If Lamb did not enter into the possession under Watts, it seems, that he

acknowledged Watts to possess the better title; and by making the contract with him, was willing to hold the possession under him. It is not perceived, therefore, that there is anything in the circumstances under which this contract was made, which would take it out of the rule of law generally applicable to cases of contract for the purchase of real property. The contract, it is true, was the result of a compromise respecting a legal controversy; but it was entered into, with a full knowledge on the part of Lamb, that Watts did not possess the legal title, but expected to obtain it by a final decree in the case referred to. *A final decree was obtained in that case, in the circuit court, in January 1818; and it is insisted, that it was the duty of Watts, at that time, to execute the conveyance; and that not having done so, he is guilty of such negligence as to prevent the relief he now asks in equity.

*395]

In the contract, there was a reference to the final decree of the circuit court, but as the decision of that court was not final in the case, and as an appeal was actually taken, by some of the defendants, to the supreme court, it may reasonably be inferred, that this contingency was within the calculation of both parties, at the time of the contract. It must have been known to them, that an appeal would vacate the decree of the circuit court, and that after it was taken, any conveyance made under such decree would be inoperative. The final decree, therefore, in the circuit court, as referred to in the contract, could only mean, in the event that the decree of that court should finally determine the matter of controversy. But if an appeal should be taken from such decree, then the final decree should be made in the supreme court. There can be no difficulty in coming to the conclusion, that both parties referred to a final decision of the case; and to such a decree as should vest the legal title in Watts. And as such a decree was not obtained until 1822, it is clear, that until that time, no negligence is imputable to Watts.

It would be within the spirit of the contract, to say, that Watts was bound to use ordinary diligence in the prosecution of the suit, both in the circuit and supreme court. But there is no charge of a want of diligence in this respect. Until 1818, Watts, as well as the defendants, supposed that the legal title was vested in Massie. There is no ground to impute fraud or imposition to Watts, in reference to this fact. When he made the contract, and up to the time specified, there can be no doubt, that he believed a final decree against Massie would give him the legal title. When he made the contract with Lamb, had he known the fact, that Massie had not the legal title, and concealed it, equity could give him no relief. The concealment would have been a fraud on Lamb, which would have enabled him to annul the contract. But Watts acted in good faith, and being mistaken, unless some injury consequently resulted to Lamb, or an unreasonable delay followed, *equity would look with a favorable eye to the specific execution of the contract. Finding that the legal title was vested in Powell's heirs, to a part of the land embraced by the contract, Watts commenced a suit in chancery against them, in the circuit court of the United States, of Kentucky, and obtained a final decree for the land. In pursuance of this decree, a commissioner appointed by the court, under a statute of Kentucky, executed a conveyance, in the fall of 1826. In July 1826, a few months after Watts obtained a patent for the land, he tendered

*396]

a deed to Waddle; and in November 1826, after the decree was obtained against Powell's heirs, it is insisted, a deed was again tendered, both of which were refused by the defendant Waddle.

The suit of Waddle, to recover back the consideration-money, was commenced in October 1824; and prior to its commencement, Waddle offered to surrender the possession of the premises. When this bill was filed by Watts, it appears, from the facts in the case, that he did not possess the legal title. The conveyance under the decree against Powell's heirs, had not, at that time, been executed. But this deed being afterwards obtained, Watts may be considered as vested with all the title conveyed by it; and also the title under the patent, which was granted to him; and the question arises, under these facts, and other circumstances in the case, whether the complainants are entitled to a specific execution of the contract?

It appears from certain depositions taken in the cause, in the spring of 1829, that this property, since the purchase, has depreciated in value one-half; but the witnesses do not state how much of that depreciation has taken place since 1822.

The defendants' counsel insist, that independent of the objection founded upon the lapse of time, there are several material defects in the title of Watts; and that the court cannot, under such circumstances, compel the defendants to receive it. It is objected, that a suit is now pending in the general court of Kentucky, by one Henry Banks, who claims the warrant on which the entry was made, under which Watts claims; and it is alleged, that the decree against Powell's heirs did not give Watts a good title. *In October 1821, it appears, Banks filed his bill against John Watts and the unknown heirs of Ferdinand O'Neal, in which he stated, that [*397 O'Neal was entitled to land, for services as a captain in the Virginia line on continental establishment, amounting to at least 4500 acres; and that for a valuable consideration, he transferred his right to one Thomas Washington; that Washington, in November 1790, authorized one Thomas Shields to make sale of said lands; and that on the 1st of March 1791, for a valuable consideration, he transferred the said lands to the complainant. He further states, that after the above assignment to Washington, O'Neal fraudulently transferred a warrant for 4000 acres of said land; and that a certain John Watts had procured grants for a part of the said 4000 acres, under an assignment from Francis and Charles Scott, made on the 11th of October 1799. And it is alleged, that Watts had full notice of the previous transfer by O'Neal, before the grants were obtained. The bill contains a prayer for a conveyance of the land specified, and also for general relief. The assignments set forth in the bill are proved by the exhibits in the case.

Process appears to have been served on Watts, the 24th October 1821, and the cause was regularly continued until August 1826; when an order was made, that public notice be given in a newspaper printed at Frankfort, to the unknown heirs of O'Neal, under a special statute of Kentucky. And from this time, the cause seems to have been regularly continued, up to January term 1829.

It is insisted by the complainants' counsel, that the pendency of this suit cannot affect, injuriously, the title of Watts; as the court of Kentucky has not jurisdiction of the subject-matter, so as to transfer the title to land in Ohio; and that from the dilatory manner in which the suit has been prose-

cuted, it is manifest, that Banks can have no expectation of success. The general court of Kentucky have jurisdiction of the controversy; and as process was served on the defendant Watts, their powers are ample to enforce their decree, *in personam*, or to direct the execution of a deed, should the land be decreed, by a commissioner, as the statute of Kentucky authorizes.

*398] *Banks has certainly been dilatory in the prosecution of his suit, but it is by no means clear, that by his negligence, in this respect, he has lost any of his original equity against Watts. And this is the question now under consideration. It is not the case of an innocent purchaser, for a valuable consideration, without notice; but the inquiry is limited to the rights of the litigant parties. If Banks has been negligent, what vigilance has been shown by Watts to terminate the controversy? It is said, there has been no rule for answer, on Watts. The record does not show whether there has been a rule to answer; and as such a rule, if entered, ought to appear, it may fairly be presumed that no such order has been taken. But this did not preclude Watts from taking an order, which would compel the complainant either to dismiss his bill, or bring it to a hearing. It would seem, therefore, if Banks has been negligent in pursuit of his rights, Watts has shown no vigilance in the defence of his.

No part of the proceeding in the suit against Powell's heirs, in the circuit court for Kentucky, is contained in the record, except the decree. The persons named defendants are John M. Powell, Francis Powell, Robert Powell, Margaret P. Bledsoe, formerly Margaret P. Powell, wife of Joseph Bledsoe, Nancy J. Rickets, wife of Charles H. Rickets, formerly Nancy J. Powell, Mary B. Jones, wife of William Jones, formerly Mary B. Powell and William M. Powell and Susan W. Powell, ——— Carr, and Fanny his wife, heirs and representatives of Robert Powell, deceased. By the decree, the defendants were required to convey to the complainant, 608 acres of land, particularly described in the decree. And if the defendants, or any of them, failed to make the conveyance, the court appointed John H. Hanna commissioner, under the statute of the state, to make the deed. It is admitted, that the deed was duly executed by the commissioner. As the record of this case is not before the court, it does not appear, whether process was served on all the above defendants, nor whether they answered

*399] the bill. But in reference *to the object for which this decree is introduced, the preparatory steps may be presumed to have been regularly taken.

Several objections are made to this decree. It being entered against *femes covert*, it is insisted, that the interest of the husbands cannot be affected by it. This seems to be considered as a matter of form by the complainants' counsel; and if it be a matter of substance, it is contended, that the full record would show that all necessary and proper parties were made by the bill. And it is denied, that the decree furnishes any evidence that the husbands of the females named as having been married, were living at the time of the decree. The females are stated to be the daughters of Powell, and the wives of the persons named. This must be considered as conclusive of the fact that their husbands were living. If they had been dead, the females would not have been named as the wives of certain persons. Under the circumstances, no presumption arises that the husbands are dead; nor can it be necessary for those who impeach the decree to show

that they are living. As the husbands of the daughters of Powell, where issue has been born, have a life-estate in the premises in question, their interests cannot be affected in a case where they are not parties. That some or all of the persons referred to are possessed of this interest, may fairly be presumed from the circumstances. A decree, to be operative, must contain sufficient certainty in itself; it cannot be aided by presumption.

It is clear, that the record at length could not obviate this objection. The defendants are named, and there is no reference by which the decree could be made to operate on the rights of the husbands. But if it were admitted, that a full record might obviate this objection, it is not incumbent on the complainants to produce it. It rests with them, to make out their case. To obtain the object of their bill, it is essential to show, that a clear title was tendered to the defendant Waddle, or at least, that they are able to make him a good title. And this they cannot show, unless there was a full divestiture of the title from Powell's heirs.

It is also objected, that the widow of Robert Powell is still living, and is entitled to her dower in the premises. She is *proved to have been living, since the commencement of this suit, and there is no evi- [*400 dence of her death; and one of the witnesses states, that she had an agent or assignee at Chillicothe, a few years since, claiming her right of dower. But it is contended, that the widow of Powell could not recover dower in this land, as, at most, he could only be considered as holding the land in trust for Watts. In proof of this, the decree against his heirs is referred to. If such were the fact, under the law of Ohio, the widow would not be entitled to her dower; but the decree referred to could not be considered as conclusive of the rights of the widow. That decree may have been entered by collusion, or under circumstances that would not bind the parties to it, if the proper steps were taken to set it aside. It is presumed, that the widow, in setting up her right of dower, would be permitted to show the nature of the title under which her husband claimed. This claim, therefore, may not be so destitute of all merit and legal propriety as the counsel for the complainants seem to consider it.

But the most decisive objection to the decree against Powell's heirs is, it is contended, that it does not vest the legal title in Watts. A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state of prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt; but it is insisted, that the deed executed by the commissioner, under the decree, by virtue of a statute of Kentucky, was a legal conveyance in that state, and as such, by a statutory provision, is good in Ohio. The words of the statute referred to are, "that all deeds, mortgages, and other instruments of writing for the conveyance of lands, tenements and hereditaments, situate, lying and being within this state, which hereafter may be made and executed, and acknowledged or approved in any other state, territory or country, agreeably to the laws of such state, territory or country, or agreeably to the laws of this state, such deed, mortgage or other instrument of writing shall be valid in law." The deed executed by the commissioner in this case, must be considered as forming a part of the proceedings in the court *of chancery; and no greater effect can be given to it than if the decree [*401

itself, by statute, was made to operate as a conveyance in Kentucky, as it does in Ohio.

The question then arises, whether, by a fair construction of the above provision, it is in the power of a court of equity, sitting in Kentucky, by force of its decree, to transfer real estate in Ohio? Can this effect be given to such decree by this statute? It is believed, that no state in the Union has subjected the real property of its citizens to the exercise of such a power. Neither sound policy nor convenience can sustain this construction; and unless the language of the statute be imperative, no court can sanction it. The legislature of Ohio could never have intended, by this provision, to place the real property of the citizens of that state at the disposition of a foreign court. The language used in the act does not require such a construction. It refers to deeds executed by individuals, in any other state; and not to conveyances made by the decree of a court of chancey. This is the true import of the section, and it does not appear, that the courts of Ohio have given it a different construction. Thus construed, it promotes the convenience of non-residents, who own lands in Ohio, and may desire to convey them; and in no point of view, can it operate injuriously to the interests of citizens of the state. In this view, it appears, that Watts did not acquire the legal title from Powell's heirs, under the deed of the commissioner; and consequently, he was unable to convey the legal title to Waddle.

The objections then to the deed tendered by Watts are, that the husbands of the *femes covert*, named in the decree, were not made defendants, and that there is no divestiture of their right; that the right of dower remains in the widow of Robert Powell; and that, at most, Watts derived only an equitable estate, under the decree against Powell's heirs. These objections are deemed decisive by the court. Under the deed tendered to Waddle, he could not defend himself against an action of ejectment commenced by Powell's heirs, or by any other persons claiming under a legal conveyance from them. A *402] decree of a court in Ohio, having jurisdiction *of the subject-matter, is necessary to give a legal effect to the decree in Kentucky. And even if this had been done, there would still exist serious objections to the title.

The principle is too well settled, to require any reference to authority in support of it, that a vendor, to entitle himself to a specific execution of the contract, must be able to make a clear title. No court of chancery will force a doubtful title on the vendee; and it is always necessary, that the vendor should not only show a proper degree of vigilance on his part, but that in all things he had complied, or was able to comply, with the contract, when he seeks a specific execution of it.

Although, in the present case, a willingness has been shown by Watts to convey to Waddle the land embraced in the contract, it is evident, that he cannot convey a good title. The title is not only shaded with doubt, but there are defects which cannot be obviated, except by the action of a court of equity. The contract which is the foundation of this suit, was entered into by Lamb, to get clear of a legal controversy; and if his assignee shall be compelled to accept a title, radically defective, he would be left in a worse condition than Lamb was in, before the compromise. The consideration-money has all been paid, and the result to the assignee would be, should he be compelled to receive the deed tendered, one or more law-suits. The

court are, therefore, clear, that the complainants, for reasons stated, are not entitled to a specific execution of the contract.

A new ground of relief has been assumed in the argument here, that was not made in the circuit court; which is, that although this court should be of the opinion, that specific execution of the contract ought not to be decreed, still, the complainants are entitled to a decree for the rents and profits of the land, while it was in the possession of the defendants. The defendants object to this relief, first, because the bill is not so framed as to embrace it; and, secondly, because this claim was adjusted in the action at law, or might have been set up to lessen the demand of the plaintiff in that action.

There is no rule of court or principle of law, which prevents the complainants from assuming a ground in this court, which was not suggested in the court below; but such a course may be productive of much inconvenience, and of some expense. Although there is no specific prayer in the bill, to be paid the *rents and profits, yet the court think, that, under the general prayer, this relief may be granted. Under this prayer, any [*403 relief may be given for which the basis is laid in the bill. In this case, the possession of the land by the defendants is alleged, and the demand for rents and profits would result from this fact. There is no pretence, that this demand was taken into view in the action at law. As it consisted of unliquidated damages, it was not a proper subject for a set-off; and it appears, that the judgment at law was rendered for the consideration-money and interest.

That part of the decree of the circuit court which refused a specific execution of the contract, is affirmed; but in order to afford relief for the rents and profits, the decree dismissing the bill is opened, and the cause remanded 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 Ohio, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that that part of the decree of the said circuit court in this cause which refused a specific execution of the contract, is affirmed; but in order to afford relief for the rents and profits, it is further ordered and decreed by this court, that the decree of the said circuit court, dismissing the bill, is hereby opened, and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, and in conformity to the decree of this court. And it is further ordered, that each party pay his own costs in this court.

*Louis McLane, Executor of Allen McLane, deceased, Claimant of a moiety of the forfeiture of the Ship Good Friends, Appellant, *v.* United States.

Remission of forfeiture.

The ship Good Friends, and her cargo of British merchandise, owned by Stephen Girard, a citizen of the United States, was seized by the collector of the Delaware district. on the 19th of April 1812, for a violation of the non-intercourse laws of the United States, then in force; the ship and cargo were condemned as forfeited, in the district and circuit courts of the Delaware district; on the 29th July 1813, congress passed an "act for the relief of the owners of the Good Friends, &c.," and a remission of the forfeiture was granted by the secretary of the treasury, under the authority of that act, with the exception of a sum equal to the double duties imposed by an act of congress passed on the 1st of July 1812. The collector was entitled to one moiety of the whole amount reserved by the secretary of the treasury, as the condition of the remission.

Where a sentence of condemnation has been finally pronounced, in a case of seizure, this court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law; and it is a familiar practice, to institute proceedings for the purpose of such distribution, whenever a doubt occurs as to the rights of the parties, who are entitled to share in the distribution.

The duty of the collector, in superintending the collection of the revenue, and of making seizures for supposed violations of law, is onerous and full of perplexity; if he seizes any goods, it is at his own peril; and he is condemnable in damages and costs, if it should turn out, upon the final adjudication, that there was no probable cause for the seizure; as a just reward for his diligence, and a compensation for his risks—at once to stimulate his vigilance and secure his activity—the laws of the United States have awarded to him a large share of the proceeds of the forfeiture. But his right by the seizure is but inchoate; and although the forfeiture may have been justly incurred, yet the government has reserved to itself the right to release it, either in whole or in part, until the proceeds have been actually received for distribution; and in that event, and to that extent, it displaces the right of the collector; such was the decision of this court, in the case of the United States *v.* Morris, 10 Wheat. 246.

But whatever is reserved to the government, out of the forfeiture, is reserved as well for the seizing officer as for itself; and is distributable accordingly; the government has no authority, under its existing laws, to release the collector's share, as such, and yet to retain to itself the other part of the forfeiture.

In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods; they are not entitled to entry at the custom-house, or to be bonded; they are, *ipso facto*, forfeited, by the mere act of importation.[1]

Appeal from the Circuit Court of Delaware. The material facts of the *405] case appear in the following agreed *statement, made in the circuit court, and brought up to the supreme court of the United States, to wit:

"On motion of C. A. Rodney, on behalf of Colonel A. McLane, collector of the Delaware district, for a distribution of the forfeiture decreed by the court, of which the said A. McLane claims one full moiety of the whole, exacted from, and paid by, the claimant, the following statement of facts is agreed to, and submitted to the court by the counsel on both sides: The ship Good Friends, laden with the cargo above stated, consisting of goods, wares and merchandise, of British growth, produce or manufacture, was seized, as prohibited, by the said A. McLane, collector as aforesaid, within the district aforesaid, on the 19th of April 1812, for a violation of the acts of congress in such case made and provided; the said ship and cargo were

[1] See Hoyt *v.* United States, 10 How. 137–8.

afterwards libelled, and prosecuted to condemnation, in the district court of the Delaware district; and the sentence of that court was afterwards affirmed on appeal, by a decree of the circuit court, from which decree an appeal was not prosecuted. That, by virtue of an act of congress, entitled, 'an act for the relief of the owners of the ships called the Good Friends, the Amazon, and the United States, and their cargoes, and also of Henry Bryce,' passed the 29th July 1813, upon the petition of Stephen Girard, claimant of the cargo of the ship Good Friends as aforesaid, a remission of the forfeiture was granted by the secretary of the treasury, with the exception of a sum equal to the amount of the double duties imposed by an act of congress passed on the 1st of July 1812; that the said sum was afterwards paid by the said S. Girard, to C. J. Ingersoll, district-attorney of the United States for the district of Pennsylvania. That it has been decided by the treasury department, that the said Allen McLane is entited to one moiety of the additional duties imposed by the act of 1st July aforesaid, on goods not prohibited, and which is, therefore, undisputed, but not to a full moiety of the whole sum exacted from the said S. Girard, and paid as aforesaid; whereas, the said A. McLane, collector as aforesaid, insists, that he is legally and justly entitled to one full moiety of the whole amount paid as aforesaid, considering *it all as forfeiture; inasmuch as the cargo of the ship Good Friends consisted entirely of goods prohibited, and not subject to any [*406
duty; and that whatsoever portion was not remitted, is to be considered as forfeiture; and that, as the sum exacted is one and indivisible, he is entitled to a full moiety of it. It is further agreed, that a decree *pro formâ* be entered on this motion, against the said A. McLane, for the purpose of bringing this question before the supreme court of the United States for final decision; and that an appeal be entered, in due form, from such decree, and that this statement of facts, with the records, exhibits, depositions and documents herein referred to, be transmitted to the said supreme court for hearing, at the ensuing term."

The particular facts referred to in the statement, appeared at large on the record of the proceedings in the district and circuit courts. The following are abstracted from the record:

The seizure was made on the 19th of April 1812, at New Castle, in the state of Delaware; the libel was filed on the 5th May 1812; the goods were appraised and delivered to the claimant upon bond, with sureties for the appraised value, the 9th May, 1812; the decree of condemnation in the district court was given the 17th April 1813, and the same day, an appeal to the circuit court was entered. This decree was affirmed in the circuit court, on the 29th September 1818; subject to the operation of the act of congress of 29th July 1813, and the remission of February 1814. On the same day, an appeal was entered to the supreme court of the United States, which was not prosecuted. In March 1812, Mr. Girard presented a memorial to congress, praying for relief. On the 29th July 1813, an act of congress was passed, of which the following is a copy, to wit:

"An act for the relief of the owners of the ships called the Good Friends, the Amazon, and the United States, and their cargoes; and also of Henry Bryce.

"§ 1. Be it enacted, &c., that the owner of the ships called the Good Friends, the Amazon, and the United States, and of the cargoes on board

*said vessels, which vessels arrived in the month of April 1812, in the district of Delaware, from Amelia Island, with cargoes that were shipped on board said vessels in the united kingdom of Great Britain and Ireland, shall be entitled to, and may avail themselves of all the benefits, privileges and provisions of the act entitled, 'an act directing the secretary of the treasury to remit fines, forfeitures and penalties in certain cases,' passed on the 2d day of January last past, in like manner and on the same conditions as though said vessels had departed from the kingdom aforesaid, between the 23d day of June, and the 15th day of September, mentioned in said act, and had arrived within the United States after the first day of July last."

The district judge of the United States for the district of Delaware, certified the following statement of facts to the secretary of the treasury of the United States, on the 25th November 1813.

"Having inquired into the facts stated in the annexed petition, after reasonable notice thereof had been given to the district-attorney and the collector of Wilmington, I do find, and cause to be stated to the secretary of the treasury of the United States: 1. That Stephen Girard, the petitioner, is a citizen of the United States, as stated in his petition. 2. That the said petitioner is the owner of the ship Good Friends and her cargo, and that he was the owner, at the time of the shipment of the cargo at London, and also at the time of the arrival of the ship and cargo in the district of Delaware. 3. That the said ship and cargo arrived in the said district of Delaware, before the declaration of war, to wit, in the month of April 1812, and were thereupon seized and prosecuted, as forfeited for a breach of the non-importation laws."

The following protest was presented by Allen McLane, Esq., November 25th 1813. "On motion, on behalf of the collector of the Delaware district, in the case of the petition of S. Girard for the remission from forfeiture of his ship Goods Friends and cargo, which had arrived in the Delaware district from London, *via* Amelia Island, and was thereupon by the said collector, acting from his own knowledge of the matter, seized and forfeited, and
*408] in pursuance to instructions from the secretary of the treasury, *bearing date the 6th of May, A. D. 1812, libelled in the district court, for the Delaware district, and afterwards condemned as forfeited, by the sentence of the said court, whereby a right to one moiety or half part of the appraised value of the said ship and cargo became vested in the said collector; it is suggested and alleged by the said collector, that the right and interest which thus vested in him by virtue of the said seizure, forfeiture and sentence of condemnation, in the said moiety of the said ship and her cargo, was absolute and indefeasible, so long as the said sentence of condemnation remained in force; so that, by no act of congress, passed subsequently to the said sentence of condemnation, could such his right or interest be affected, impaired or divested; and it is, therefore, insisted on behalf of the said collector, protesting against the allowance of the prayer of the said petition, or the said petitioner obtaining the benefit thereof, that this court should not, by its certificate or act upon the said petition, impair or infringe the right of the said collector in the said moiety of the said ship and cargo; and to the end that this allegation and protest may appear, that a copy thereof may be annexed to the honorable district judge's certificate,

and act upon the said petition. And it is further suggested by the said collector, that the act of congress, under which the petition is presented, was not intended in its provisions to extend to any case in which a sentence of condemnation had been rendered, but only to the cases from Amelia Island, which were *sub judice*, and undecided, at the time of passing it." And the case of the Good Friends having been regularly prosecuted to condemnation, before the passing of the said act, it is thereupon ordered and directed by his honor the judge, that a copy of this suggestion be transmitted to the secretary of the treasury, with the certificate in this case granted by this court.

The remission by the secretary of the treasury, on the 24th of February 1814, was in these terms: "To all to whom these presents shall come, I, George Washington Campbell, secretary of the treasury of the United States, send greeting: Whereas, a statement of facts, bearing date the 25th day of November 1813, together with the petition of Stephen Girard, owner of the ship Good Friends and cargo, thereto annexed, *touching the forfeitures and penalties which, by reason of the importation [*409 of certain merchandise in the said ship Good Friends, have been incurred under a statute of the United States, entitled, 'an act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,' and a statute entitled, 'an act concerning the commercial intercourse between the United States and Great Britain and France, and for other purposes,' and the statute supplementary to the last-mentioned statute, has been transmitted to the secretary of the treasury, by the judge af the United States for the district of Delaware, pursuant to the statute of the United States, entitled, 'an act to provide for mitigating or remitting the forfeitures, penalties or disabilities accruing in certain cases therein mentioned,' and pursuant to two other statutes of the United States, one of which is entitled, 'an act for the relief of the owners of the ships called the Good Friends, the Amazon, and the United States, and their cargoes, and also of Henry Bryce;' and the other, which is therein referred to, is entitled, 'an act directing the secretary of the treasury to remit fines, forfeitures and penalties in certain cases,' as by said statement of facts and petition, remaining in the treasury department of the United States, may fully appear: And whereas, I, the said secretary of the treasury, have maturely considered the said statement of facts and petition; and whereas, it has been proved to my satisfaction, that the goods, wares and merchandise, by the importation whereof the forfeitures and penalties aforesaid have been incurred, were, at the time of their shipment and importation, *bonâ fide* owned by a citizen of the United States, and the said forfeitures and penalties were incurred without wilful negligence or intention of fraud: Now, therefore, know ye, that I, the said secretary of the treasury, in pursuance of the directions of the said act entitled, 'an act for the relief of the owners of the ships called the Good Friends, the Amazon, and the United States, and their cargoes, and also of Henry Bryce;' and by virtue of the power and authority vested in me, by the aforesaid several other acts, do hereby remit to the petitioner aforesaid, all the right, claim and demand of the United States, and of all others whomsoever, to the whole or any part of the fines, penalties and *forfeitures incurred as aforesaid, upon the costs and charges that have [*410

arisen, or may arise, being paid, and on payment of the duties, which would have been payable by law on the goods, wares and merchandise imported in the said ship Good Friends if the same had been legally imported into the United States after the 1st day of July 1812; and also, do hereby direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be determined, on payment of the costs, charges and duties as aforesaid."

This case was argued by *Jones* and *Sergeant*, for the appellant; and by *Taney*, Attorney-General of the United States, for the appellees.

Sergeant, for the appellant, contended, that the decree of the circuit court ought to be reversed, and a decree rendered in favor of the appellant; because the amount directed by the remission to be paid to the United States was, in fact and in law, a portion of the thing forfeited, or of the proceeds thereof; and was so directed and ordered by virtue of the power derived from the forfeiture; and therefore, the appellant is entitled to a full moiety thereof.

1. Was not the late Allen McLane entitled, and are not his personal representatives entitled, to one equal moiety of what was reserved by the government, out of the forfeiture of the cargo of the ship Good Friends? The right to the moiety of what has been received, beyond the amount of the single duties, is admitted. That matter is disposed of, and finally decided. The question, therefore, is, whether he is not entitled also to a moiety of the residue, or of that sum which is equal in amount to what are denominated the single duties. In other words, whether the sum reserved is divisible, so that one part of it is to be dealt with and considered as forfeiture, and the other part as not being forfeiture. It is contended, and an endeavor will be made to maintain, that the whole is forfeiture, and to be dealt with and disposed of accordingly. That there is no ground for a distinction to the prejudice of the collector. That such distinction as has been made is entirely arbitrary (*mitiori sensu*) and unwarranted.

*411] *Before proceeding to refer to the several acts of congress upon this subject, it is necessary to state some dates. The seizure was made by the collector, A. McLane, at New Castle, in the state of Delaware, the 19th April 1812; the libel was filed the 5th May 1812; the condemnation in the district court was upon the 17th April 1813. The act of congress for the relief of the owner of the Good Friends was passed on the 29th July 1813; the remission by the secretary of the treasury was granted upon the 24th February 1814. The decree of condemnation was affirmed in the circuit court the 29th September 1818; Mr. McLane protested against the remission on the 25th March 1813.

The several acts of congress material to the case, are, first, the act of the 29th July 1813, which is set out in the case agreed. (6 U. S. Stat. 122.) This act refers for the "mode" and "measure" of relief to the act of 2d January 1813. (2 U. S. Stat. 789.) The difference between the cases provided for by the act of 2d January 1813, and the present case, is obvious. Those were cases of goods brought in after the duties were doubled; this case is one of goods brought in before that period. The other acts are the acts doubling the duties, passed on the 1st July 1812. (2 U. S. Stat. 768.) The act of 2d January 1813, refers to the act for mitigating and remitting

penalties, of 3d March 1797. (1 Ibid. 506.) The difference between the acts of 1813 and the general act of 1797, consists in several very important particulars. 1. The facts to be proved under the act of 1797, are not required to be proved under these acts. 2. By the acts of 1813, no discretion is given to the secretary of the treasury. 3. The terms of remission are prescribed by the law, and not left to the secretary, as by the act of 1797.

This act, 29th July 1813, is, therefore, neither more nor less than a legislative remission, applying, retrospectively, to the relief of forfeitures incurred before the passing of the act. This is a most material circumstance, to be borne in mind throughout the present case. It was a relief in cases to which no existing power applied, upon terms which no existing law prescribed. It was an act of legislative grace and pardon, of a very peculiar character. *As between the United States and the claimants, such an exertion of power was well enough, and is not to be complained [*412 of. As respects third persons, whose rights and interests were already vested, and were to be affected, it is another question.

The acts under which the forfeiture in the case of the Good Friends accrued, and the acts under which the rights of Colonel McLane became vested, were the following: The first was the act of 1st March 1809, §§ 4, 5 (2 U. S. Stat. 529); the act of 28th June 1809, §§ 1, 2, 4 (Ibid. 530); the act of 1st May 1810, § 3 (Ibid. 606); the act of 2d March 1211 (Ibid. 651). Under these acts, all importation was prohibited; no goods could be entered or become liable to duty; they were all subject to seizure and condemnation. By these acts, it will be seen, that penalties and forfeitures were to be imposed and distributed according to the provisions of the 91st section of the act of the 2d March 1799. (1 U. S. Stat. 697.) These are all the acts or parts of acts it is material now to refer to.

The question, then, is upon the true interpretation and meaning of the act of the 29th July 1813, keeping in view all the acts and parts of acts already referred to. It is not necessary now to inquire into the general power of congress, upon the subject of forfeitures incurred. So far as respects the property relinquished by the act, the collector now acquiesces; although he protested at the time, and considered himself very much injured. But as to that part which was not relinquished, but was retained by the United States, the question is, upon the interpretation of the act, involving, *quoad hoc*, the power of congress. Could congress not only relinquish a part of the forfeiture incurred, to the prejudice of the collector's rights; but could they also, of the portions reserved, give to the United States a larger portion than to the collector? It is considered clear, that they could not. By the seizure, the collector had a right in the property seized, to the extent of one-half, to be consummated by condemnation. *Jones* v. *Shore*, 1 Wheat. 462; *Van Ness* v. **Buel*, 4 Ibid. 74; [*413 *United States* v. *Morris*, 10 Ibid. 246, 292–3.

2. There existed no law which conferred upon the secretary of the treasury, or upon any one else, a power of remission, so as to impair that right, or to prevent or diminish its enjoyment by the collector. It may be, that it was within the scope of the president's power of pardon, though that it is a questionable point. It has once been before this court (*United States* v.

Lancaster, 5 Wheat. 434), but was not decided. It does not arise here, for the pardoning power has not been interposed.

3. Congress have no such power, that is, to operate by legislation upon pre-existing vested rights.

4. Wherever congress have legislated upon the subject of remission, it has always been with a saving of pre-existing rights; and such they have always considered to be the rights acquired by seizure. Of this there is the plainest evidence in the act of 3d March 1797, § 3. (1 U. S. Stat. 506.) *United States* v. *Morris*, 10 Wheat. 246. There is, also, plain evidence of this in the act of 28th June 1809, § 2. (2 U. S. Stat. 550.) There is very powerful evidence of this also in the fact, that every law creating penalties and forfeitures gives a special power of remission, prospectively. So that it may be said to be the sense of the legislature, as it is of the judiciary, that the right is vested by the seizure and prosecution, subject only to such qualified power of remission as then existed by law. Colonel McLane, the collector, might well contend, as he did, that there was no power, by subsequent legislation, to touch his share of the forfeiture. He is fully sustained in it; for such appears to be the uniform understanding, without exception.

5. Under the general law, the secretary of the treasury has clearly no power to remit or relinquish the collector's part, *eo nomine*. *The Margaretta*, 2 Gallis. 515.

6. No duties were by law payable upon these goods; no duties could accrue upon them. Duties by law accrue, and are payable only upon goods imported according to law; no duties are or can be payable upon goods brought in contrary to law, and in violation of law. They cannot be, for the most obvious and conclusive reasons. Duties *accrue, not upon
*414] arrival in the United States, but upon arrival at the port of entry. *United States* v. *Vowel*, 5 Cranch 368; *Arnold* v. *United States*, 9 Ibid. 104; s. c. 1 Gallis. 348. But forfeiture to the United States also accrues, at latest, immediately upon arrival in the United States, and before arriving at the port of entry. No matter when the seizure takes place, it has relation back to the time of offence committed, and overreaches a *bonâ fide* sale. This has been decided upon the very acts now in question. *United States* v. 1960 *Bags of Coffee*, 8 Cranch 398; *United States* v. *The Mars*, Ibid. 417. So, in *Gelston* v. *Hoyt*, 3 Wheat. 246, 311: "A forfeiture attaches *in rem*, at the moment the offence is committed, and the property is instantly divested." If it be instantly divested as to the former owner, it is, of course, instantly vested in the United States; but no duty is payable upon goods belonging to the United States. The goods in question, therefore, were never liable to duties. No duties were by law payable upon them, and no duties could be charged upon them; they could not be entered or bonded. No duties accrued upon them: for, 1. They were not legally imported. 2. They were forfeited to the United States, before arrival in port, and before duties could accrue. 3. That forfeiture was consummated by seizure, and conclusively proved by condemnation; it overreaches everything.

7. It need only be added, for the entire understanding of the question, that in this forfeiture, accrued and perfected, before duties could accrue, the collector had, by law, a vested right to a moiety. It was his by contract, as much as his salary; as a part of the emoluments of his office; or as a reward for his special exertions, exposure and sacrifice. In these cases, it

was very well earned; it cost him great labor, and exposed him to a contest with powerful adversaries; he stood alone against a host. No doubt, it was subject to existing laws; no doubt, it was subject to existing rights; but it was not subject to new or subsequent laws; nor to newly-created rights. One-half of whatever might be recovered by the United States, belonged, by law and by contract, to the collector. The collector's part, as such, cannot be remitted. *The Margaretta*, 2 Gallis. 522.

*It is not intended, however, to examine the general power of congress, nor to ask this court to perform the invidious duty of limiting an exercise of power by congress. Let it be admitted, for the present purpose, that congress can, by a legislative remission, release the forfeiture, and disappoint the just expectations of the collector, as an incident. Can congress do still more? can congress reserve to the United States a portion of the forfeiture, giving up entirely that of the collector? The proposition is too extravagant to be admitted for a moment; the intention to do so, is too manifestly unjust, to be imputed; respect for congress forbids the imputation. Mark what the effect would be. The policy of these acts of grace towards importers is not to be questioned now. But this is clear—it gave to the offenders the full benefit of the non-importation laws, at the expense of the rest of the community; they had, in effect, the fruits of a monopoly. The United States, too, are to reap a harvest; the collector alone, who has toiled and suffered in the service, is to go unpaid and unrewarded. This ought not to be! This cannot be! [*415

The treasury, it is admitted, has been properly cautious in avoiding the responsibility of a decision of this question. A court of justice experiences no such difficulty, and practices no such caution; it pronounces its judgments according to the right. Upon the ground of right, it is asked, whence is any such power derived as that asserted for the United States?

This, then, was the state of things, when the act of July 1813, passed. No duties had accrued, or were payable; the goods were forfeited, in fact and in law; the forfeiture was fixed by the condemnation; the right to one-half was by law vested in the collector; an application was made to congress for relief; congress gave it by the act of July 1813. What is the just and legal interpretation of that act? It is not necessary to remind the court, that such an interpretation is always to be given, if possible, as is consistent with justice and the rightful power of the legislature. Nothing but express words can extort a different construction, even from an act of a parliament, said to be omnipotent; still less, of an act of a constitutional congress, whose power is limited by written law, and by a cautious respect for the rights of the citizen. *What, then, is the true construction of the act in question? [*416

1. There are no express words, it must be admitted, requiring an unjust construction of the act, to the injury of the collector: 2. There is nothing which shows this to have been the intention, but the contrary: for, 3. The reservation is one and entire, without discrimination or distinction; the whole reservation is of one character; it all derives its efficacy from the same source, namely, forfeiture; giving up a part, and retaining the rest by right of forfeiture: 4. The true character of the act is that of relinquishment or remission of a part; the title of the act, and all the provisions, demonstrate this.

It is proper here to notice an incident in the case, which may perhaps appear, at first view, to have some influence upon it. It seems, that the goods were given up, on bonds for the appraised value, the 9th May 1812. The only authority for such a delivery is that contained in the 89th section of the act of 1799. (1 U. S. Stat. 695.) On this, it is to be observed, that it is no part of the case stated. Why not, is obvious; for it was unauthorized by law; the non-intercourse acts did not adopt this provision in the collection law, expressly or impliedly. The reason of it was, that it did not apply; goods were not importable under the law; the treasury remonstrated against it.

2. If it had applied, it would not have altered the question of forfeiture, nor the question of distribution; they do not depend upon the mode of proceeding. It is wholly disregarded by the act of 29th July 1813. That act takes up the matter, upon the original simple ground of forfeiture, without regard to this proceeding. It fixes the forfeiture to be insisted upon, in gross; it does not say "in addition" to duties. It, in fact, and in the plainest possible way, disregards that incident, and takes up the matter entirely *de novo*. If anything had previously been paid, it could only be a credit under this act, whether paid as duties or otherwise: so the treasury construed it. What, then, was the intention of the act? It was a just and honest intention. To do justice to the country, and at the same time to do justice to the confessedly meritorious officer. To give to the United States an amount equal
*417] to the duties *which would have accrued, if the importation had been legal; and to the collector, a like amount. The duties that would have accrued were the single duties; the goods arrived before the duties were doubled.

What was the mode adopted to accomplish this purpose? To fix a sum equal to twice the amount of duties; this precisely accomplished the purpose. The mention of "duties" was merely a reference to fix the amount according to this view. It was not to charge duties, but only to ascertain a sum. So it has been understood by the treasury. If any part was "duty," the whole was duty. But the treasury has agreed, that one moiety was forfeiture, and that of that moiety the collector is entitled to one-half. This concession (too plain to be withheld) is an admission which inevitably goes to the whole: for, as the reservation is one and entire, if any part was forfeiture, the whole was forfeiture, and none was duty. Upon any other construction, the United States would get three-fourths, and the collector only one-fourth. He would be stripped of his due proportion, even of the remnant that was retained of that entire and large forfeiture of the whole cargo, of which a moiety so clearly belonged to him.

On these grounds, it is submitted, that the title of the appellant is plain. The partnership between the United States and the collector, established by law, continues throughout. It is not to be supposed, that when the United States, by their own act, diminished the joint stock, without the consent and against the remonstrances of the collector, to his great prejudice, they intended also, by their own mere power, to do him still further wrong, by changing the proportions of interest in what remained, and appropriating to themselves (at his expense) the largest share of what remained. Less than "equality" cannot here be "equity."

Taney, Attorney-General, contrà.—The principles which regulate the case now before the court have been decided in the case of the *United States* v. *Morris*, 10 Wheat. 289. The settlement by the treasury with the owner of the Good Friends and her cargo, settles the case. Its being a remission by an act of congress, does not change the *principles by which the case is governed. The remission does not derive its authority from [*418 the act of congress of 1813; that act was intended only to justify what might perhaps be doubtful. The power to remit existed prior to that act.

The ship Good Friends arrived in the Delaware, in April 1812; and on the 1st of July of that year, the act imposing double duties was passed. The double duties were imposed as a penalty; and this principle was assumed at the treasury and acted upon in the case; but as to the single duties, they would have been due, if the vessel had arrived after the 1st of July; and as to these duties, the importation was treated as if it had been legal. The settlement in the case of this ship was the same with those which were made in similar cases.

An examination of the act of the 29th July 1813, will show, that it was not an act conferring new powers, but it gave relief on the same terms as the act referred to; and we must look to the law of July 1st, 1812, to see what were the benefits intended to be conferred by the act of July 29th, 1813, for the relief of the owners of the ships Good Friends and Amazon, &c. The remissions under the act of January 2d, 1813, were made on payment of the duties; and the act of July, in favor of the collector, was intended to put this case on the same footing; except that an additional penalty is imposed by the act, and the rights of parties must be determined by the act of January 2d, 1813. In all these cases, they were forfeitures, and within the power of the secretary of the treasury to remit; and the act was passed on account of the magnitude of the case. Message of the President of the United States to Congress of 4th March 1812; also Report of Mr. Gallatin, Secretary of the Treasury, of 18th March 1812. The importations against the non-intercourse laws at that period are stated, in the report of Mr. Gallatin, to amount to about $18,000,000; and they would have given duties to the amount of $5,000,000. Mr. Gallatin expressly states, that all these cases came under the remitting power of the secretary of the treasury, but asked the interference of congress. There was a report of a committee of congress, sanctioning the power of the secretary, but this was not adopted; and the law of January 2d, 1813, originated from that circumstance. *In all these cases, seizures had been made, and the [*419 law put the importations on the same footing as if they had been legal, and the claims of the seizing officers were not regarded. The whole course of proceedings at the treasury has been according to this construction. To change this construction now, would unsettle millions; and the government would be bound to refund one-half of what was received as duties.

The case of the *United States* v. *Morris*, 10 Wheat. 289, was under the same non-intercourse law as that to the penalties of which the Good Friends was subjected. The remission of the secretary of the treasury in that case reserved $500, to be distributed among certain officers. The seizure gives no absolute right to the seizing officer; but all is subject to the power of the secretary of the treasury, to dispense with the forfeiture on equitable principles. Upon a full examination of the ques-

tions in this case, these positions may be sustained: 1. The seizure of the Good Friends was for the same cause with the seizures mentioned in the act of January 2d, 1813. 2. The rights acquired by the seizing officer were of the same nature and description with those acquired by the collector, upon the seizures mentioned in the act of January 2d, 1813. 3. The Good Friends, as well as the other vessels, was seized for a violation of the non-intercourse laws. 4. The seizures were made subject to the power of remission given in the 18th section of the non-intercourse law; and the rights of the seizing officer were inchoate and conditional, and might be remitted at any time before the collection of the money. 5. The acts of January 2d, 1813, and July 29th, 1813, did not give the power of remission; it directed the power to be exercised in certain cases. 6. It has been the settled practice of the government, to receive for itself, exclusively, the amount of duties due upon a lawful importation, and to give no part of it to the officer. If, in this case, the appellant is entitled to a share of the duties, due on a lawful importation, the $5,000,000 received upon the remissions under the act of January 2d, 1813, must be divided, and the one-half refunded to the seizing officer. The settled practice of the government would not now be disturbed by the court, unless the case was a clear one under the *law. 7. The court have sanctioned the interpreta- *420] tion of the executive officers, and decided this case in effect, in the case of the *United States* v. *Morris*, 1 Paine 209; 10 Wheat. 289–92, 296. The remission is not in the nature of a pardon, but of a relief in equity—a restoration to his legal rights as a lawful importer. The collector seizes subject to such equity; and if the secretary decides the equity against the United States, the collector is entitled to nothing. The form in which it has been found necessary to bring forward this question, shows that the collector has no legal vested right. Who would call for the money to be brought into court? The United States never directed satisfaction to be entered; they refuse to prosecute further. How can the collector proceed? Who is to ask that the money be brought into court? Who is to be ordered to bring it in? 8. There can be no reason for regarding this portion as forfeiture, under the true meaning of the act of congress. The question is, whether the legal duties are a part of this forfeiture contemplated by the act of March 2d, 1799, ch. 128, §§ 89, 91. (1 U. S. Stat. 695, 697.)

The right of the collector is founded on the act of March 1st, 1809, § 18. (2 U. S. Stat. 532.) Did congress mean, by this language, where the forfeiture was remitted, to give to the collector the one-half? 1. Where they authorized the forfeiture to be remitted, they certainly intended that the legal duties should be paid. 2. They contemplated a case of unlawful importation—a breach of the non-intercourse—for the penalty is inflicted, and the power of remission given in such cases. 3. Where they directed the distribution of the penalty, did they mean the legal dues upon a lawful importation? If this be the interpretation, the relief must always be imperfect; for the United States, in order to protect themselves, must exact from the merchant more than the legal duties. The innocent must always suffer, or the United States must lose a part of its revenue, and divide the duties with the collector. Those who imported goods from England, without a knowledge of the declaration of war, were free from all blame; they ought

not to suffer. It is said, they made large profits: *is the public to lose? The seizure, in that case, is a positive injury. If there was no seizure, the goods would be entered, and the public receive the duties without abatement. The government divides the forfeiture; it divides whatever is gained by the vigilance of the officer. This is the compensation for his responsibility—for the enemies he makes—the friends he disobliges. Such was the situation of the collector, in the case before the court, and he received as his reward $27,000.

It is said, that this release was by virtue of the law passed after this seizure, and not before; and that different terms are required, and therefore, the power was derived from the law of 1813. To this it is answered, that the terms are superadded by the legislature, and the collector therefore had no right to complain. See act of 1797 (1 U. S. Stat. 506); Act of January 2d, 1813 (2 Ibid. 789). The legislature left the power as it stood, but the officer who might remit, refused to do it, unless the additional circumstances were proved. The legislature refused to admit it to be done, without them; and the officer refused to act on his own responsibility, without them. Yet, when it took place, it was by virtue of the power under the act of 1797.

It is objected, that the United States have released the portion of the collector; but to this it is answered, that they have released no more for him than for themselves. There was no contract. The collector was the agent of the government. But supposing there was a contract. It was no more than that the government would share with its agent whatever it received as penalty, and the same amount must be left to the government. But such supposed contracts would extend to the whole cargo, if there was any right vested in the collector by the seizure.

Jones, in reply, contended, that the claims of the collector in the case before the court did not rest upon any general law; nor were they to be arranged under any class of cases. They are founded in a specific case, provided for in a particular law of the United States; and in which law congress had not undertaken to judge of the merits of the claims. The *objection that this court cannot enforce these claims, is unexpected; since the United States have voluntarily submitted the case to this [*422 court. It does not appear, where the money claimed by the appellant is; it may be under the control of the court. It was paid to the district-attorney of the United States, it is true, as the agent of the United States; and it may, perhaps, be presumed to have been paid into the treasury. But the question before the court is as to the right of distribution, not as to the power of enforcing it. The third section of the act of 1797 saves the rights of the collector and of the seizing officer, in all cases of seizure before the act, and gives the court a right to judge of the distribution; and the agreed case, now before the court, implies, that the money shall be deemed in court.

It is denied, that the case of the *United States* v. *Morris* decides this case. There, the law for remission existed at the time of the forfeiture, and there was no question of distribution; but the only question in that case was, whether the execution could be enforced, after the condition of the remission had been complied with; and that case was under the act of 1797,

when the discretion of the secretary of the treasury was uncontrolled. It is not admitted, that the usage of the treasury should have any influence in the case before the court. The right of the appellant is to be decided by the acts of congress; and the court will construe these acts, without the aid of the practice of the government.

There was no discretion as to the payment of the duties on the cargo of the ship, under the act of 1799; it was made absolute and indispensable, that the duties should be paid; and they were demanded, as a precedent condition to bonding the goods. Those duties were not to be deducted, if there should have been ultimately a forfeiture of the goods bonded. But the law of 1813 made no provision about delivering goods; and the whole sum must be considered as paid as the price of redemption, and of course, all that was paid was penalty.

The act of 1799 goes on the ground of an offence having been committed, but mitigated by circumstances; and the secretary of the treasury has power to remit, on such terms as he thinks proper; and the act of 1813 *423] goes on the same *principle, but no discretion is left to the secretary, on condition of making certain payments. The secretary had no power, under the act of 1797, to remit this penalty. The law of the 1st July was stronger than that of January 1813; and under that law, all that the secretary had to do was, to inquire whether Mr. Girard, the owner of the Good Friends and cargo, was an American citizen.

It is denied, that there was any distinction between legal and extra dutes. The whole amount which was paid by the owner of the ship and cargo, was paid as an entire sum; and the reference to duties was made, only to ascertain the amount to be paid as the condition of redeeming the goods. The law authorizing this remission did not mean, by a retrospective operation, to make lawful that which was illegal. No forms of entry at the custom-house were gone through, nor was anything done, as is required where duties on importation are imposed or collected. The equity of the act of January 1813, was in favor of merchants who had ordered goods, without having had notice of the declaration of war, in sufficient time to revoke the order. The case of the Good Friends was not of that kind; but it rested on other circumstances, and the authorizing the remission was induced by other considerations. This is shown by the petition of Mr. Girard, to which the court is referred. It is submitted, that the law of July 1st, 1813, was nothing more than a remission of the forfeiture, and did not put the case on the ground of a lawful importation. In the cases which were released by the act of January 1813, there was a clear and unqualified exemption from forfeiture or penalty, on payment of duties. This was not the fact, in the case of the Good Friends.

Story, Justice, delivered the opinion of the court.—This case comes before the court upon an application made by Allen McLane, collector of the district of Delaware, to the circuit court of that district, for a decree of distribution of the forfeiture accruing from the seizure and condemnation of the ship Good Friends and cargo, one moiety whereof is claimed by the said collector, as seizing officer; there having been a remission of the for- *424] feiture by the secretary of the treasury, under the *authority of the act of congress of the 29th of July 1813, ch. 33. Upon the conditions

required by that act, the only controversy existing in the cause is between the United States and the collector, in respect to his distributive share. The United States and the collector agreed upon a special statement of the facts; upon which, it was further agreed, that a decree, *pro formâ*, should be entered by the circuit court, against the collector, for the purpose of a final decision in the supreme court; and by an appeal from the *pro formâ* decree, so rendered, the cause now stands before this court.

Upon the argument at the bar, some objection was suggested, though not strenuously urged, against the jurisdiction of the circuit court to entertain the cause, under the peculiar circumstances. But this objection appears to us not well founded. Where a sentence of condemnation has been finally pronounced in a case of seizure, the court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law. And it is a familiar practice, to institute proceedings of this nature, wherever a doubt occurs as to the rights of the parties, who are entitled to share in the distribution. There is nothing in the circumstances of the present case, to displace this jurisdiction. And it now appears, that the proceeds of which the distribution is now claimed have been, by an express agreement between the United States and the collector, put in a situation to be forthcoming to meet the exigency of the decree which may be rendered upon the statement of facts.

The act of congress of the 29th of July 1813, enacts, "That the owners of the ships called the Good Friends, the Amazon, and the United States, and of the cargoes on board said vessels, which arrived in the month of April 1812, in the district of Delaware, from Amelia Island, with cargoes that were shipped on board said vessels, in the united kingdom of Great Britain and Ireland, shall be entitled to, and may avail themselves of, all the benefits, privileges and provisions of the act entitled, 'an act, directing the secretary of the treasury to remit fines, forfeitures and penalties in certain cases,' passed on the 2d day of January last past, in like manner and on the same conditions as though said vessels had departed from the kingdom aforesaid, between the 23d day of June and the 15th day *of September mentioned [*425 in said act, and had arrived within the United States after the first day of July last."

The act of the 2d of January 1813, ch. 149, enacts, "that in all cases where goods, wares and merchandise, owned by a citizen or citizens of the United States, have been imported into the United States from the united kingdom of Great Britain and Ireland, which goods, &c., were shipped on board vessels which departed therefrom between the 23d day of June last and the 15th of September last, and the person or persons interested in such goods, &c., or concerned in the importation thereof, have thereby incurred any fine, penalty or forfeiture under an act, &c. (reciting the titles of the non-intercourse acts of 1st of March 1809, of the 1st of May 1810, and of 2d of March 1811), on such person or persons petitioning for relief to any judge or court proper to hear the same, in pursuance of the provision of the act entitled, 'an act to provide for mitigating or remitting the fines, penalties and forfeitures, in certain cases therein mentioned,' and on the facts being shown, on inquiry had by said judge or court, &c.; in all such cases, wherein it shall be proved to his satisfaction, that said goods, &c., at the time of their shipment, were *bonâ fide* owned by a citizen or citizens of the

United States, and shipped, and did depart from some port or place in the united kingdom of Great Britain and Ireland, owned as aforesaid, between the 23d day of June last and the 15th day of September last, the secretary of the treasury is hereby directed to remit all fines, penalties and forfeitures that may have been incurred under the said act, in consequence of such shipment, importation or importations, upon the costs and charges which have arisen, or may arise, being paid, and on payment of the duties which would have been payable by law on such goods, &c., if legally imported," &c.

The result of both these acts, taken together, as applicable to the case of the Good Friends, is, that the secretary of the treasury was directed to remit the forfeiture, upon the payment of costs and charges, and the duties upon the cargo, which would have been payable upon the same goods, if legally imported after the 1st of July 1812, that is to say, upon payment of the double duties imposed by the act of the 1st of July 1812, ch. 112. Without question, these acts of congress were *directory and mandatory to the secretary; and in his remission, which forms a part of the case, he purports to act, and has in fact acted, in obedience to their requirements. It is wholly unnecessary to inquire, whether the secretary would have had authority to remit the forfeiture in this case, under the remission act of the 3d of March 1797, ch. 67; because, in the first place, the terms, upon which the remission is to be granted by that act, essentially differ from those prescribed by these acts; and because, in the next place, the secretary purports to have acted in obedience to the latter.

*426]

The question, then, arises, in what light the reservation and payment of the double duties, as conditions upon which the remission is granted, are to be considered? Are the double duties to be deemed a mere payment of lawful duties; or are they to be deemed a part of the forfeiture reserved out of the proceeds of the cargo? If the latter be the true construction, then the collector is entitled to a moiety; if the former, he is barred of all claim. The duty of the collector in superintending the collection of the revenue, and in making seizures for supposed violations of law, is onerous, and full of perplexity. If he seizes any goods, it is at his own peril; and he is condemnable in damages and costs, if it shall turn out, upon the final adjudication, that there was no probable cause for the seizure. As a just reward for his diligence, and a compensation for his risks—at once to stimulate his vigilance and secure his activity—the laws of the United States have awarded to him a large share of the proceeds of the forfeiture. But his right, by the seizure, is but inchoate; and although the forfeiture may have been justly incurred, yet the government has reserved to itself the right to release it, either in whole or in part, until the proceeds have been actually received for distribution; and in that event, and to that exteut, it displaces the right of the collector. Such was the decision of this court in the case of the *United States* v. *Morris*, 10 Wheat. 246. But whatever is reserved by the government out of the forfeiture, is reserved, as well for the seizing officer, as for itself; and is distributable accordingly. The government has no authority, under the existing laws, to release the collector's share as such; and yet to retain to itself the other part of the forfeiture.

*In the present case, it is perfectly clear, that the seizure of the Good Friends and her cargo was justifiable, and that they were forfeited for a violation of the non-intercourse acts. This is established, not only by the final decree of condemnation, but by the very terms of the remission granted by the secretary of the treasury. In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods; they are not entitled to entry at the custom-house, or to be bonded. They are *ipso facto* forfeited, by the mere act of importation. The Good Friends, then, having arrived in April 1812, long before the double duties were laid, and her cargo being prohibited from importation, it is impossible, in a legal sense, to sustain the argument, that the importation could be deemed innocent, and the government could be entitled to duties, as upon a lawful importation. It was entitled to the whole property, by way of forfeiture; and to nothing by way of duties. When, therefore, congress authorized the remission, upon the payment of double duties, the latter was imposed, as a condition of restitution, upon the offending party. In the language of the act of the 2d of January 1813, the remission was to be "on payment of the duties, which would have been payable by law on such goods, &c., if legally imported;" not upon payment of the duties, which had lawfully accrued upon the same goods. The act pre-supposes that no duties had accrued, or could accrue, by operation of law, upon the goods; and the act of the 29th of July 1813, expressly treats it as a condition. Indeed, it is impossible, that double duties could have lawfully accrued upon the importation of the cargo of the Good Friends, in April 1812, when the double duties were not imposed until the passage of the act of the 1st of July, of the same year.

If the government had reserved a gross sum, equivalent to the double duties, out of the forfeiture, as a condition of the remission, there could be no doubt, that the collector would have been entitled to his moiety of the sum so reserved. Can it make any difference, in point of law, that the reservation is made, by a reference to double duties, as a mode of ascertaining that sum? It has not been pretended, that the act of the 29th of July 1813, could divest the rights of the collector, antecedently vested in him by the existing laws. And if such a *doctrine could be maintained at all, it would still be necessary to establish, that there was an [*428 unequivocal intention on the part of the government to remit his share, and to retain its own share of the forfeiture. Such an extraordinary exercise of power, if it could be even maintained, where it is subversive of existing rights, ought to be evidenced by terms susceptible of no doubt. We are of opinion, that the present act neither justifies nor requires any such construction. The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture; and not as a declaration of intention on the part of the government, that they were to be received as legal duties, due upon a legal importation.

But a distinction has been taken, at the argument, on behalf of the United States, and an apportionment or division of the duties has been insisted on. It is said, that so much of the duties demanded as were equal to the single duties, payable by law on imported goods, in April 1812, ought to be considered as received in that character by the government; since this case has been treated by the government as an innocent importation.

But as to the additional duties imposed by the act of 1st of July 1822, they may be considered as a reservation of forfeiture. And it is added, that the government has itself acted upon this distinction, in this very case; for it has allowed the collector his moiety of the latter, and denied it in respect to the former. The true answer to be given to this argument is, that the act itself contemplates no such apportionment or division of the duties. The duties are reserved as a whole, and not in moieties. And it could not well be otherwise; for, as has been already shown, no duties at all were legally payable on the goods. They were, in fact, and were treated by the government as prohibited goods. And when the government imposed the double duties as a condition, they were imposed as a sum, which would have accrued upon a legal importation after the first day of July 1812. The very circumstance, that the government itself has treated any part of the reservation as forfeiture, and as distributable accordingly, is conclusive, to show, that the whole is incapable of being treated as duties. The distinction contended for, then, not *being found in the act itself, and part of it being confessedly received in the character of a forfeiture, we think the whole must be treated as received as a reservation by way of forfeiture. Our opinion is grounded upon the fact, that the act refers to the double duties as a mere mode of ascertaining the amount; and that it is undistinguishable from the case of a reservation of a gross sum.

*429]

Upon the whole, the decree of the circuit court, refusing the distribution, is to be reversed, and the cause remanded to that court, with directions to decree to the legal representatives of Allen McLane, the collector, one moiety of the double duties, deducting that portion which has been already received by him.

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 Delaware, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the decree of the circuit court, whereby it was ordered that the said Allen McLane take nothing by his motion for a decree of distribution of the forfeiture decreed by the circuit court in the proceedings in this cause, mentioned upon the statement of facts, in the same proceedings mentioned; and for this error it is ordered, adjudged and decreed, that the decree of the said circuit court upon the motion aforesaid, be and hereby is reversed and annulled. And this court, proceeding to render such decree as the said circuit court ought to have passed, do hereby order, adjudge and decree, upon the said motion and statement of facts, that the said Allen McLane, as collector, as herein mentioned, was, in his lifetime, entitled, and that his legal representative is now entitled, to receive as his distributive share of the forfeiture aforesaid, one full moiety of the whole sum which has been paid by Stephen Girard, according to the act of congress, and the remission by the secretary of the treasury, as in the same statement of facts mentioned. And the said Allen McLane being now dead, it is further ordered, adjudged and decreed, that the same full moiety be paid over to his legal representative, now appearing and made a party to these proceedings in this court, viz., Louis McLane, the executor of the last will and testament of the said Allen McLane, deceased, as his distributive share, accordingly; deducting, however, therefrom, the moiety of the said moiety, which has

been decided by the treasury department to belong to the said Allen McLane; if the same has been received by the said Allen McLane, or by his legal representative.

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*The President, Recorder and Trustees of the City of Cincinnati, Plaintiffs in error, *v.* The Lessee of Edward White, Defendant in error. [*431

Dedication to public uses.

The equitable owners of a tract of land on the river Ohio (the legal title to which was granted to John Cleves Symmes, from whom they had purchased the land, before the emanation of the patent from the United States) proceeded, in January 1789, to lay out on part of the said tract a town, now the city of Cincinnati; a plan was made and approved of by all the equitable proprietors, according to which, the ground lying between Front street and the river was set apart as a common, for the use and benefit of the town for ever, reserving only the right of a ferry, and no lots were laid out on the land thus dedicated as a common; afterwards, the legal title to the lands became vested in the plaintiff in this ejectment, who, under the same, sought to recover the premises so dedicated to public uses: *Held*, that the right of the public to use the common in Cincinnati must rest on the same principles as the right to use the streets; and that the dedication made when the town was laid out, gave a valid and indefeasible title to the city of Cincinnati.[1]

Dedications of land for public purposes have frequently come under the consideration of this court, and the objections which have been raised against their validity, have been the want of a grantee competent to take the title; applying to them the same rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use; the law applies to them rules adapted to the nature and circumstances of the case, to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from and enjoyed, by the dedication.

There is no particular form or ceremony necessary in the dedication of land to public use; al- that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.[2]

Although dedications of land for charitable and religious purposes, which, it is admitted, are valid, without any grantee to whom the fee could be conveyed, are the cases which most frequently occur, and are to be found, in the books; it is not perceived how any well-grounded distinction can be made between such cases and the case of a dedication of land for the use of the city of Cincinnati; the same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public uses, when there is no grantee *in esse* to take the fee; but this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case.

In this class of cases, there may be instances where, contrary to the general rule, a fee may remain in abeyance, until there is a grantee capable of taking, when the object and purpose of the appropriation look to a future grantee in which the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from re-asserting any right *over the land, at all events, so long as it remains in public use, [*432 although there may never arise any grantee capable of taking the fee.[3]

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[1] See Barclay *v.* Howell, *post*, p. 498.

[2] Morgan *v.* Railroad Co., 96 U. S. 716; Godfrey *v.* Alton, 12 Ill. 29; Columbus *v.* Dahn, 36 Ind. 330; Holden *v.* Cold Spring, 24 N. Y. 474.

[3] Land may be dedicated to public use, without vesting the legal title in a corporate body. New Orleans *v.* United States, 10 Pet. 662. But an intention must be shown on the part of the owner, so to dedicate it, manifested by some act or dedication. Irwin *v.* Dixion, 9 How. 10; Robertson *v.* Wellsville, 1 Bond 81; Lounsdale *v.* Portland, 1 Deady 39. The mere omission of a littoral proprietor, however, to use the space between high and low water mark, lays no foundation for a presumption, that he has dedicated it to public use; until he occupy it, the use by the public, though lawful, is not

Cincinnati v. White.

The doctrine of the law relative to the appropriation of land for public highways, was applied to a public spring of water, for public use, in the case of McConnell *v.* Trustees of the Town of Lexington, 12 Wheat. 582.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground, in both cases; and applies equally to the dedication of the common as to the streets. This was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and, doubtless, greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public ground.

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais* which precludes the original owner from revoking such dedication; it is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

If the mere naked fee is in the plaintiff in ejectment, it by no means follows, that he is entitled to recover possession of the land in his action; the action of ejectment is a possessory one, and the plaintiff, to entitle himself to recover, must have the right of possession; whatever takes away this right of possession, will deprive him of the remedy by ejectment.[1]

Error to the Circuit Court of Ohio. The case came before the court on a bill of exceptions, taken by the plaintiffs in error, the defendants in the circuit court, to the instructions given by the court to the jury, on the request of the counsel for the plaintiffs in that court; and to the refusal of the court to give certain instructions as prayed for by the defendants below.

In the opinion of the court, no decision was given on those exceptions, save only on that which presented the question of the dedication of the land in controversy for the use of the city of Cincinnati; which, and the facts of the case connected therewith, are fully stated in the opinion of the court. The arguments of the counsel in the case, on the matters of law presented by the exceptions, are, therefore, necessarily omitted.

The case was argued by *Storer* and *Webster*, for the plaintiffs in error; and by *Ewing* and *Clay*, for the defendants.

*433] *Thompson, Justice, delivered the opinion of the court.—The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground, in the city of Cincinnati, lying in that part of the city usually denominated the common.

To the right understanding of the question upon which the opinion of the court rests, it will be sufficient to state, generally, that on the 15th of October, in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations relative to the payments for the land delayed the consummation of the contract for several years; but on the 30th of September 1794, a patent was issued, conveying

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adverse. Boston *v.* Lecraw, 17 How. 426; s. p. Nelson *v.* Madison, 3 Biss. 244.

[1] Dickerson *v.* Colgrove, 100 U. S. 582–4.

to Symmes and his associates, the land contracted for; and as Symmes was the only person named in the patent, the fee was, of course, vested in him. Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Matthias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one-third of his purchase to Israel Ludlow, and one-third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being the equitable owners of the land (no legal title having been granted), proceeded, in January 1789, to lay out the town. A plan was made and approved of by all the proprietors; according to which, the ground lying between Front street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town for ever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Matthias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17, from the books of John C. Symmes, to Matthias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Matthias Denman, of New Jersey, presents for entry and location, a warrant for one fraction of a section, or $107\frac{8}{10}$ acres of land, by virtue of which he locates the *17th fractional section in the 4th fractional township, east of the Great Miami river, in the first fractional range of townships on the Ohio river; number of the warrant, 192." In March 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located, to Joel Williams; and on the 14th of February 1800, John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed, which included the premises in question; and on the 16th of April 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself. [*434

In the course of the trial, several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff, in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions.

The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff; and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury, "that to enable the city to hold this ground, and defend themselves in this action, by possession, they must show an unequivocal, uninterrupted possession for at least twenty years." On the part of the defendants, the court was asked to instruct the jury, "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication, the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of, and was vested in, the public, for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right to the

said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction: "That it was com-
*435] petent for the original proprietors of the *town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same, by writing or deed, to any particular person; by which reservation and dedication, the right of use to such part is vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court, to be collected from these instructions, was, that although there might be a parol reservation and dedication to the public of the use of lands; yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years was not a defence in this action. The decision and direction of the circuit court upon those points came up on a writ of error to this court.

It is proper, in the first place, to observe, that although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense, as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor, But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from and enjoyed, by the dedication.

It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are the cases which most frequently occur and are to be found in the books, it is not perceived,
*436] how any well *grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases, there may be instances, contrary to the general rule, where the fee may remain in abeyance, until there is a grantee capable of taking; where the object and purpose of the appropriation look to a future grantee, in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from re-asserting

any right over the land, at all events, so long as it remains in public use, although there may never arise any grantee capable of taking the fee.

The recent case of *Beatty* v. *Kurts*, 2 Pet. 256, in this court, is somewhat analogous to the present. There, a lot of ground had been marked out upon the original plan of an addition to Georgetown, "for the Lutheran Church," and had been used as a place of burial, from the time of the dedication. There was not, however, at the time of the appropriation, or at any time afterwards, any incorporated Lutheran church, capable of taking the donation. The case turned upon the question, whether the title to the lot ever passed from Charles Beatty, so far as to amount to a perpetual appropriation of it to the use of the Lutheran church. That was a parol dedication only, and designated on the plan of the town. The principal objection relied upon was, that there was no grantee capable of taking the grant. But the court sustained the donation, on the ground, that it was a dedication of the lot to public and pious uses; adopting the principle that had been laid down in the case of the *Town of Pawlet* v. *Clark*, 9 Cranch 292, that appropriations of this description were exceptions to the general rule requiring a grantee. That it was like a dedication of a highway to the public. This last remark shows that the case did not turn upon the bill of rights of Maryland, or the statute of Elizabeth relating to charitable uses, but rested upon more general principles; *as is evident from what fell from the court in the case of the *Town of Pawlet* v. *Clark*, which was a dedication to religious uses; yet the court said, this was not a novel doctrine in the common law. In the familiar case, where a man lays out a street or public highway over his land, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. And in support of the principle, the case of *Lade* v. *Shepherd*, 2 Str. 1004, was referred to; which was an action of trespass, and the place where the supposed trespass was committed was formerly the property of the plaintiff, who had laid out a street upon it, which had continued thereafter to be used as a public highway; and it was insisted, on the part of the defendant, that by the plaintiff's making a street, it was a dedication of it to the public, and that although he, the defendant, might be liable for a nuisance, the plaintiff could not sue him for a trespass. But the court said, it is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of his absolute property in the soil. The doctrine necessarily growing out of that case has a strong bearing upon the one now before the court, in two points of view. It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from anything that appears in the case, was barely laying out the street by the owner, across his land. And in the second place, that it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so, from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance, until a grantee shall come *in esse*; and indeed, the case referred to in Strange considers the fee as remaining in the original owner; otherwise, he could sustain no action for a pri-

[*437

vate injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law, applicable to highways, it must apply
*438] with equal force, and in all its parts, to all *dedications of land to public uses; and it was so applied by this court to the reservation of a public spring of water, for public use, in the case of *Mc Connell* v. *Trustees of the Town of Lexington*, 12 Wheat. 582. The court said, the reasonableness of reserving a public spring, for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood, that the spring lot was drawn by any person, and the early appropriation of it to public purposes, were decisive against the claim.

The right of the public to the use of the common in Cincinnati must rest on the same principles as the right to the use of the streets; and no one will contend, that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public. All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground, in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and, doubtless, greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds. And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public, in such cases, does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and
*439] private right. *The case of *Jarvis* v. *Dean*, 3 Bing. 447, shows, that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case, turned upon the question, whether a certain street, in the parish of Islington, had been dedicated to the public as a common public highway. Chief Justice Best, upon the trial, told the jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury and the verdict found thereupon; although this street had been used as a public road only four or five years; the court saying, the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point, therefore, upon which the establishment of the public street

rested, was, whether it had been used by the public as such, with the assent of the owner of the soil; not whether such use had been for a length of time, which would give the right by force of the possession; nor whether a grant might be presumed; but whether it had been used with the assent of the owner of the land; necessarily implying, that the mere naked fee of the land remained in the owner of the soil, but that it became a public street, by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case, the fact of dedication to public use is not left to inference, from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And indeed, the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and direction of the trustees, would be amply sufficient to show an acceptance, if that was necessary, for securing the protection of the public right.

*But it has been argued, that this appropriation was a nullity, because the proprietors, Denman, Ludlow and Patterson, when they [*440 laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true, that no legal title had passed from the United States to Symmes. But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis* v. *Dean*, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case there having been an actual dedication, fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex* v. *Lloyd*, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated t to the public.

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the

land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made, after the patent issued. It may be considered a subsequent ratification and affirmance of the first appropriation. And it is very satisfactorily
*441] proved, *that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that his ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he, afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact, that these grounds were laid open and used as a common, it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended, that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court, in the fourth instruction asked by the plaintiff, and given by the court, viz: "that if the said proprietors did appropriate said ground, having no title threto, and afterwards acquired an equitable title only, that equitable title could not inure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title."

We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows, that he is entitled to recover possession of the common, in an action of ejectment. This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32; Stark. part 4, p. 506–7. This is the rule laid down by Lord Mansfield in *Atkyns* v. *Horde*, 1 Burr. 119: "An ejectment," says he, "is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property." And in the case of *Doe* v. *Staple*, 2 T. R. 684, it was held, that
*442] although an oustanding satisfied term may be presumed to be *surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir-at-law, even though he claim only subject to the charge. Thereby clearly showing, the plaintiff must have, not only the legal title, but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of *Doe* v. *Jackson*, 2 Dow. & Ry. 523, Bailey, Justice, says, "An action of ejectment, which from first to last is a fictitious remedy, is founded on the principle that the tenant in possession is a wrongdoer; and unless he is so, at the time the action is brought, the plaintiff cannot recover. If, then, it is indispensable, that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrongdoers, it is difficult to perceive, on what grounds this action can be sustained.

The later authorities in England which have been referred to, leave it at

least questionable, whether the doctrine of Lord MANSFIELD in the case of *Goodtitle* v. *Alker*, 1 Burr. 143, "that ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway," would be sustained, at the present day, at Westminster Hall. It was not, even at that day, considered a settled point, for the counsel on the argument (page 140), referred to a case, said to have been decided by Lord HARDWICKE; in which he held, that no possession could be delivered of the soil of a highway, and therefore, no ejectment would lie for it. This doctrine of Lord MANSFIELD has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case, where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the supreme court of errors of Connecticut, where the contrary doctrine has been asserted and sustained, by reasons much more satisfactory than those upon which the case in Burrow is made to rest. *Stiles* v. *Curtis*, 4 Day 328; *Peck* v. *Smith*, 1 Conn. 103.

But if we look at the action of ejectment, on principle, and *inquire what is its object, it cannot be sustained, on any rational ground. [*443
It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff. The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right; that right consists in the uninterrupted enjoyment of the possession; the two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice SMITH, in the case of *Stiles* v. *Curtis*, that the execution of a judgment, in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery, would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said, in the case in Burrow, that an ejectment could be maintained, because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So also, if the fee is supposed to remain in the original owner, cases may arise where, perhaps, waste, or a special action on the case, may be sustained, for a private

injury to such owner; but these are actions perfectly consistent with
*444] *the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is, that the judgment must be reversed, and the cause sent back with directions to issue a *venire de novo*.

Judgment reversed.

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*445] *UNITED STATES *v.* JOHN D. QUINCY.

Neutrality.

Indictment under the third section of the act for the punishment of certain crimes against the United States, &c., passed April 20th, 1818. The indictment charged the defendant with being knowingly concerned in the fitting out, in the port of Baltimore, of a vessel, with intent to employ her in the service of a foreign "people," the United Provinces of Buenos Ayres, against the subjects of the Emperor of Brazil, with whom the United States were at peace. The vessel went from Baltimore to St. Thomas, and was there fully armed; she afterwards cruised under the Buenos Ayrean flag. To bring the defendant within the words of the act, it is not necessary to charge him with being concerned in fitting out *and* arming the vessel; the words of the act are "fitting out *or* arming;" either will constitute the offence. It is sufficient, if the indictment charge the offence in the words of the act.

It is true, that with respect to those who have been denominated at the bar, the chief actors, the law would seem to make it necessary, that they should be charged with fitting out "and" arming; the words may require that both shall concur, and the vessel be put in a condition to commit hostilities, in order to bring her within the law; but an attempt to fit out "and" arm, is made an offence; this is certainly doing something short of a complete fitting out and arming.[1]

To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it; any effort or endeavor to effect it, will satisfy the terms of the law. It is not necessary that the vessel, when she left Baltimore for St. Thomas, and during the voyage from Baltimore to St. Thomus, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment.

The defence consists, principally, in the intention with which the preparations to commit hostilities were made; these preparations, according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary, that the intention with respect to the employment of the vessel, should be formed, before she leaves the United States. This must be a fixed intention—not conditional or contingent, depending on some future arrangement. This intention is a question belonging exclusively to the jury to decide; it is the material point, on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or a warlike character.

The law does not prohibit armed vessels, belonging to citizens of the United States, from sailing out of our ports; it only requires the owners to give security that such vessels shall not be employed by them, to commit hostilities against foreign powers at peace with the United States.

The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable, that such vessels are intended to be employed, by the owners, to commit hostilities against some foreign power, at peace with the United States; all the latitude, therefore, necessary for commeacial purposes, is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war.

*446] If the defendant was knowingly concerned in fitting out the vessel, within the *United States, with intent that she should be employed to commit hostilities against a state or prince or people, at peace with the United States; that intention being defeated by what might afterwards take place in the West Indies, would not purge the offence, which was previously consummated; it is not necessary that the design or intention should be carried into execution, in order to constitute the offence.

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[1] See United States *v.* Skinner, 2 Wheeler's Cr. Cas. 232; The Meteor, 1 Am. L. Rev. 401.

United States v. Quincy.

The indictment charged that the defendant was concerned in fitting out the Bolivar, with intent that she should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata; it was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation, by the executive department of the government of the United States, before the year 1827; it was argued, that the word "people" was not applicable to that nation or power. The objection is one purely technical, and we think not well founded; the word "people," as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act af congress to a foreign power.

CERTIFICATE of Division from the Circuit Court of the United States for the district of Maryland. An indictment was found against the defendant in that court, at May term 1829, founded on the third section of the act of congress, passed April 20th, 1818, entitled, "an act in addition to the 'act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned"

The third section provides, that if any person shall, within the limits, of the United States, fit out "and" arm, or attempt to fit out "and" arm, or procure to be fitted out "and" armed, or shall knowingly be concerned in the furnishing, fitting out "or" arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or shall issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, with the intent that she may be employed as aforesaid, every person so offending shall be guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and *equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States. [*447

The indictment contained fifteen counts, upon two only of which evidence was given; and the questions upon which the judges of the circuit court were divided in opinion, arose on those counts, and on the evidence in reference to the matters stated in them; they were the 12th and 13th counts.

12. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John D. Quincy, on the day and year aforesaid, at the district aforesaid, within the limits of the United States, and within the jurisdiction of the United States and of this court, with force and arms, was knowingly concerned in the fitting out of a certain vessel called the Bolivar, otherwise called Las Damas Argentinas, with intent that such vessel be employed in the service of a foreign people, that is to say, in the service of "the United Provinces of Rio de la Plata," to commit hostilities against the subjects of a foreign prince, that is to say, against the subjects of "his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil," with whom the United States then were, and still are, at peace; against the form of the act of congress in such case made and provided, and against the peace, government and dignity of the United States.

13. And the jurors aforesaid, upon their oath aforesaid, do further pre-

sent, that the said John D. Quincy, on the day and year aforesaid, at the district aforesaid, within the limits of the United States, and within the jurisdiction of the United States and of this court, with force and arms, was knowingly concerned in the fitting out a certain other vessel, called the Bolivar, otherwise called Las Damas Argentinas, with intent that the said vessel should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, against the subjects and property of his Imperial Majesty the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were, and still are, at peace; against the form of the act of congress in such case made and provided, and against the peace, government and dignity of the United States.

*448] *The defendant pleaded not guilty, and the cause came on to be tried before the circuit court, on the 8th day of April 1830. On the part of the United States, evidence was given of the repairing and fitting out of the schooner Bolivar, in the port of Baltimore, in 1827. That she was originally a Maryland pilot-boat of sixty or seventy tons. The work was done at the request of Henry Armstrong and of the defendant, who superintended the same; that she was fitted with sails and masts larger than those required for a merchant vessel, and was altered in a manner to suit her carrying passengers, and with a port for a gun. This evidence on the part of the United States was intended to apply to the twelfth and thirteenth counts in the indictment, and to sustain the allegations therein. It was in proof, that the Bolivar sailed from Baltimore for St. Thomas, on the 27th September 1827, having on board provisions, thirty-two water casks, one gun-carriage and slide, a box of muskets and thirteen kegs of gunpowder; and after a bond had been given by John M. Patterson, as master, and George Stiles and Victor Valette, of Baltimore, as owners, not to commit hostilities against the subjects or property of any prince or state, or of any colony, district or people with whom the United States were at peace. After her arrival at St. Thomas, Armstrong had no funds, and was uncertain whether he could get funds; at St. Thomas, she was fitted as a privateer and sailed to St. Eustatius, having changed her name to Las Damas Argentinas; the defendant was her captain during the subsequent cruise. Armstrong was on board, not as an officer, but as an owner, and as agent for the other owners; on the voyage from Baltimore, he told a witness, that if the vessel went privateering, it would be under the Buenos Ayrean flag; and that he had procured a commission for the Bolivar, from an agent of the Buenos Ayrean government, at Washington, for $800. A witness testified that he conversed with Armstrong about going to the West Indies, that the latter told him, it was his intention, or rather his wish, to employ the Bolivar as a privateer; but he had no funds to fit her out as such, and could not tell, until he got to the West Indies, what he might ultimately do.

*449] Armstrong wanted witness, in Baltimore, to advance some *funds, and told him he would be glad, if witness would go as surgeon. He spoke of the difficulty of getting funds, both in Baltimore and in the West Indies. The witness knew that Armstrong had no funds, when he arrived in the West Indies, and was two or three days negotiating with Cabot & Co., of St. Thomas, and was uncertain of there getting funds. From St.

Eustatius, the vessel proceeded, under the Buenos Ayrean flag, and captured several vessels, Portuguese, Brazilian and Spanish; which were ordered, in consequence of the blockade of the Rio de la Plata, to the West Indies, in pursuance of instructions from the government of Buenos Ayres. The cruise terminated on the 1st of March 1828; one prize and cargo produced $35,000, which was distributed among the crew.

It was admitted, that before the year 1827, the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation, by the executive department of the government of the United States.

The defendant moved the circuit court for their opinion and direction to the jury:

1. That if the jury believe, that when the Bolivar left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, she was not armed, or at all prepared for war, or in a condition to commit hostilities, the verdict must be for the traverser.

2. That if the jury believe, that when the Bolivar was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies, in search of funds with which to arm and equip the said vessel, and had no present intention of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies, to endeavor to raise funds to prepare her for a cruise, then the traverser is not guilty.

3. That if the jury believe, that when the Bolivar was equipped at Baltimore, and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies, for the purpose of arming and preparing her for war, then the traverser is not guilty.

*4. That according to the evidence in this cause, the United Provinces of Rio de la Plata is, and was at the time of the offence [*450 alleged in the indictment, a government acknowledged by the United States; and that the United Provinces of Rio de la Plata is, and then was, a state, and not a people, within the meaning of the act of congress under which the traverser is indicted; the word "people" in that act being intended to describe communities under an existing government, not recognised by the United States; and that the indictment, therefore, cannot be supported on this evidence.

The district-attorney of the United States moved the court for their opinion and direction to the jury:

1. That if the jury find from the evidence, that the traverser was, within the district of Maryland, knowingly concerned in the fitting out of the privateer Bolivar, *alias* Las Damas Argentinas, with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata, to commit hostilities, or to cruise and commit hostilities, against the subjects, or against the subjects and property, of his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States were at peace, then the traverser has been guilty of a violation of the third section of the act of congress of the 20th of April 1818, which punishes certain offences against the United States; although the jury should further find, that the equipments of the said privateer were not complete, within the United States, and that the cruise did not actually

commence, until men were recruited, and further equipments were made, at the island of St. Thomas, in the West Indies ; and should further find, that the Bolivar, on her voyage from Baltimore to St. Thomas, had no large gun, no flints, nor any canon or musket balls, and that the muskets and sabres were, during the voyage, nailed up in boxes.

2. That if the jury find from the evidence, that the traverser was, within the district of Maryland, knowingly concerned in the fitting out of the privateer Bolivar, *alias* Las Damas Argentinas, with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata, to commit hostilities, or to cruise and commit hostilities, against the
*451] subjects, or against the subjects and property, of his Imperial *Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were at peace, then the traverser has been guilty of a violation of the third section of the act of congress of the 20th of April 1818, which punishes certain crimes against the United States; although the jury should further find, that the intention so to employ the said vessel was liable to be defeated by a failure to procure funds in the West Indies, where further equipments were intended and required to be made, before actually commencing the contemplated cruise.

3. That if the jury find from the evidence, that the traverser was, within the district of Maryland, knowingly concerned in the fitting out of the privateer Bolivar, *alias* Las Damas Argentinas, with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata, to commit hostilities, or to cruise and commit hostilies against the subjects, or against the subjects and property, of his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were at peace, then the traverser has been guilty of a violation of the third section of the act of congress of the 20th of April 1818, which punishes certain crimes against the United States ; although the jury should further find, that the fulfilment of the intention so to employ the said vessel would have been defeated, if further funds had not been obtained in the West Indies, where further equipments were intended and required to be made, before actually commencing the contemplated cruise.

4. That the 12th and 13th counts in the indictment are good and sufficient in law, whereon to found a conviction, notwithstanding the employment therein of the words "in the service of a foreign people, that is to say," preceding the words "in the service of the United Provinces of Rio de la Plata."

Upon the aforesaid prayers, and upon each of them, the judges were opposed in opinion ; and thereupon, the court ordered the same to be certified to the supreme court of the United States.

The case was argued by *Williams*, for the United States ; and by *Wirt*, for the defendant.

Williams, for the United States, contended, in support *of their
*452] first prayer, that the guilty intention having been proved to have existed in the mind of the traverser, in the United States, and the guilty enterprise having actually commenced there, the traverser is guilty of a violation of the third section of the act of the 20th of April 1818 ; although the

equipments were not completed in the United States, and although the cruise was not commenced, nor the Bolivar prepared to commence her cruise, until after her arrival in St. Thomas. The section in question punishes the fitting out and arming; the attempting to fit out and arm; the procuring to be fitted out and armed; and with a view to comprehend all who shall have any participation in disturbing the neutral relations of the United States, it punishes those who shall be knowingly concerned in the furnishing, fitting out, or arming, any ship or vessel, with intent, &c. The offence charged here is for being knowingly concerned in fitting out, &c. The Bolivar was, in fact, not only fitted out in the port of Baltimore, but was partially armed; having on board muskets, sabres, powder, and a gun-carriage, and a commission to cruise.

If it be necessary for the completion of the offence, that the vessel should not only be fitted out, but also armed, it is manifest, that this important act of congress, required by the laws of nations, and essential to preserve the peace of this country with foreign nations, will become a dead letter. For it is not only easy to evade its provisions, but, at least, equally convenient to do so, by having some additional equipments, however inconsiderable, to be effected abroad. This position admits, that the attempt to fit out and arm, however small the progress therein, is an offence; while the complete fitting out, having a commission on board, with the most flagrant intention to privateer, is no infringement of the act. The slightest augmentation to an armed vessel is, undeniably, an offence under the fifth section. The policy and scope of this whole law, so far from restraining the express terms used in this section, afford the strongest aid towards a literal construction of those terms. The 12th and 13th counts of this indictment, and the first prayer, are drawn in the very words of the third section *of the act in question. And if these counts and this prayer are not sustained, it must be on the ground, that the act ought to be interpreted differently from its obvious and literal meaning. [*453

The reason for a strained interpretation, which will have the effect to defeat and repeal this wholesome statute, will scarcely prevail with this court. And the authorities will be found to overthrow such an interpretation, and to support that which is insisted on by the prosecution. The exact and faithful discharge of the duties which a neutral position imposes upon governments, is among the highest and most important of all national duties. Honor and interest concur in making it especially binding on our own government; and while this conduct has in a very great degree promoted the prosperity of this country, it has placed the policy and character of the nation in a high and elevated position in the estimation of other powers.

In the third circuit and Pennsylvania district, a decision was made upon the words on which this indictment is drawn; and it was there decided, in the case of the *United States* v. *Guinet*, 2 Dall. 321, "that the converting a ship from her original destination, with intent to commit hostilities; or, in other words, converting a merchant-ship into a vessel of war, must be deemed an original outfit, for the act would otherwise become nugatory and inoperative; it is the conversion from her peaceable use to the warlike purpose, that constitutes the offence." And in this case, far less advance towards arming was made than in the case of the Bolivar. Besides that,

the privateer "Les Jameaux" never actually proceeded on a cruise, and yet Guinet was convicted. Whereas, in the case at bar, the Bolivar, having actually performed her cruise, and made captures of vessels and property of nations with whom the United States were at peace, no room is left for doubting the object of her outfit in the port of Baltimore. In the *Case of Needham et al.*, Pet. C. C. 487, the same principle was decided. See also, *United States* v. *Grassin*, 3 W. C. C. 65; 1 Kent's Com. 114.

The decisions of this court on the acts prohibiting the slave-trade, furnish cases strikingly analogous to the one now under argument. *The
*454] expressions used in these acts seem, indeed, to require a more complete development and fulfilment of intention than the neutrality acts. In the last slave-trade act, which passed at the same session as the act upon which this indictment is framed, it is provided, that, "if any ship or vessel shall be built, fitted out, equipped, laden, or otherwise prepared, for the purpose of procuring any negro," &c., "such ship," &c., "shall be forfeited." *The Emily and Caroline*, 9 Wheat. 388; *The Plattsburg*, 10 Ibid. 141; *United States* v. *Gooding*, 12 Ibid. 471, 473; *The Alexander*, 3 Mason 177; 1 Dods. 81, were cited. Chief Justice MARSHALL says, in giving the opinion of this court, in 5 Wheat. 95, "That although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which these words, in their ordinary acceptation, or in the sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ; where there is no ambiguity in the words, there is no room for construction." See also, opinion of Justice STORY, 2 Pet. 262.

In support of the second point, it was insisted, that the intention, coupled with acts tending to the accomplishment of the object, constitutes the offence, under this statute. For no otherwise could our neutral relations be preserved with nations belligerent towards each other. And in the description of the offence, it differs from many common-law offences, such as robbery, murder, &c. And it is not necessary the criminal intent should be accomplished, in order to subject the party to conviction and punishment. As analogous, see the cases in larceny, where carrying away is essential to the offence; Arch. Pl. & Ev. 127, and the authorities there cited; and 2 Russ. Cr. L. 1034, where, among other similar decisions, the twelve judges of England held, "that the removal of a parcel from the head to the tail of a wagon, with intent to steal it, was a sufficient asportation, to constitute larceny."

*455] In favor of the third point, it was contended, that the acts *given in evidence, in this case, so far consummated the offence, that no *locus pœnitentiæ* remained for the traverser, after leaving the port of Baltimore. The criminal intent, and the acts consequent thereon, have been conjoined in this case, so that there can be neither a divorce nor a purification, by a possible, or even a probable, failure of continued and successful support. All human enterprises are subject to contingencies. The death of the actors, the shipwreck of the vessel, &c., are among the casualties to which every maritime adventure is exposed. These may be supposed as much to enter into the calculation of those who engage in such adventures,

as the uncertainty about the requisite funds influenced the mind of the traverser in this case. If the traverser was innocent, because his guilty enterprise might have been defeated, or would have been defeated, if the requisite funds had been withheld; how can any one ever be guilty, since some contingencies must be inseparable from every enterprise? Here, unfortunately for the traverser's case—and what illustrates the extravagance of this part of the defence—the contingency turned up favorable for the adventure. And that which commenced in Baltimore was uninterruptedly prosecuted to the close of a successful cruise. 2 East's P. C. 557; 2 Russ. C. L. 991, 1036.

In support of the fourth point, the counsel for the United States contended, that the word "people" was descriptive of an independent government, acknowledged by the United States, as the word is used in this act. This word has no technical meaning, for which it invariably stands, and to which courts are obliged, as in technical words, always to annex the same ideas, as, *e. g.*, the words "felonious, traitorous," &c. Nor is this word used in this act, in opposition, or made to have a more limited meaning than ordinary, by reason of being placed in connection with other words, by which its general and usual meaning could be affected. There is nothing in the context here, to indicate the legislative intention that this word was to be understood in any other than its ordinary or vernacular sense. *If there be anything remarkable in the use made of the word "people," in this government and country, it is in its enlarged, rather than its restricted, sense. And it cannot be shown, by examples, that congress ever use it in a narrow interpretation. The largest state in the confederation uses the word as descriptive of its corporate character: "The People of New York." But the meaning of this word must be ascertained by reference to standard authorities; and Johnson, Crabb's Synonymes, were referred to. The traverser's counsel, in asking the court to support his fourth prayer, upon the ground, that the "Provinces of Rio de la Plata" were not a people, because they had been acknowledged by the government of the United States, thereby to overthrow this indictment, makes a demand, founded only on a gratuitous hypothesis, and deriving no support, either from authority or popular usage. A wholesome rule for the construction of words used in criminal as well as in civil cases, will be found in 1 Chitty Cr. L. 172, laid down by Lord Ellenborough. "Except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments or other pleadings, a different sense is to be put upon them, than what they bear in ordinary acception," &c. [*456

Wirt, for the defendant.—The only two counts in the indictment for the consideration or the court, are the 12th and 13th; which are founded on the act of congress of 1818, for the punishment of certain crimes. The difference between the counts is in the manner of laying the intent charged to the defendant; the 12th charges that the defendant with the intent that such vessel "be" employed; the thirteenth, with intent that such vessel "should be" employed. The prayers of the traverser are founded on the evidence; and they called upon the court to say, whether, on the hypothesis that the jury should believe certain facts which his counsel considered as

fairly deducible from the evidence, there had been any violation of the statute on which the indictment is founded.

*457] *The statute is one of a peculiar character, growing out of peculiar circumstances, and directed to a peculiar object, connected with our neutral rights, on the one hand, and some neutral obligations on the other, which distinguish it from the slave act, and the other act of congress with which the argument for the United States has sought to confound it. It demands a construction of its own; which it is for the first time to receive in this court.

The course of argument proper to be pursued, is, first, to examine the act upon its own construction; and second, to show the substantial difference between its provisions and those of the slave and other acts with which it has been so confounded.

1. To examine the act on its own construction. The object of all construction is to arrive at the intention of the legislature. The direct mode of doing this, is by looking at the language of the law; but there are other auxiliary modes of arriving at this intention, to which courts also resort for the purpose. One of the most familiar rules for interpreting statutes is to refer to the old law, the mischief and the remedy—that is, to look to the history of the act; the cause which produced it; and the precise object which it was intended to attain. *Preston* v. *Browder*, 1 Wheat. 115. For this salutary purpose, and with this legitimate object, the court will permit a reference to the history and peculiar circumstances which produced the act of congress now under consideration.

This act, as is well known to the court, is only a transcript of the act of 1794, so far as this prosecution is concerned. The act of 1794 was produced by an attempt on the part of M. Genet, the minister of France, to take advantage of the intense sympathies of this country in behalf of revolutionary France, to involve the United States in the war between that country and Great Britain, and the powers allied with her against France. This was the mischief which produced the statute; and it is necessary that the court should have a precise view of this mischief, in order to measure the corresponding remedy in the statute. They are referred, for the circumstances under which the statute was passed, to 5 Marshall's Life of

*458] Washington, *409–11, 427–8, 430–33, 441–3; Message of the President, Dec. 3d, 1793, 1 State Papers, 39–40; Proclamation of Neutrality, 1 State Papers, 44–46. All that was required by the government, and the whole purpose of the law, was, to preserve our neutral relations, as enjoined by the law of nations; and as the rules and regulations which had been prescribed by President Washington in the proclamation, had been declared to go all the length of our neutral obligations, why should it be supposed, that congress intended to go further, to the unnecessary and extreme prejudice of the American trade? The mischief had been, the arming and equipping vessels in our ports, and sallying out thence, in warlike array, to cruise and commit hostilities on foreign nations, with which we were at peace; that was the mischief; and why should the remedy be more extensive? It was declared in the instructions, that a vessel whose equipments were so equivocal as to be applicable either to commerce or war, was not a proper object of seizure or molestation. No obligation of neutrality required us to disturb her; while a just regard to the rights of

neutral trade required, that she should be left at liberty to pursue her own course, free from molestation. It is now insisted, on the part of the traverser in this case, that the act under consideration, with this light of its history collected upon it, is manifestly intended to cover no more ground than the executive rules and regulations which have been referred to.

Having thus brought the history of the act to aid in its construction, the rule that penal statutes shall be interpreted strictly, is invoked, to aid in the further consideration of the application of the law to the case made out by the United States on the testimony. A careful scrutiny of the language of this act, following, as it did, close on the proclamation of President Washington, and adverting to the views and purposes of its enactment, as shown by its history, will satisfy the court, that the position assumed for the traverser is fully sustained. The offence to be punished was the fitting out "and" arming any ship or vessel, within the ports of the United States, intended to be employed in hostilities against the subjects of any foreign state in amity with us. *The meaning of the terms "fitting out and arming," is, that the vessel shall be both fitted out "and armed," [*459 and to be so fitted out and armed, as to be placed in a condition to commit hostilities. The whole of the purpose of the law was this, and the vessel was to be completely fitted out and armed in our own ports, and was to be put in a condition, and with a capacity to commit hostilities immediately. Nothing else, and nothing less than this, was the purpose of the law. Between the attempt to fit out and arm, and the fitting out and arming, there is a wide and important difference. To fit out and arm, is to do the thing completely; to attempt to fit out and arm, means that the party has begun it, but has been prevented accomplishing the purpose, by the interference of the government. He has all the guilt of the intention, because his intention was to fit out and arm completely in our ports, in violation of the act. It is, therefore, incumbent on the prosecution to prove, that the object of the traverser was to fit out and arm completely; and in all respects to place in a state for immediate hostilities, the vessel referred to in the indictment.

The argument submitted to the court is, that the third section of the act on which the indictment is founded makes the offence to consist in fitting out and arming, which is an entire act; and requires the vessel to be placed in a posture for war, in a condition to commit immediate hostilities, before the offence is completed—such being the only rational meaning of the words of the statute. That if the indictment charges the attempt, the charge must not be of an attempt to fit out merely, but of an attempt to fit out and arm; that if it charge a procurement, the charge must not be that the accused procured the vessel to be fitted out merely, but that he procured her to be fitted out and armed. In these three descriptions, the law is looking at the prime actor, for he is described as the person who fits out and arms; or attempts to fit out and arm; or procures to be fitted out and armed: he is the actor or the procurer.

With regard to the principal or prime actor, it is not said, if he knowingly does the thing (for knowledge is involved in the very description of the offence), but the language of the law as to those who were concerned in furnishing any of the materials is different; this must have been done knowingly. *With respect to those persons, their participation is manifestly of an accessorial character; they are not, indeed, called [*460

accessories, but the language in which the agency is described, construed with that in which the operations of the principal are described, manifests that the legislature was looking at them in an accessorial light. There is, then, in a fair construction of the law, a principal in the offence, and an accessory. But the offence must have been committed; there must have been a fitting out "and" arming, or an attempt to fit out and arm, or the principal actor has been guilty of no offence; and it could not have been intended to punish the secondary or accessorial actor, if the principal actor has not been guilty of an offence. This would be the case, if to attempt to fit out, not being an offence, any one had, knowingly, furnished articles to the vessel, to be used for that purpose; and yet, if, before the complete fitting out and arming had been accomplished, the vessel had been seized, and this consummation prevented, the prime actor would not have been indictable under the law. Thus, the part of a transaction becomes a crime in one citizen, while the whole of it is not a crime in another. The construction on the other side is, that the law meant to punish, not merely the consummation of the act, the fitting out and arming, but every step that is taken towards it; so that the fitting out, *per se*, becomes an offence—is a crime, without arming. But if this had been the intention of congress, the copulation "and" would have found no place in the description; the language of the law would have been "fit out *or* arm," and attempt to fit out *or* arm. The following cases were cited and commented upon: 1 Wheat. 121; 5 Ibid. 76, 94; 1 Gallis. 114; 1 Paine 32; 2 Wheat. 119; 3 Dall. 328; Case of Smith and Ogden, Pamph. 240; Pet. C. C. 487; 9 Wheat. 389; 10 Ibid. 141; 12 Ibid. 472.

The intent charged against a defendant under the act, should be a fixed and positive intent, not in any manner contingent. The vessel, in this case, was in a condition to be considered as going out as a commercial vessel; she had no crew for war, no muskets, no ammunition. The offence must be consummated within the United States, and the intent is not to be collected from what occurred afterwards. *The evidence shows, that until *461] the vessel arrived at St. Thomas, the purpose of privateering was uncertain. It depended, for its accomplishment, on the receipt of funds there, and for some time this was uncertain. If the vessel had been sold, on her arrival in the West Indies, most certainly, the defendant could not be found guilty. The intention, in cases of larceny, is not like this; in those cases, where a slight asportation has taken place, it is sufficient to constitute the offence; but there the act is complete by such removal.

The objection to calling the government of Rio de la Plata "a people" is purely technical, growing out of the case of *Gelston* v. *Hoyt*. This related to the situation of Petion and Christophe, in St. Domingo; and the court, in that case, said, neither could be considered a state. The word "people" applies to a community in the course of revolution, and not yet settled down. But this was not the situation of Buenos Ayres; it was a state, and should have been so described. The object of the law was, to include political communities of every denomination. The court cannot know but that there may be a people called Buenos Ayres; a reference to particulars would not cure the defect. Buenos Ayres, being a state, should have been so denominated.

Williams, in reply.—The Bolivar did not sail from the United States as a merchant vessel, for she had no cargo; nor was there ever produced any account of sales of an outward cargo. She carried out nothing but provisions for a privateer's crew, and munitions of war. The whole invoice cost only $687.81; whereas, she was advertised by the traverser to be a vessel capable of carrying from four to five hundred barrels.

At the time when the first neutrality act was passed (1794), the unjustifiable acts consisted in not only fitting out, but also in arming; and therefore, this description of the offence in the act, as well as in the correspondence of the executive department, becomes the most prominent. But the act would have been soon found to be wholly inefficient, if more ample provisions had not been enacted. If, in Genet's time, he had set on foot the fitting out of privateers from this country, to be *armed in the West Indies, can it be doubted, that our government would have denounced this practice, as contrary to our neutrality and the laws of nations? [*462

The case in 2 Wheat. 119, relating to the transportation of oxen across the line, favors our construction. There, it was attempted, for the United States, to bring a case within the operation of a penal law, which the letter of the law did not cover. Here, the indictment, and the act on which it is drawn, comprehend, in their letter and spirit, the very case of the traverser.

The fourth class of offences in the third section is not confined to accessorial participators, but is calculated and intended to comprehend all parties concerned in fitting out "or" in arming. The argument on the part of the traverser requires words to be interpolated into the law; and contradicts the rule, that an indictment, drawn in the words of the act, is sufficient. For if the arming, as well as fitting out, must be proved, so also ought it to be averred in the indictment.

The slave-trade acts are, manifestly, analogous to the neutrality acts; and the mischiefs of the former trade are not greater than those which flow from violating the latter acts. For, to the lawless practice of privateering, may be ascribed the growing prevalence of piracy.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the United States for the Maryland district, on a division of opinion of the judges, upon certain instructions prayed for to the jury.

The indictment upon which the defendant was put upon his trial, contains a number of counts, to which the testimony did not apply, and which are not now drawn in question. The 12th and 13th are the only counts to which the evidence applied; and the offence charged in each of these is substantially the same, to wit, that the said John D. Quincy, on the 31st day of December 1828, at the district of Maryland, &c., with force and arms, was knowingly concerned in the fitting out of a certain vessel called the Bolivar, otherwise called Las Damas Argentinas, with intent that such vessel should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to *commit hostilities against the subjects of a foreign prince, that is to say, against the subjects of his Imperial Majesty, the constitutional Emperor and perpetual defender of Brazil, with whom the United States then were, and still are, [*463

at peace; against the form of the act of congress in such case made and provided.

The act of congress under which the idictment was found (2 U. S. Stat. 448, § 3) declares, "that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, &c., every person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years," &c.

The testimony being closed, several prayers, both on the part of the United States and of the defendant, were presented to the court for their opinion and direction to the jury; upon which the opinions of the judges were opposed, and which will now be noticed in the order in which they were made.

On the part of the defendant, the court was requested to charge the jury, that if they believe, that when the Bolivar left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, she was not armed, nor at all prepared for war, nor in a condition to commit hostilities, the verdict must be for the defendant. The prayer on the part of the United States, upon this part of the case, was, in substance, that if the jury find from the evidence, that the defendant was, within the district of Maryland, knowingly concerned in the fitting out the privateer Bolivar, with intent that she should be employed in the manner alleged in the indictment, then the defendant was guilty of the offence charged against him, although the jury should find, that the equipments of the said privateer were not complete, within the United States, and that the cruise did not *actually commence, until men were recruited, and further equip- [*464]
ments were made, at the island of St. Thomas, in the West Indies. The instruction which ought to be given to the jury, under these prayers, involves the construction of the act of congress, touching the extent to which the preparation of the vessel for cruising or committing hostilities must be carried, before she leaves the limits of the United States, in order to bring the case within the act.

On the part of the defendant, it is contended, that the vessel must be fitted out "and" armed, if not complete, so far, at least, as to be prepared for war, or in a condition to commit hostilities. We do not think this is the true construction of the act. It has been argued, that although the offence created by the act is a misdemeanor, and there cannot, legally speaking, be principal and accessory, yet the act evidently contemplates two distinct classes of offenders. The principal actors, who are directly engaged in preparing the vessel, and another class who, though not the chief actors, are in some way concerned in the preparation. The act, in this respect, may not be drawn with very great perspicuity. But should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit), it is not perceived, how it can affect the present case. For the indict-

ment, according to this construction, places the defendant in the secondary class of offenders. He is only charged with being knowingly concerned in the fitting out the vessel, with intent that she should be employed, &c. To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out "and" arming. The words of the act are, fitting out "or" arming; either will constitute the offence. But it is said, such fitting out must be of a vessel armed, and in a condition to commit hostilities, otherwise, the minor actor may be guilty, when the greater would not; for, as to the latter, there must be a fitting out "and" arming, in order to bring him within the law. If this construction of the act be well founded, the indictment ought to charge, that the defendant was concerned in fitting out the Bolivar, being a vessel fitted out and armed, &c. But this, we apprehend, is not required. It would be going beyond *the plain meaning of the words used in defining the offence. It is sufficient, if [*465 the indictment charges the offence in the words of the act; and it cannot be necessary to prove what is not charged. It is true, that with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary, that they should be charged with fitting out "and" arming. These words may require that both should concur; and the vessel be put in a condition to commit hostilities, in order to bring her within the law. But an attempt to fit out "and" arm is made an offence; this is certainly doing something short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it; any effort or endeavor to effect it, will satisfy the terms of the law.

This varied phraseology in the law was probably employed with a view to embrace all persons, of every description, who might be engaged, directly or indirectly, in preparing vessels, with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence, the great latitude given to the courts in affixing the punishment, viz., a fine not more than ten thousand dollars, and imprisonment not more than three years. We are, accordingly, of opinion, that it is not necessary that the jury should believe or find, that the Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment. The first instruction, therefore, prayed on the part of the defendant must be denied, and that on the part of the United States given.

The second and third instructions asked on the part of the defendant, were: That if the jury believe, that when the Bolivar was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies, in search of funds, with which to arm and equip the said vessel, and had no present intention *of using or employing the said vessel as a [*466 privateer, but intended, when he equipped her, to go to the West Indies, to endeavor to raise funds to prepare her for a cruise, then the defendant is not guilty. Or, if the jury believe, that when the Bolivar was equipped at Baltimore, and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to

employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies, for the purpose of arming and preparing her for war, then the defendant is not guilty.

We think these instructions ought to be given. The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary, that the intention, with respect to the employment of the vessel, should be formed, before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or warlike character.

The law does not prohibit armed vessels, belonging to citizens of the United States, from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilitied agoinst foreign powers at peace with the United States.[1] The collectors are not authorized to detain vessels,

[1] In the case of General Quitman, it was decided, in the circuit court for the eastern district of Louisiana, in July 1854, that a federal judge might, on just grounds of suspicion, require security for the observance of the neutrality laws of the United States.

United States *v.* John A. Quitman.

Campbell, Justice.—This case originated in a requisition by the court, upon the defendant, to show cause why he should not give a bond to observe the laws of the United States, in reference to the preservation of their neutral and friendly relations with foreign powers, contained in 3 U. S. Stat. 447. The occasion for this requisition was a report of the grand jury, of which the following is an extract:

"The grand jury beg leave to report to your Honor that, in the discharge of the duty confided to them by the court, they have cited, from among their fellow-citizens, a number of persons as witnesses, to testify, and to prove from them, if possible, evidence in relation to the rumor in this city of an expedition, said to be on foot, the tendency and purpose of which would be to violate the neutrality laws of the United States. Among the witnesses cited were several whose names figured most prominently with the rumored expedition; and from the refusal of some of them to testify (as is known to the court), on the ground they could not do so, without criminating themselves, under the ruling of the court, the obvious inference left upon the minds of the grand jury was, that those rumors were not altogether without foundation; and from collateral evidence brought to their notice, in the course of the investigation, they are further left to infer, that meetings have been frequently held upon the subject of Cuban affairs, and that what are termed "Cuban bonds" have been issued, that funds have been collected, either by contribution, sale of these bonds, or promises to pay, to a very considerable amount, which was, or would be hereafter, at the disposal of whomsoever might be chosen to the command of an expedition purporting to be in aid of the Cuban revolutionists; but from a strict and searching investigation of the witnesses, through the district-attorney, the grand jury have been unable to elicit any facts upon which to found an indictment against any one. Although the grand jury strongly incline to the opinion, that these meetings and collections of funds have for their end the organization of an expedition, either for the purpose of assisting in a Cuban revolution, or of making a demonstration upon that island, yet the plan, whatever it may be, seems altogether in the prospective and, aware as we are, that a great deal has been said and written about the extensive and formidable preparations on foot for the purpose of revolutionizing Cuba, we believe, it has been very much overrated and magnified—nothing like a military organization or preparation having been brought to our notice."

At the time the report was made, the name of the defendant was returned, with others, who had declined to answer the interrogatories of the jury, and a printed statement of the facts which had occurred while he was before the jury has been filed. By that statement, it appears, that a printed circular, marked "private and confidential," signed by J. S. Thrasher, as "corresponding secretary" of an association, was handed to the witness, was examined by him,

although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable, that such vessels are intended to be employed by the owners to commit hostilities

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and he was asked for an account of the meetings and proceedings described in it. That the witness declined to give information, because his answers would criminate him. The printed circular referred to, is also filed. It discloses the facts of several meetings in New Orleans, for the purpose of considering upon the means of liberating Cuba from the government of Spain; that there is a junto which acts in the name of "Free Cuba" and represents its "aspirations;" that the junto has collected a large sum of money ($500,000), and holds intercourse with military men in the United States, relative to that object; that it issues bonds in the name and upon the pledge of the independent island and proposed government, and makes contracts with citizens of the United States, to be trustees and treasurers of the movement, and to take the military control of it. It contains the contract of a board of American trustees, to hold its money, and the declarations of an eminent military leader, who agrees to take the command of the expedition, when a million of dollars are collected. That the meetings are all in the design of fulfilling this requisition of this leader, whose name is not given. The bonds are issued to the subscribers at one-third their par value, and the military leader is pledged, should the expedition prove successful, to employ his influence to procure their assumption as a public debt of "Free Cuba." The circular discloses the fact, that Cuba is in no condition to effect her own liberation; that the strength of the government and the vigilance of its police, exposes every revolutionary movement in the island to defeat.

The whole plan is addressed to citizens of the United States, and is for their execution. The military chief, selected from the United States, is the soul of the enterprise. The defendant is known to be an accomplished soldier, having a large share of the public confidence, and especially, of those states which border on the gulf of Mexico. The report of the grand jury is, "that his name has figured prominently with the rumored expedition," and for that reason, he was cited to afford evidence "in relation to the rumor in this city, of an expedition, the tendency and purpose of which would be to violate the neutrality laws of the United States." The circular I have described was handed to the defendant, and was inspected by him, and it contains a description of a person and the report of a speech, which, perhaps, might be attributed to the defendant, without great injustice, whenever the fact is ascertained that he would consent to implicate himself in an enterprise like that set forth. The defendant confessed the fact of a connection of a kind which rendered it a matter of impropriety for the grand jury to press any question upon him relative to the details of the movement. "The obvious inference," says the grand jury, "is, that these rumors were not altogether without foundation," and they find from other evidence, that an expedition is on foot, "for the purpose of assisting a Cuban revolution, or of making a demonstration upon the island."

The questions presented to the court are, is there a reasonable ground for the belief, that the defendant is connected with the preparation of such an enterprise? Does the existence of such a suspicion impose a duty upon the court?

The defendant contends, that I have no right to rest any proceeding upon the inference of the grand jury, or to deduce any conclusion unfavorable to him from this conduct. The constitution of the United States does not allow the examination of a witness in any criminal case against himself, except with his consent. The common law of evidence extends the exemption, and he is not required to answer in any case, either as a witness or a party, the effect of which answer might be to implicate him in a crime or misdemeanor, or subject him to a forfeiture. Burr's Case, 1 Rob. (La.) 242; Cloyes *v.* Hayes, 3 Hill 564. This privilege belongs exclusively to the witness. The party to the suit cannot claim its exercise, nor object to its waiver by the witness. 2 Russ. Cr. 929; People *v.* Abbot, 19 Wend. 195. The witness asserts this privilege on oath. The assertion is direct and positive, that his answer will implicate him in a prosecution or forfeiture, and the court accepts his declaration, without an inquiry as to what his answer will be. The inquiry of the court is, may the answer be such that it can be used as evidence against him? If the witness claims the privilege, falsely and corruptly, he is guilty of perjury, and if, by his falsehood, he deprives a party of the benefit of necessary testimony, he is answerable for the damage he occasions, in a civil action. Poole *v.* Perritt, 1 Spears (S. C.) 128; Warner *v.* Lucas, 10 Ohio 336. The profound author of the "Treatise on Judicial Evidence" inquires, whether, if all the criminals of every class had assembled and framed a system, after their own wishes, is not this rule the very first which they would have established? Innocence can have no advantage

against some foreign power, at peace with the United States. All the latitude, therefore, necessary for commercial purposes, is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war.

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from it; innocence claims the right of speaking, must speak, while guilt alone invokes the security from silence. The supreme court of Ohio say, in the case last cited, "for a witness to refuse to testify, because his testimony may criminate him, is at once to pronounce his turpitude. Not one man in a thousand would, without reason, venture upon so perilous a situation!"

It was, for a time, supposed, that questions addressed to a witness, tending to criminate him, could not be propounded. This notion has been discarded, and the witness is driven to plead his exemption. When this plea is made, in the case of third persons, no inference can be drawn, unfavorable to the parties to the action. The plea is not theirs, and their suit should not be affected by the act of a stranger. 2 Stark. 157–8; 1 R. & M. 382, note. Though this doctrine is impugned by high authority. 2 Russ. 939; 1 R. & M. 382, note. The case before me is not this case. The grand jury, representing the United States, were taking an inquisition of the crimes against their authority, and were entitled to the information which their fellow-citizens had. They have ascertained the existence of acts in violation of law. The defendant excuses himself from affording information he possesses, because his relations to those acts are such that his answers would criminate him. He has conducted himself so that an ordinary, but a most important, duty cannot be fulfilled. It is my duty to afford the defendant every exemption that the laws have conferred. The constitutional exemption originated in the righteous abhorrence of our ancestors for the proceeding of those tribunals of the continent of Europe, where the rack and torture wrung from the accused, in the agony of their pain, words admitting guilt. I do not compel the defendant to answer.

It is said, that drawing a conclusion unfavorable to the defendant's innocence, from his refusal to answer, is equivalent to compelling a confession. The objection is specious, but without any application to the case in which it is preferred. The requisition upon the defendant involves no criminal prosecution nor charge of guilt, nor is the requisition a punishment. In the times of the Saxon constitution, every subject of England was held to give securities for his good behavior, who were to produce him to answer every legal charge; and if he did wrong, and escaped, to bear what he ought to have borne. 1 Spence's Inquiry 352–3. Blackstone describes this as a preventive justice, "applicable to those as to whom there is a probable ground to suspect of future misbehavior." That the precaution spoken of is intended merely for *prevention*, without any crime actually committed by the party, but arising only from a *probable suspicion* that some crime is intended, or likely to happen, and consequently, is not meant as any degree of punishment. 4 Bl. Com. 252; 1 T. R. 696, 700.

The statute of Edw. III. defined the powers of magistrates in the exercise of this jurisdiction. That statute invested justices with authority to take and arrest all those that they may find by indictment, or by suspicion, and put them in prison, and "to take of all that be not of *good fame*, where they shall be found, sufficient surety and mainprize of their good behavior;" to the intent that the people be not by such rioters troubled, nor endangered, nor the peace blemished." The interpretations of this statute comprehend all whom the magistrate shall have just cause to suspect to be dangerous, quarrelsome or scandalous. Hawkins P. C. b. 2, ch. 8, § 16. Dalton enumerated twenty classes of offenders who fall within it, including rioters, common quarrellers, such as lie in wait to rob, steal, make assaults, put passengers in fear, libellers, persons guilty of mischief to animals, and concludes, whatsoever act or thing is of itself a misdemeanor, is cause sufficient to bind such an offender to the good behavior. Dalton Just. 124.

The cases in which this jurisdiction has been exercised are numerous. A person who said "he would do everything in his power to annoy another, short of actual violence," was held to give surety, the court declaring "we should be poor guardians of the public peace, if we could not interfere, until an actual outrage had taken place, and perhaps, fatal consequences ensued." If a party inform the court, or a justice of the peace, that he goes in fear and in danger of personal violence, by reason of threats employed against him, and pray protection of the court, the court will grant it. 12 Ad. & E. 599. Nor will the defendant be allowed to controvert the facts or bring counter-evidence. 13 East 171. The whole rests on the principle, that this is not a criminal proceeding, nor designed as a punishment. 1 T. R. 700.

I have thus traced the nature and extent of this jurisdiction in England, for the reason that it is the model upon which the same jurisdic-

The second and third instructions asked on the part of the *United States ought also to be given. For if the jury shall find (as the instructions assume), that the defendant was knowingly concerned in fitting

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tion in Louisiana has been framed. Crimes, offences and misdemeanors are mentioned in her statutes, and the modes of proceeding and rules of evidence, are construed, intended and taken with reference to the common law of England, except as otherwise provided. Rev. Stat. 215. Justices are allowed to take sureties of the peace, when there is a just cause to apprehend, that a breach of the peace is intended. (Rev. Stat. 220, § 48.) The laws regulating the internal police of the state, under the title "vagrants, vagabonds and suspected persons" (Rev. Stat. 587, *et seq.*), confer a jurisdiction similar to that described by Hawkins and Dalton, under the statute of Edward III. Persons found under circumstances of suspicion, and whose conduct awakens apprehension for the security of property or of life, or for the maintenance of order or decorum, persons whose conduct jeopardizes the tranquillity of society, or the supremacy of the laws, are subject to arrest under these statutes, and may be held to security, or sentenced to the house of correction.

I find no words in any English statute or commission more broad and compretensive. It is true, that these statutes affect the loitering, idle, vagrant and pauper population, and seem to have been framed for that class. But the law is not a respecter of persons, and if the proud and powerful place themselves, by crime, in the ranks of the suspicious, or vagrant, the law does not regard their pride or power. The supreme court of Louisiana, at an early period, exercised the power in question, n a case of libel, and rested upon common-law authorities. Nugent's Case, 1 Mart. (La.) 103.

The authority of this court is derived from the act of congress of 1793. 1 U. S. Stat. 609. The judges of the supreme court, by that act, "have power and authority to hold to security of the peace, and for good behavior, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognisable before them." Crimes against the United States are ascertained from their statutes. These laws, like the laws of the states, are designed to secure the public peace and to promote domestic tranquillity. The powers granted to the justices of the supreme court extend only within the lim its of that department of the public order which has been committed to the oversight of the federal government. The assembly of a body of men, for the purpose of disturbing the peace of a city, or to invade private property, or to assail a particular person, would be an unlawful assembly or rout, or if followed by an unlawful act, a riot, under state laws; and first in the list of the offences described by Dalton and Burns, which fall within the remedial statutes, who have considered are those.

By the treaties of Spain, and by the neutrality laws, the United States have placed the territories of that kingdom under their protection against military and naval expeditions, or enterprises from their borders, or conducted by their citizens. They are in our peace; the attempt of a citizen to disturb that peace, by beginning or setting on foot, or providing means for a military or naval expedition, is a breach of the peace. The statute pronounces those acts to be misdemeanors. The most restricted construction of statutes which authorize the requirement of sureties for good behavior must comprehend the cases arising under this statute. The question now arises, under what circumstances, can this requisition be made? The authorities say, "that the justices have power to grant it, either by their own discretion, or upon the complaint of others; yet that they should not command it, but only upon sufficient cause seen to themselves, or upon the complaint of other very honest or credible persons." Hawkins and Blackstone define the discretion to be a legal discretion, to be put in exercise upon a just cause of suspicion. The facts disclosed in the report of the grand jury, with the explanatory evidence accompanying that report, leave me no room for hesitation or doubt.

I have set forth at large the reasons for the judgment I have given, that there may be no misconstruction nor mistake of the grounds upon which this court acted. I have explained in the charge addressed to the grand jury, my sense of the importance of the act of congress involved in this discussion, and my opinion of the policy in which it is founded. The honor of our country, the fair repute of its citizens, in my opinion, require an exact observance of that act. It is a law binding upon our whole people, and the principles which justify its violation, menace the order and repose of the whole confederacy. But if my opinions were the reverse of what they are, in the position I occupy, I have but a single duty to perform. To the full extent and no further, of the powers conferred upon me, I must enforce its execution.

The defendant has, before a portion of this court, declared his inability to fulfil the public

out the Bolivar, within the United States, with the intent that she should be employed as set forth in the indictment, that intention being defeated by what might afterwards take place in the West Indies would not purge the offence which was previously consummated. It is not necessary that the design or intention should be carried into execution in order to constitute the offence.

The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a "state," and not a "people" within the meaning of the act of congress under which the defendant is indicted; the word "people" in that act being intended to describe communities under an existing government, not recognised by the United States; and that the indictment, therefore, cannot be supported on this evidence.

The indictment charges that the defendant was concerned in fitting out the Bolivar, with intent that she should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation, by the executive department of the government of the United States, before the year 1827; and therefore, it is argued, that the word "people" is not properly applicable to that nation or power. The objection is one purely technical, and we think not well founded. The word "people," as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of congress to a foreign power. The words are, "in the service of any foreign prince or state, or of any colony, district or people." The application of the word people is rendered sufficiently certain by what follows under the *videlicet*, "that is to say, the United Provinces of Rio de la Plata." This particularizes that which, by the word *"people" is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the *videlicet*. only serves to explain what is doubtful and obscure in the word "people." This instruction must, therefore, be denied, and the one asked on the part of the United States, viz., that the indictment is sufficient in law, must be given. These answers must, accordingly, be certified to the circuit court.

*468]

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 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,

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duty of affording information of practices involving a breach of laws. That this inability arises from some undisclosed connection with those who are thus engaged. The president of the United States has admonished the country that there is danger of a violation of these important statutes, and the grand jury, after a patient investigation, certify that this admonition has a legitimate foundation. Public rumor has attached suspicion to the name of the defendant, according to the certificate. I will say with the chief justice of England, already quoted, "We should be poor guardians of the public peace, if we could not interfere, until an actual outrage had taken place, and perhaps, fatal consequences ensued."

agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, 1. That it is not necessary that the jury should believe or find, that the Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment; therefore, the first instruction prayed for on the part of the defendant, must be denied, and that on the part of the United States given. 2. That the second and third instructions asked for on the part of the defendant should be given. 3. That the second and third instructions asked for on the part of the United States should also be given. 4. That the fourth instruction asked for on the part of the defendant must be denied, and the one asked on the part of the United States, viz., that the indictment is sufficient in law, must be given.

It is, therefore, ordered and adjudged by this court, that it be certified to the said circuit court: 1. That it is not necessary that the jury should believe or find, that the Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit *hostilities, in order to find the defendant guilty of the offence charged in the [*469 indictment; therefore, the first instruction prayed on the part of the defendant must be denied, and that on the part of the United States given. 2. That the second and third instructions asked for on the part of the defendant should be given. 3. That the second and third instructions asked for on the part of the United States should also be given. 4. That the fourth instruction asked for on the part of the defendant must be denied; and the one asked on the part of the United States, viz., that the indictment is sufficient in law, must be given.

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*United States, Appellant, *v.* Joseph Nourse, Complainant. [*470

Appellate jurisdiction.—Treasury distress-warrant.

The agent of the treasury of the United States, under the provisions of the act of congress passed on the 15th of May 1820, entitled "an act for the better organization of the treasury department," issued a warrant to the marshal of the district of Columbia, under which the goods and chattels, lands and tenements of Joseph Nourse, late register of the treasury of the United States, were attached for the sum of $11,769.13, alleged to be due to the United States upon a settlement of his accounts at the treasury of the United States; Nourse, under the authority of the fourth section of that act, applied to the district judge of the district of Columbia, for an injunction to stay proceedings under the warrant, alleging that a balance was due to him by the United States, as commissions for the expenditure of large sums of money for the United States, and as a compensation for other duties than those of register of the treasury, in the disbursement of the said sums of money, to which commissions and compensation he claimed to be entitled, according, as he alleged, to the established practice, and by the application to his claims of the same rules which had been applied to other and similar cases in the adjustment of accounts at the treasury department; the district judge granted an injunction to stay proceedings under the warrant; and the United States having filed an answer to the bill of Nourse, auditors were appointed by the district judge to audit and settle the accounts of Nourse with the United States. The auditors reported the sum of $23,582.72 due to Nourse by the United States, for extra services rendered to the United States in receiving and disbursing public money; allowing credit in the audit of the accounts, of the sum of $11,769.13, claimed

by the United States, a balance of $11,813.59 would be due to Nourse. The district judge made a decree that the injunction should be perpetual; the United States appealed to the circuit court; and the decree for a perpetual injunction was affirmed in that court; the United States appealed to the supreme court; and on a motion by the appellee to dismiss the appeal, for want of jurisdiction, it was held, that no appeal is given by the act of congress from a decree of the district judge to the circuit court.

The special jurisdiction created by the act of congress must be strictly exercised within its provisions; a particular mode is pointed out by which an appeal from the decision of the district judge may be taken by the person against whom proceedings have issued; consequently, it can be taken in no other way; no provision is made for an appeal by the government; of course, none was intended to be given to it.

It appears, that no provision is made in the general act organizing the courts of the United States to authorize an appeal from the judgment or decree of the district court to the circuit court, except in cases of admiralty and maritime jurisdiction. On the principle of the case of the United States *v.* Goodwin, the *appeal in this case cannot be maintained; if it be a case in chancery, no provision is made in the general law to appeal such a case from the district to the circuit court.[1]

*471]

Appeal from the Circuit Court of the District of Columbia, for the county of Washington. (Reported below, 4 Cr. C. C. 151.)

Coxe, for the complainant, moved to dismiss this appeal for want of jurisdiction.

The circumstances and proceedings in this case, as exhibited in the record, were the following:

Joseph Nourse was removed from the office of register of the treasury of the United States in 1829. The following communication was afterwards addressed to him from the treasury department.

Treasury Department, Comptroller's Office,
26th June, 1829.

Sir:—Upon a statement of a general account, comprehending the different agencies under which you acted as late register of the treasury, the following balances were found to be due on them, respectively, to the United States, to wit:

As agent for the joint library committee of congress, - -	$2502.55
Ditto, for paying the expenses of stating and printing the public accounts, - - - - - - - - - - - -	934.98
Ditto, for paying the superintendent and watchmen of the buildings occupied by the state and treasury departments, - -	1325.41
Ditto, for paying the expenses of printing certificates of the public debt, - - - - - - - - - - -	1011.29
Ditto, for paying the contingent expenses of the treasury department, - - - - - - - - - - - - -	5994.90
Amounting, in the whole, to	$11,769.13

In the general account rendered by you, a balance of $9367.87 is claimed; between which and the balance above stated, there is a difference of $21,137; and is occasioned, with the exception of $54.50 paid to Gabriel Nourse and James Watson, suspended for want of vouchers, *by

*472]

[1] That no appeal lies, by the United States, from the decree of a district judge, awarding an injunction to stay a treasury distress-warrant, was again decided in United States *v.* Cox, 11 Pet. 162. These cases overrule Porter *v.* United States, 2 Paine 213.

your having charged a commission of two and a half per cent. on all the moneys which have passed through your hands, under the different agencies above specified, but which the accounting officers of the Treasury could not allow, there being no law to authorize or sanction such a charge. A copy of the treasury settlement of your accounts is inclosed for your information. It becomes my duty to request that you will deposit the above-mentioned balance of $11,769.13, in the office of discount and deposit of the branch Bank of the United States, at Washington City, to the credit of the treasury of the United States, taking duplicate receipts therefor from the cashier, one of which you will forward to this department. Respectfully,

Jos. Anderson, Comptroller.

Jos. Nourse, Esq., late Register of the Treasury.

The request contained in this letter not having been complied with, on the 14th of July 1829, the following process was issued by order of the agent of the treasury.

To Tench Ringgold, Esquire, Marshal of the District of Columbia.

Whereas, Joseph Nourse, late register of the treasury, in relation to his several accounts as United States agent, stands indebted to the United States in a cash balance of eleven thousand *seven* and sixty-nine dollars and thirteen cents; agreeably to the settlement of this account, made by the proper accounting officers of the treasury, a copy of which is herewith inclosed; and whereas, the said Joseph Nourse, having failed to pay over according to the act of congress, passed the 15th day of May 1820, entitled, "an act for the better organization of the treasury department," the said sum of $11,769.13: these are, therefore, in pursuance of the said act, to command you to proceed immediately to levy and collect the said sum of $11,769.13, by distress and sale of the goods and chattels of the said Joseph Nourse, giving ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the said goods or chattels were taken, or in the town or county *where the owner of such goods or chattels may reside; and should there not be found sufficient goods and chattels to satisfy the [*473 said sum of $11,769.13, remaining due and unpaid as aforesaid, you are hereby commanded to commit the body of the said Joseph Nourse to prison, there to remain until discharged by due course of law: and should the said Joseph Nourse be committed to prison, as aforesaid, or if he abscond, and goods and chattels sufficient to satisfy the said sum of $11,769.13, be not found, you are hereby commanded to levy upon, and expose to sale, at public auction, for ready money, to the highest bidder, the lands, tenements and hereditaments of the said Joseph Nourse, or so much thereof as may be necessary to satisfy the said sum of $11,769.13, or whatever sum there may remain due and unpaid thereof, after you shall have given notice of the said sale, at least three weeks prior to its taking place, in not less than three public places in the county of district where such real estate is situate; and all moneys which may remain of the proceeds of such sale, after satisfying the said sum of $11,769.13, and paying the reasonable costs and charges of the sale, you are required to return to the proprietor or proprietors of the land or real estate sold as aforesaid: and whatever you may do in obedience to this warrant, make return thereof to this office; and for so doing this

shall be your sufficient authority. Given under my hand and seal, at my office, in the department of the treasury of the United States, at the city of Washington, in the district of Columbia, this 14th day of July, in the year of our Lord 1821. S. PLEASONTON. [SEAL.]
Agent of the Treasury.

This warrant was issued under the second section of the act of congress passed May 15th, 1820 (3 U. S. Stat. 592), entitled, "an act providing for the better organization of the treasury department." The third section provides, "that if any officer employed, or who has been heretofore employed, in the civil, military or naval departments of the government, to disburse
*474] the public money appropriated for the service of those *departments, respectively, shall fail to render his accounts, or to pay over, in the manner and in the times required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such officer, it shall be the duty of the first or second comptroller of the treasury, as the case may be, who shall be charged with the revision of the accounts of such officer, to cause to be stated and certified the account of such delinquent officer, to the agent of the treasury, who is hereby authorized and required, immediately, to proceed against the delinquent officer, in the manner directed in the preceding sections; all the provisions of which are hereby declared to be applicable to every officer of the government charged with the disbursement of public money, and to their sureties, in the same manner and to the same extent as if they had been described and enumerated in the said section."

The second section of the act directs the warrant to issue to the marshal of the district where the delinquent resides; and that the marshal shall proceed to levy the sum due, by distress and sale of the goods and chattels of such delinquent, and if there be not sufficient goods and chattels to satisfy the warrant, the marshal is authorized to take the person of the delinquent, and to commit him to prison, there to remain until discharged by due course of law, &c.

The fourth section provides, that if any person shall consider himself aggrieved by any warrant issued under the act, he may prefer a bill of complaint to any district judge of the United States, setting forth the nature and extent of the injury of which he complains; and thereupon, the judge aforesaid may, if, in his opinion, the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; but no injunction shall issue, until the party applying shall give bond and sufficient security, conditioned for the performance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe; nor shall the issuing of said injunction in any manner impair the lien produced by the issuing of such warrant. And the same proceeding shall be had on such injunction, as in other cases, except that no answer shall be necessary on the
*475] part of the United States; and if upon *dissolving the injunction, it shall appear to the satisfaction of the judge who shall decide upon the same, that the application for injunction was merely for delay, "the judge may add damages, not to exceed ten per centum on the principal sum."

The fifth section provides, that such injunctions may be granted in or out of court; and the sixth section enacts, "that if any person shall consider himself aggrieved by the decision of such judge, either in refusing to issue the injunction, or if granted, on its dissolution, it shall be competent for such person to lay a copy of the proceeding had, before the district judge of the supreme court, to whom authority is hereby given, either to grant the injunction or permit an appeal, as the case may be, if in the opinion of such judge of the surpeme court, the equity of the case requires it; and thereupon the same proceedings shall be had upon such injunction, in the circuit court, as are prescribed in the district court, and subject to the same conditions in all respects."

The marshal of the district of Columbia having levied the warrant on the lands and tenements, goods and chattels of Mr. Nourse; on the 25th of August 1829, he presented to the district judge of the United States for the said district, the following bill for relief.

To William Cranch, Esq., chief justice of the District of Columbia, and judge of the district court of the United States for said district: This, the bill of complaint of Joseph Nourse, late register of the treasury of the United States, shows, that his public accounts as such register, and agent of the treasury department in disbursing certain funds, and settling certain accounts of contingencies and other miscellaneous matters, and as agent for the joint library committees of congress, matters altogether distinct from and unconnected with his duties as such register, have been settled at the treasury, since his removal from office; upon which settlement, a pretended balance has been found against him for the sum of $11,250.26; for which a warrant of distress has been issued against his lands and tenements, goods and chattels, by Stephen Pleasonton, Esq., agent of the treasury, in the pretended execution of the act of congress, passed on the 15th day of May 1820, "providing for the better *organization of the treasury department," which warrant has been levied, during the absence of this [*476
complainant, on his lands, tenements, goods and chattels, by the marshal of this district, copy of which is annexed. That the said account is unjust and illegal; and so far from any balance being due thereon to the United States, a considerable balance should have been struck thereon in favor of this complainant, as appears by an account hereto annexed, which he declares is just and true. That, besides his regular duties as register, established by law, and stated according to the custom and routine of his office as such register, he was, for a long course of years, that is to say, from the year 1790, till his recent dismission from office, duly employed by the proper department of the government of the United States, in the separate, independent and wholly extra business of special agent for the disbursement of the contingent funds of the treasury department, and for the settlement, as such special agent, of all the numerous accounts connected with the disbursement of those funds. That this distinct branch of duty, which he took upon himself, at the special instance and request of the proper department of the government, and having competent authority to engage him, or any other agent, in that capacity, and for the performance of those duties, devolved upon him great labor, responsibility and risk, altogether independent of, and apart from, his proper duties as register, and occupied a great portion of his private hours, that is,

of those hours, when, according to the established order and routine of his department, he was altogether discharged and free from the proper duties appertaining to his office of register, and had his time entirely at his own disposal, but for his employment as special agent as aforesaid. That the extent of the extra labor and responsibility so devolved upon him cannot be adequately described, or conceived, without a reference to, and inspection of, his books, bank-accounts, and vouchers, connected with this branch of his employment in the public service; and he, therefore, prays that these documents may be ordered to be produced from the treasury department, and audited in this court. That, besides the great labor and consumption of time induced by this extra employment, he was exposed to considerable *pecuniary losses, from the ordinary errors that occasionally occur in the accounts of the best accountants, from the multiplicity and minuteness of the various accounts and vouchers to be settled and preserved; that when he undertook this branch of public employment, the precise nature and amount of compensation therefor were not ascertained by any particular stipulation; that, if the government had employed any different person to perform these duties, without any other precise compensation stipulated beforehand, a reasonable mercantile commission or per-centage on the sums disbursed would have resulted to such person, according as well to general usage as to the custom of the treasury department in the like cases. That the usage of the treasury department, and other departments of the government, has invariably been, since the organization of the general government, to allow such commissions or "per-centage," not only to unofficial persons so employed, but to official persons and clerks of the departments, when such duties were distinct from the stated duties appertaining to their offices and stations, notwithstanding such official persons were in the receipt of fixed salaries for their stated duties.

*477]

That as early as the year 1800, this complainant made out an abstract of his disbursements, under these extra agencies, claiming to be allowed a compensation therefor; which original abstract is on file in the treasury department; from whence he prays that it may be produced and audited in this court. That he has duly made out and presented his account to the proper accounting officers of the treasury, charging his commission at the rate of two and one-half per cent. on the amount of his disbursements, which, if allowed, would, after a full and fair settlement of all his public accounts, leave the United States indebted to him in a balance of $9886.24; which he has good reason to believe, and does verily think and believe, to be justly and equitably due and owing to him from the United States, as stated in his said annexed account. That the accounting officers of the treasury have altogether rejected and thrown out his said charge, and denied him any manner of compensation for his extra services as such special agent as aforesaid, not upon the ground of pretence that his charge of commission is too high or unreasonable, if he were entitled to *any compensation; but that he is not entitled to any compensation whatever for his extra services as such special agent, and pretending that his stated salary as register shall be received as full compensation, not only for his proper duties as register, but for his extra employment and services in the agencies above mentioned.

*478]

That the commissions or per-centage so charged by the complainant are

not only reasonable and usual in the like cases, but are an inadequate compensation for the peculiar labor and responsibility of the complainant in the discharge of the particular employment and duties for which they are charged. And this complainant further shows, that he is well advised by counsel, and believes, that the act of congress under which the said warrant of distress is pretended to have been issued, being a law in derogation of common right, and of the ordinary and approved remedies under the general law of the land, ought to be construed with the utmost strictness against any authority assumed under it, and in favor of the citizen; but, that on no reasonable construction of the same, can this complainant or his accounts, either as register of the treasury, or as the special agent of the treasury, or as the agent of the joint library committees of congress, above described, be brought within the description of persons over whom that act gives jurisdiction to the agent of the treasury. By the second and third sections of the said act, the officers subjected to the summary jurisdiction and process of such treasury agent are distributed into two classes: 1st, Those employed to collect and receive the public money, before it is paid into the treasury; 2d, Those employed to disburse the public money, after it is paid into the treasury, appropriated for the service of the civil, naval or military departments. There can be no pretence whatever, and he presumes none is set up, to bring this complainant within the first class; and therefore, the only question is, whether he falls within the second. This class, he is well advised and believes, was intended to comprehend none but the regularly appointed officers of the government, charged, *ex officio*, with disbursements for any of the three great departments named in the act. That this description cannot embrace mere subordinate agents employed *by any particular department of the government, as by the treasury, to disburse [*479
the contingent funds of the department, such agent not being an officer who is, *ex officio*, to disburse the public money appropriated for the service of either of the three great departments named; but, in the strictest sense, a mere unofficial agent, employed informally, without any letters-patent, or commission or letter of appointment, to perform extra services for the treasury, as a commission-merchant or banker, to make purchases or accept bills on public account, might be employed, without attaching to such commission-merchant or banker the character or functions of a public officer. Whereas, the third section of the act throughout describes the party subjected to the summary process authorized by it, as "any officer employed," &c.; "such delinquent officer," &c.; and as to his office of register of the treasury, which constituted the only official relation between him and the government of the United States, it was not an office, the duties or employment of which consisted in the disbursement of any public money appropriated for the services of any of the three great departments of service named in the third section of the act of congress. Nor did this complainant, as such register, receive or disburse, nor was he competent, as such register, to receive or disburse, any of the public money charged to him in the said pretended account so settled by the accouting officers of the treasury, and upon which the said warrant of distress was issued as aforesaid.

Nevertheless, the said accounting officers of the treasury have unjustly and unlawfully charged him, in the settlement of his official account as register, with all the moneys received by him for disbursement as such special

agent as aforesaid; and the whole of the alleged delinquency is charged to him officially as register, and under that official head; and against him, officially as register, such warrant was issued. Whereas, his said account for the receipts and disbursements of public money was wholly unofficial, and unconnected with his official duties and station as register. The complainant, therefore, submits, that, whatever its merit, in the opinion of the court, of the essential dispute or matters of account between him and the accounting officers, the parties *may be remitted to the ordinary pro- *480]
cess of law, so as to have a fair trial and regular adjudication of the merits, before execution be had of his body or estate. Therefore, this complainant prays that injunction may be granted to him to stay proceedings of the said warrant altogether; and that he may have such further and other relief in the premises, as to this court shall seem meet and agreeable to equity and good conscience. JOSEPH NOURSE.

The district judge granted the injunction as prayed for, which was served upon the agent of the treasury, and a citation was issued, directed to him, to appear and answer the bill of injunction, at the next court, to be holden in Alexandria. The following answer was filed on behalf of the United States.

The answer of the United States of America, to a bill of injunction filed against them in the district court of the United States for the district of Potomac, by Joseph Nourse, late register of the treasury of the United States. The United States, by Thomas Swann, their attorney, answer and say, that, upon a settlement by the proper officers of the government, of the general account of the complainant, comprehending the different agencies under which he acted as register of the treasury, he was found indebted to the United States in the sum of $11,769.13, as will appear by the account settled as aforesaid, a copy of which is exhibited by the complainant, in his bill of complaint, with the letter of Joseph Anderson, comptroller, and to which the United States refer, and request that they may be considered as a part of this answer. The United States, by their attorney as aforesaid, state, that the said complainant had rendered to the United States his general account against them, charging a commission of two and a half per cent. upon all moneys which had passed through his hands in the different agencies in which he had acted as aforesaid, and claiming, by the account, a balance, as due to him from the United States of $9367.87, as will appear by a copy of the said account, exhibited, by the complainant, and made a part also of his said bill of complaint. *The United States, by their *481]
said attorney, state, that the grounds upon which the United States had claimed from the complainant the aforesaid balance of $11,769.13, are fully stated and disclosed by the aforesaid letter of the comptroller; and the difference between the account of the United States and that rendered by the complainant, with the exception of $54.50, as stated in the comptroller's letter, arises from the charge of a commission, as hereinbefore stated, of two and a half per cent. upon the public money which had passed through the hands of the complainant as aforesaid. The United States, by their said attorney, deny that the complainant is entitled to the commission which he claims as aforesaid, and say, that there is no law of the United States authorizing any such commission, or any commission whatever, upon

the public moneys which had passed through his hands as aforesaid; and they insist that the balance of $11,769.13, is justly and fairly due from the complainant to the United States, and that the United States were authorized by law, and fully justified in resorting to the remedy by distress, to enforce the payment of the said balance: the United States do, therefore, request that the injunction granted to the said complainant in this case may be dissolved, and that they may be permitted to pursue their legal remedies for the recovery of the said balance. THOMAS SWANN, Att'y U. S.

On the 20th of December 1830, the district judge, having heard the counsel on behalf of the complainant, and of the United States, made an order and decree, "That the said Joseph Nourse has produced satisfactory evidence that he did, for a long course of years, render various services, and disburse large sums of money for the use of the United States, and at their request, from time to time, made, through the respective secretaries of the treasury of the United States for the time being; which services and disbursements were performed and made by the said Joseph Nourse, over and above the services required by the duties of his office as register of the treasury of the United States, for which said extra services and disbursements he has never been allowed any compensation in the *settlement [*482
of his accounts at the treasury department: and it being by the court deemed expedient to ascertain, by the report of auditors to be appointed by the court for that purpose, the value of those services, and the compensation to which the said Joseph Nourse is equitably entitled therefor, and for his disbursements as aforesaid, it is further ordered, that Robert J. Taylor, Phineas Janney and Colin Auld, be and they are hereby appointed auditors to ascertain the said value and compensation, and to report thereon to this court without delay; and that such of the papers and evidence in this cause as relate to that subject, be submitted to the said auditors for their better information thereon." The auditors, on the 31st December 1830, reported as follows:

The subscribers, appointed auditors by the decree of the court in the above cause, made on the 20th day of this month (of which a copy is annexed), to value the services of the complainant, and the compensation to which he is equitably entitled for the same, and for disbursements of public money made by him, at the request of the United States, through the respective secretaries of the treasury for the time being, over and above the services required by the duties of his office of register of the treasury of the United States, respectfully report: That it appears from the documents and evidence submitted to them, that, from the 10th of April 1790, to the 31st of May 1829, thirty-nine years, one month and twenty-one days, the complainant, as agent for the payment of contingent expenses of the treasury department, for stationery, and printing of public accounts, for payment of the superintendent and watchman of the state and treasury departments, for miscellaneous disbursements, comprising fifteen different agencies, for advances made to sundry persons who brought from the several states the votes for presidents and vice-presidents of the United States, and on account of the congressional library, disbursed the sum of $943,308.83; the services rendered in which said agencies, and in making said disbursements, were over and above the services required of him by the duties of his office as

register of the treasury of the United States; we find, that, for similar services, where no *special provision had been made by law, a commission of two and a half per cent. has been heretofore, in many cases, allowed at the treasury of the United States; and we are of opinion, that a commission of two and a half per cent. on the said sum of $943,308.83, amounting to the sum of $23,582.72, is an equitable compensation for the services so as aforesaid rendered to the United States by the said Joseph Nourse; and that the said services are equitably worth the said last-mentioned sum. All which is respectfully submitted.

*483]

Alexandria, Dec. 31, 1830.

R. J. Taylor,
Phineas Janney,
Colin Auld.

Whereupon, the following decree was made by the district judge, on the 4th day of January 1831. And at a court continued and held for the said district, the 4th day of January 1831, the auditors, Robert J. Taylor, Phineas Janney and Colin Auld, to whom, by an interlocutory order of this court, bearing date December 20th, 1830, it was referred to ascertain the value of the services rendered by the complainant to the defendant, over and above the regular official duties attached to his office of register of the treasury of the United States, as set forth in said interlocutory order as aforesaid, having made and returned their report to the court, bearing date the 31st day of December 1830, in and by which the said auditors state, among other things, that a commission of two and a half per cent. upon the sum of $943,308.83, amounting to the sum of $23,582.72, is an equitable compensation for the services so as aforesaid rendered to the United States by the said Joseph Nourse; and that the said services are equitably worth the said last-mentioned sum, and no sufficient reasons having been presented to the court against the confirmation of said report of said auditors, it is thereupon, this 4th day of January 1831, ordered, adjudged and decreed, that the said report be and the same is hereby in all particulars, confirmed and made absolute. And the said cause now also coming on for final decision upon said report, and the bill, answer, replication, exhibits, *depositions and other evidence admitted by the parties, and upon the equity reserved under and by the said interlocutory order, it is further ordered, decreed and adjudged, that the injunction heretofore granted in this cause be and the same is hereby perpetuated; and that the said defendants be and they are hereby perpetually enjoined from proceeding further against the said complainant, upon the warrant of distress in the bill mentioned, for or on account of a claim or demand, for the recovery of which the said warrant of distress issued.

*484]

The United States appealed to the circuit court, in which court a motion was made to discuss the appeal, which was overruled. The circuit court affirmed the decree of the district judge, and the United States prosecuted this appeal.

The motion to dismiss the appeal was argued by *Coxe* and *Sergeant*, for the appellee; and by *Swann*, district-attorney, and *Taney*, attorney-general, for the United States.

For the *appellee*, it was contended, that the circuit court had no juris-

diction to entertain an appeal from the decree of the district judge; and that, therefore, no appeal will lie from the circuit court to this court. The act under which the warrant was issued against Nourse, authorizes an anomalous proceeding; and as it assumes a penal character, subjecting the party who resists the operation of it to the penalty of ten per cent. on the debt, it is to be construed with a strict observance of its provisions. No right of appeal is given, in terms, to the United States; and in all cases under the judiciary acts, when an appeal is given, it is authorized by express provisions. In this act, the right of appeal is given to the party aggrieved only, and not to the United States; they not being aggrieved, cannot have an appeal; as the language of the law authorizes it in favor of the person against whom the warrant has issued, and his appeal is to a judge of the supreme court.

The appeal now before the court has been taken as if this was the case of an ordinary suit; but this is denied. The decree is not that of a court; the proceeding is before the district judge, not in his character as composing the district court. The bill for an injunction may be preferred to any district *judge of any district; and it is not confined to the district judge of the district where the party resides. The United States [*485 are not brought into court; they may not appear; the whole proceeding is that of a judge, not judicially. The directions of the statute must be pursued. Bac. Abr. Stat. C; 3 Mass. 307; 1 Paine 406; 6 Dane's Abr. 593. A new remedy or new jurisdiction is not to be extended, when it is summary. 6 Dane's Abr. 596. If the decision of the district judge had been against Nourse, he could not have had an appeal. All the authority of the circuit and district courts of the United States is derived from the statutes; and in the law organizing those courts, no right of appeal in such a case is allowed.

There is no force in the argument *ab inconvenienti*, when urged for the United States. The government had a right to proceed in the ordinary course; and by so doing, all the right to have a final judgment in this court upon their claim could have been exercised. But if another mode is chosen, they are bound by it; and it is not a subject of complaint that they must be regulated by the law, the provisions of which they have voluntarily elected to employ.

The decision of this court in the case of *Bullock*, a case arising in Georgia, seven years ago, determined the principle contended for on the part of the appellee. The opinion of Mr. Justice JOHNSON in that case, which was, that no appeal could be taken by the United States from the decision of the district judge, must have been known to the treasury; and it should be considered as having settled the law. (*a*)

(*a*) The proceedings in the case of the United States *v.* Bullock, referred to in the arguments, were as follows:

District of Georgia. In the District Court. United States *v.* A. S. Bullock. Petition, &c. This case is brought before me again, by a petition in nature of a petition for leave to file a bill of review. In order to a correct understanding of this proceeding, it is necessary to observe, that on the 3d September 1822, a warrant of distress issued from the treasury department against the defendant, stating that he was in arrears and indebted to the United States in a certain sum of money, and directing the marshal of this district to proceed, by levy and sale of the defendant's property, and

*The act under which the warrant was issued against Mr. Nourse, is
*487] not a judicial, but a treasury act. It was passed *for certain purposes; and if it does not accomplish those purposes, let there be other legislative provisions.

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if a deficiency should happen, to arrest his person. While the marshal was proceeding as directed, the defendant filed a bill of complaint before me, and, after consideration, an injunction was allowed, according to the act of congress of 15th May 1820. Upon the hearing of a motion for a dissolution of the injunction, it was found necessary to submit the accounts to auditors, which was done; and their report returned and filed. The defendant paid the amount adjudged to be due to the United States, and the case there rested. The United States now petition for a rehearing of the cause, alleging, that new and other evidence has been discovered, since the hearing, which it was not in their power to produce at that time. The question now before me is, have I now the power and authority to review my own determinations, under the act of congress before mentioned? I must give to that part of the act relating to the case now before me such a construction as it requires, having in view the intention of the legislature. It will be observed, that there was no equity jurisdiction given to the district courts at their organization; but by an act of congress, district judges were allowed to grant injunctions in all cases, which before was confined to supreme court judges; and this authority was very limited. Now, it appears to me, it never was the meaning or intention of the act of the 15th May 1820, to grant all and unlimited equity powers to district judges; but rather a limited authority to grant or not, dissolve or continue, injunctions, in such cases alone as the act contemplates; to grant to complainants a hearing, and adjust according to equity and justice the real balance due to the United States; and direct the warrant of distress to be proceeded on or restrained accordingly; and here, I take, the power and authority of district judges cease. But it is said, that the district court is a court of record, and all courts of record are authorized, and have power to correct their own errors. This is true of common-law courts, but not so of the United States courts; they are courts created by statute, their jurisdiction limited, and their errors corrected by higher tribunals. And in all cases like the one now before me, individuals are provided for, and if the United States are not, it is because the act itself in this respect is deficient. Congress thought proper to grant this summary mode of proceeding, and it is with courts to pursue it, and take it as they find it. Upon the whole, I am of opinion, that the petition ought and must be dismissed, for want of jurisdiction or authority to proceed in the case. It is to be remarked, that had I the power to proceed, it is extremely doubtful, whether the petitioners bring themselves within the rules prescribed by courts of equity for granting a bill of review, for the receipt that now seems to have been found, was always in the department—it was about eight years before it was looked for, and then certified to be lost or burnt—whether reasonable diligence has been made use of to search for it, is yet very questionable. It is ordered, that the petition be dismissed. J. Cuyler.

Extract from the minutes of the District Court. 4 June 1829.

George Glen, *Clerk.*

Statement.—The application to the district judge was for a rehearing. It was refused:

1. Because in the opinion of that judge, the act of the 15th May 1820, did not vest in the district court general and unlimited equity powers; but merely gave a special authority, which having been executed, could not now be reviewed by that court.

2. If the court had discretionary power to grant a rehearing, the United States had not entitled themselves to it, having been guilty of *laches.*

Under the direction of the President of the United States, the attorney-general submitted to the supreme court a motion for a *mandamus*, requiring the district judge to proceed to rehear the cause. The attorney-general mentioned to the court the case

The appellate power of this court is not to be inferred from doubtful expressions in the law. Those who assert the power, are bound to show its existence affirmatively; they must show this, by the express terms of some act of congress; it must be found in the act itself, or in some other law. The act of congress under which the warrant was issued gives no appeal expressly—none by reference or by implication; nor does it give such a proceeding as in its nature supposes an appeal, but exactly the contrary. To establish the right of appeal under this law, it is necessary to maintain that in every case in which a judge is called upon to act, the right of appeal exists. In the very nature of the proceedings, there is an *inconsistency with a right to appeal in the government; and such a right [*488 is in opposition to the policy of the law. The purpose of the law was, to give a summary process, in cases of extreme urgency; but an appeal would defeat this object, as, if the United States could appeal, so could the defaulter. The act establishes a system of its own; and the court cannot go out of the law for its aid, or to introduce or engraft upon it that which it does not direct or authorize.

Nor is the right of appeal given in any other act of congress. It is conceded, that it does not exist under the judiciary act of 1789; but it has been asserted, that it may prevail under the act of 1803. But this position is not correct. The act of 1803 gives no appeal from the district judge, nor does it give an appeal in equity, for the district judge has no equity jurisdiction. When he exercises that jurisdiction, it is as a judge of the circuit court. The appeal from the district judge is given by that act, in cases of common law, and in admiralty and maritime cases. But this point has been decided in the case of the *United States* v. *Goodwin*, 7 Cranch 108, by which it has been adjudged that the act of 1803 does not apply. See also, 6 Cranch 233, 235.

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of the United States *v.* Lawrence, 3 Dall. 42, and suggested the doubt arising from that case. It was a refusal to grant a *mandamus* to a district judge, for refusing to issue a warrant, declaring that this court would not compel the district judge, while acting in a judical capacity, to decide according to the dictates of any other judgment but his own. The supreme court refused the motion, in the principal case; without assigning its reasons at large.

Supreme Court of the United States, of January Term. Ex parte the United States. In the matter of the United States *v.* Archibald S. Bullock, &c.

Mr. Attorney-General moved the court for a rule to be served on the district judge of the United States for the district of Georgia, commanding him to be and appear before this court, to show cause why a *mandamus* should not be awarded to the said district judge, commanding him to proceed in the case of the United States *v.* Archibald S. Bullock, collector, &c. The consideration of which motion is ordered to be postponed. March 6, 1830.

Ex parte the United States. In the matter of the United States *v.* Archibald S. Bullock, &c. On consideration of the motion made by Mr. Attorney-General, on a prior day of this term, to wit, on Saturday the 6th day of March, of the present term of this court, for a rule to be served on the district judge of the United States for the district of Georgia, requiring him to be and appear before this court, to show cause why a *mandamus* should not be awarded to the said district judge, commanding him to proceed in the case of the United States *v.* Archibald S. Bullock, collector, &c.; it is ordered and adjudged by this court, that the said motion be and the same is hereby overruled; and that the rule prayed for be and the same is hereby refused.

For the United States, *Swann* and the *Attorney-General* contended, that the jurisdiction of the court was manifest, and was essential to preserve the rights of the United States. A new remedy given by a statute does not require an express provision for an appeal; this right results from the general power of this court over the inferior courts. Equity jurisdiction is given to the district judges, and there is incident to this grant of power, all that is required to the completion of ample justice to both the parties. The right to an appeal is necessary to this, or how else shall it be attained? The law is exceedingly special in providing an appeal by the party aggrieved. It is considered, that the district judges proceeded in this case as a case in the district court; and from that court there was an appeal to the circuit court, and from that court to this court. The question now
*489] before this court is not whether the district *or circuit court had jurisdiction. That question may come up when the argument takes place on the merits, but cannot arise on a motion to dismiss the cause. The only question here is, whether this court will take jurisdiction over a decree of the circuit court, when the subject was within its jurisdiction.

The original proceedings were on the part of the United States, but those summary proceedings are not now in review. By the filing of the bill, the case has become one in equity, and is to be governed by all the rules of equity proceedings. It has become a proceeding by a debtor against the United States; the United States have, by instituting their proceedings under the act, consented to be sued; and the bill filed by Mr. Nourse is for relief from the judgment against him. The district judge could not act in the case, except judicially, whether in or out of court. He could not hear the merits out of court, nor could he, but in court, grant or dissolve the injunction. The law contemplates a hearing in court; an issue joined or assumed to be joined—by exempting the United States from answering. This is necessarily implied, by directing the proceedings "to be the same as in other cases." All the proceedings after the application for the injunction are judicial, and in court, on a regular proceeding in equity. The power is given to the district judge, for the purpose of stopping the execution; and it is similar to an application for an injunction in any other case. The words "as in other cases," refer to, and authorize all the ordinary proceedings in a chancery suit.

The act of 1803, giving an appeal, extends to decrees in cases like this. The decree of the district court was a final decree, and was, therefore, within the general language of that act. It gives an appeal from all final decrees of a certain amount; and all the powers subsequently given to the district courts, where final decrees are made, are under the influence of that law, and become subject to the revision of the superior courts. 6 Cranch 51, 533; 5 Ibid. 317; 8 Ibid. 251.

*490] McLean, Justice, delivered the opinion of the court.—*A motion is made by the counsel for the defendant, the appellee, to dismiss this suit for want of jurisdiction.

The proceedings in this case were instituted by the government, under an act of congress "providing for the better organization of the treasury department," passed the 15th of May 1820. By the second section of this act, it is provided, "that from and after the 30th day of September next,

if any collector of the revenue, receiver of public money, or other officer, who shall have received the public money, before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same, in the manner or within the time required by law, it shall be the duty of the first comptroller of the treasury, to cause to be stated the account of such collector, receiver of public money, or other officer, exhibiting truly the amount due to the United States, and certify the same to the agent of the treasury, who is hereby authorized and required to issue a warrant of distress, against such delinquent officer and his sureties, directed to the marshal, &c., who is authorized to collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer, on ten days' notice, &c.; and if the goods and chattels be not sufficient to satisfy the said warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law."

The fourth section provides, that if any person should consider himself aggrieved by any warrant, issued under this act, he may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon, the judge aforesaid may, if in his opinion the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; but no injunction shall issue, until the party applying for the same shall give bond and sufficient security, conditioned for the perfomance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of such warrant. And the same proceedings shall be had on such *injunction, as in other cases, except that no answer shall be necessary on the part of the United States; and if upon dissolving the injunction, it shall appear to the satisfaction of the judge who shall decide upon the same, that the application for the injunction was merely for delay, in addition to the lawful interest, the judge is authorized to add such damages, as, with the interest, shall not exceed the rate of ten per cent. per annum upon the principal sum. [*491

The fifth section provides, that such injunctions may be granted or dissolved by such judge, either in or out of court. And in the ninth section, "that if any person shall consider himself aggrieved by the decision of such judge, either in refusing to issue the injunction, or, if granted, on its dissolution, it shall be competent for such person to lay a copy of the proceedings had before the district judge, before a judge of the supreme court, to whom authority is given either to grant an injunction or permit an appeal, as the case may be, if, in the opinion of such judge of the supreme court, the equity of the case requires it; and thereupon, the same proceedings shall be had upon such injunction, in the circuit court, as are prescribed in the district court, and subject to the same conditions in all respects whatsoever."

Under these provisions, a warrant of distress was issued against the defendant, as late register of the treasury of the United States, for the sum of $11,769.13; which was alleged to be a balance found against him in favor of the United States, on a final settlement of his accounts. On presenting his bill to the district judge, setting forth that he was not indebted

to the United States, the defendant obtained the allowance of an injunction, and it was issued on his giving the requisite security. On the 2d of January 1830, although not required, the attorney of the United States filed an answer to the bill. and by consent, the cause came on to be heard ; when, on motion, the injunction was dissolved, and it was agreed, that if the cause should be appealed to the circuit court, a general replication might be filed, and either party have liberty to take and file such testimony as
*492] might have been taken in the district court. *Afterwards, in September 1830, it was agreed between the parties, that "the order for the dissolution of the injunction, and the decree dismissing the bill, having been made under a misapprehension that the evidence might be taken in the circuit court, upon the appeal, should be set aside, and the cause be reinstated upon the docket of the district court, at the next term, and that it should be set for hearing at that term ; and that testimony should be taken," &c. In pursuance of this agreement, the cause was docketed in the district court ; and on the 20th of December 1830, the accounts exhibited by both parties were referred, by the court, to auditors, who, on the 4th of January 1831, reported that the defendant, for certain specified services which he had rendered the United States, and for which he had received no compensation, was justly entitled to the sum of $23,582.72. This report having been duly considered by the court, was "confirmed and made absolute ;" and the injunction was decreed to be perpetual.

From this decree, an appeal was taken by the government to the circuit court. And afterwards, the following decree was made in that court: "Whereupon, the records and proceedings aforesaid, with the abstracts and accounts, and all things thereto relating, having been read and fully understood ; and after argument of counsel, and mature deliberation thereon had by the court here, for that it appears to the said court that there is no error in the decree in the record and proceedings aforesaid, nor in the giving of the said decree ; therefore, it is considered by the court here, that the said decree, given in form aforesaid, be in all things affirmed and stand in full force and effect." From this decree, an appeal was taken, by the government, to this court, and the dismissal of this appeal is the object of the present motion.

The summary proceedings, authorized by the recited act, were designed to secure the interests of the government, in cases where the ordinary process of law would be inadequate. To provide for such emergencies, the treasury department is vested with extraordinary and responsible powers ; and to guard the rights of the citizens from any abuse by the exercise
*493] *of these powers, a special authority is given to a district judge of the United States, or one of the judges of this court, to arrest the proceedings, by granting an injunction. The judge who allows the injunction, may extend it to the whole or a part of the demand of the government, as the equity of the case may require. He may grant such injunction or dissolve it, either in or out of court. As the proceedings on this injunction, in regard to the merits of the case, are to be the same as in other cases of injunction, and may be had before the judge, out of court, and as the district court possesses no chancery powers, the jurisdiction given by this act must be limited by it. If the party be aggrieved, either by the refusal of the judge to grant the injunction, or by his dissolving it, an appeal may be

allowed to the circuit court, by a judge of the supreme court. As this special mode is pointed out, by which an appeal from the decision of the district judge to the circuit court may be taken, it negatives the right to an appeal in any other manner.

Whilst congress seemed disposed to protect the citizen from oppression by the exercise of the extraordinary powers vested in the government, under the act of 1820, they were not willing that the proceedings should be arrested, except upon equitable ground. No provision is made in the act for an appeal by the government; but it is insisted, that this right is secured by the general provisions of the act of 1803. By the second section of this act, it is provided, "that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed." This act authorizes an appeal from a decree or judgment of the district court, rendered in the ordinary exercise of its jurisdiction, which is limited to cases at law, and of admiralty and maritime jurisdiction. It may be admitted, that an enlargement of the powers of the district court, by giving a new remedy, would not require a special provision, to secure the right of appeal; but if a new jurisdiction be conferred, and a special mode be provided, by which it shall be exercised, it is *clear, that the remedy cannot be extended beyond the provisions of the act. If provision had not been made in the act, allowing an [*494
appeal to the aggrieved party, under the sanction of a judge of the supreme court, he could take no appeal from the decision of the district judge. And as there is no provision in the act, authorizing an appeal by the government, is it not equally clear, that it can take no appeal?

In judicial proceedings, no exclusive rights are given to the government in this respect, over other suitors, except by statutory provisions. From a decision of the district judge, out of court, how could the government appeal to the circuit court? It is no answer to this question, that the decree under consideration was made by the district judge in court. The right to an appeal cannot depend upon this contingency, and the objection to the appeal in one case is as strong as in the other. The government consents to have the summary proceedings instituted by its officers arrested, on certain conditions, and gives a right to the aggrieved party to carry his complaint to the circuit court; but no appeal is provided for, or seems to be contemplated, in behalf of the government. Having submitted itself to the special jurisdiction created by the act, it is as much bound by the decision of the judge, as an individual; and can claim no exemption from the decision, by appeal or otherwise, which does not belong equally to the other party, independent of any special provision. Having the power to collect in this summary mode, the sum due from an individual, as established by the books of the treasury, the legislature may have considered that the interest of the government would be safe in the hands of the judge, to whom the special jurisdiction is given.

It is objected, that in the consideration of this motion to dismiss the appeal for want of jurisdiction, the court cannot look beyond the decree which was made in the circuit court. And that, as that court apparently had jurisdiction, this being a chancery proceeding, its jurisdiction can only be questioned, if at all, on the final hearing. In the discussion of the motion,

the jurisdiction of the circuit court has been fully investigated on both sides; and the *question must be considered as much before the court as it could be on the final hearing. This being a case in chancery, a motion to dismiss for want of jurisdiction may involve all objections to the jurisdiction, which may be urged without a consideration of the merits of the case. If it clearly appear, that the circuit court had no jurisdiction in this case, still this court may take jurisdiction, so far as it regards the proceedings had before the circuit court; but those proceedings, being wholly unauthorized, must be annulled or reversed. This court, however, in such case, can take no further jurisdiction of the cause. They cannot remand the cause for further proceedings to the circuit court, because that court has no jurisdiction; and they cannot retain the cause here for further proceedings, because this court can exercise no appellate jurisdiction which is not given to it by statute. Upon a deliberate consideration of the case, the court are clearly of the opinion, that the special jurisdiction created by the act of 1820, must be strictly exercised within its provisions. A particular mode is provided, by which an appeal from the decision of the district judge may be taken; consequently, it can be taken in no other way. No provision is made for an appeal by the government, of course, none was intended to be given to it.

*495]

There is another point of view in which this case may be considered, and which is equally conclusive against the jurisdiction of this court. The jurisdiction of the district court is limited to cases at law, and of admiralty and maritime jurisdiction. From all decrees over a certain amount, in the latter, appeals may be taken to the circuit court; but judgments of law must be removed by writ of error. In the case of the *United States* v. *Goodwin*, 7 Cranch 108, this court decided, that no writ of error lies to reverse the decision of a circuit court in a civil action, which had been brought to that court from the district court by writ of error. This decision was made under the provision of the 22d section of the judiciary act of 1789; which subjects no cause to revision in the supreme court by writ of error, that was brought from the district to the circuit court, in any other way than by appeal. And as no cause, except of admiralty and maritime jurisdiction, could be so appealed, it *followed, under that act, that such cases only, coming from the district to the circuit court, could be taken to the supreme court on a writ of error. The act of 1803, which provides, that, "from all final judgments or decrees in any of the district courts, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court;" made no alterations in the law of 1789, as it respects appeals to the circuit court, except in reducing the sum or matter in controversy from three hundred to fifty dollars, on which such appeals shall be allowed. The above provision had no reference to a chancery proceeding, as the district court is not vested with chancery powers; and the words, "final judgments or decrees," refer to judgments and decrees in cases of admiralty and maritime jurisdiction. It, therefore, follows, that in such cases only, has the law authorized an appeal from the district to the circuit court.

*496]

In the second section of the act of 1803, it is also provided, "that from all final judgments or decrees rendered, or to be rendered, in any circuit court, in any cases of equity, of admiralty and maritime jurisdiction, and of

prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2000, shall be allowed to the supreme court." This provision so far modifies the 22d section of the act of 1789, as to allow appeals to be taken from the judgments or decrees of the circuit court, in cases of admiralty and maritime jurisdiction; though such causes may have been brought to the circuit court by an appeal from the district court. An appeal is substituted by this act instead of a writ of error, to remove such causes from the circuit to the supreme court.

It might have been contended in the case of the *United States* v. *Goodwin*, as it has been argued in this case, that as the supreme court had power to revise the judgments of the circuit court, they could not dismiss the writ of error in that case, for want of jurisdiction. But they decided, that their jurisdiction was limited to the provisions of the statute; and that as it contained no provision for the revision, in the supreme court, by writ of error, of any judgment or decree of the circuit court, in a cause which had been brought to that court *from the district court, except by appeal, they [*497
could not sustain the writ of error.

If, then, it appears, that no provision is made in the general act to authorize an appeal from the judgment or decree of the district court to the circuit court, except in cases of admiralty or maritime jurisdiction, is it not clear, on the principle of the case of the *United States* v. *Goodwin*, that the appeal cannot be sustained in this case? If it be a case in chancery, as denominated by the counsel for the government, no provision is made in the general law for the appeal of such a case from the district to the circuit court. Whether we look to the general law which regulates appeals, or to the provisions of the act of 1820, which confers the special jurisdiction that was exercised in this case, the want of jurisdiction in the circuit court is equally clear. The decree of the circuit court must be reversed.

Decree reversed.[1]

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*Joseph Barclay, Florence Colter and John M. Snowden, [*498
Plaintiffs in error, *v.* Richard Howell's Lessee.(*a*)

Verdict in ejectment.—Dedication.—Evidence.—Boundaries.—Presumption of grant.

The declaration described the property for which the ejectment was instituted as "lying between Water street and the river Monongahela, with the appurtenances, situate and being in the city of Pittsburgh;" the jury found a general verdict for the plaintiff; and the defendants assigned for error, that the verdict, being general, was void for the want of certainty. This must be considered as an exception to the sufficiency of the declaration; as any other matter embraced in it might have been considered on a motion for a new trial, but cannot now be noticed.

Formerly, it was necessary to describe the premises for which an action of ejectment was brought with great accuracy, but far less certainty is required in modern practice; all the authorities say

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(*a*) Mr. Justice Baldwin did not sit in this case, he having been of counsel for the defendant in error, in the circuit court.

[1] The government subsequently instituted an action of *assumpsit* against Nourse, to recover the amount stated in the treasury transcript; but the court held, that the decision of the district judge enjoining the distress warrant was final, and an absolute bar to a subsequent action for the same cause. United States *v.* Nourse 9 Pet. 8.

that the general description is good; the lessor of the plaintiff, on a lease for a specific number of acres, may recover any quantity of less amount.

The plaintiffs in error, defendants in ejectment in the circuit court, claimed for the city of Pittsburgh, a slip of land lying on the bank of the river Monongahela, near the junction of that river with the river Allegheny, being a space between the southern line of the lots of the city, and the Monongahela river; it was contended by them, that this slip of land was dedicated by the surveyor, when he laid out the town, to the public, as a street, or for other public uses; the depositions of witnesess who were present when the ground on which the city stands was laid out in lots by the surveyor, authorized so to do by the proprietors of the land, were offered, to prove declarations of the surveyor, made to persons assembled at the survey, and who occupied part of the ground so laid out; by which declarations, and other acts of the surveyor, also proposed to be proved, it was contended, the said dedication was made; *i. e.*, that he had observed, that "the street," the slip of land, "to low water-mark, should be for the use of the citizens, and the public for ever." The surveyor had authority to fix upon the plan of the town and survey it; he had the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on everything so far as related to the town, and its beauty, convenience and value; these were clearly within the scope of his powers, as they were essentially connected with the plan of the town, on which he was authorized to determine at his discretion. The proof of such declarations should have been admitted by the circuit court; because, under the circumstances, they formed a part of the transaction.

The declarations of a survey which contradict his official return, are clearly not evidence; nor ought they to be received, where he has no power to exercise discretion, as explanatory of his return, while he is still living, and may bs examined as a witness.

If the ground in controversy in the ejectment had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by *causing the removal of obstructions. But even in such a case, the property dedicated would not revert to the original owner; the use would still remain in the public, limited only by the conditions imposed in the grant.

*499]

The right of the court to decide on the legal effect of a written instrument, cannot be controverted; but the question of boundary is always a matter of fact for the determination of the jury.

It is the province of the court, in an action of ejectment, that they should fix the boundaries of the tract in controversy, by an examination of the whole evidence.

Artificial or natural boundaries called for, control a call for course and distance.

An unmolested possession for thirty years would authorize the presumption of a grant; under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment, by the statute of limitations.

By the common law, the fee in the soil remains in the original owner, where a public road is made upon it, but the use of the road is in the public; the owner parts with this use only; for if the road should be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it; he may bring an action of trespass against any one who obstructs the road.

Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual owner over whose soil a public road is established, and who continues to hold the land on both sides of it. *Quære?* Whether the purchasers of town-lots are, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to adjoining lots?

In some cases, a dedication of property to public use, as, for instance, a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been deemed sufficient for dedication.

Error to the Circuit Court for the Eastern District of Pennsylvania. This was an ejectment, originally instituted in the district court for the western district of Pennsylvania, and removed to the circuit court for the eastern district, under the act of congress of March 3d, 1821; the judge

of the western district having been counsel in a former ejectment, involving the same matter in controversy.

The defendant in error, the plaintiff below, claimed in the declaration, "one messuage, a lot, or piece or parcel of land, lying between Water street and the river Monongahela, with the appurtenances, situate and being in the city of Pittsburgh."

The cause came on for trial at the circuit court for the *eastern district of Pennsylvania, at the April term 1829, and the jury found [*500 a general verdict for the plaintiff in the ejectment. The defendants prosecuted this writ of error.

On the trial, a bill of exceptions was tendered by the defendants to the ruling of the circuit court, as to the introduction of certain evidence, and also to several of the matters contained in the charge of the court; all which are particularly stated in the opinion of this court.

The case was argued by *Wilkins*, for the plaintiffs in error; and by *Sergeant*, for the defendant.

McLean, Justice, delivered the opinion of the court.—This suit was brought in the western district of Pennsylvania, to recover a lot of ground in the city of Pittsburgh, described in the declaration as lying between Water street and the river Monongahela. As the district judge could not sit in the cause, it was certified to the eastern district, under the act of congress. The defendants in the court below appeared in behalf of the city and defended the action, on the ground, that the entire slip of land between the north line of Water street and the river, was dedicated, at the time the town was laid out, as a street or right of way to the public. The lessor of the plaintiff exhibited legal conveyances for the lot in controversy. At the trial, various exceptions were taken to the ruling of the court, in the rejection of evidence offered by the defendants, and also to the charge of the court to the jury. These exceptions are brought before this court for consideration, by a writ of error.

The first assignment of error is, in substance, that the verdict being general, is void for want of certainty. That the finding of the jury did not settle the matter in controversy; and by consequence, did not authorize the judgment. This must be considered as an exception to the sufficiency of the declaration; as any other matter embraced by it might have been considered, on a motion for a new trial, but cannot now be noticed. The description of the lot in the declaration is general, as lying between Water street and the river; but, no doubt is *entertained, that this is a [*501 sufficient description. Formerly, it was necessary to describe the premises for which an action of ejectment was brought with great accuracy; but far less certainty is requisite in modern practice. All the authorities say, that a general description is good. The lessor of the plaintiff, on a lease for a specific number of acres, may recover any quantity of less amount.[1]

[1] Washington, Justice, in the court below, upon a motion for a new trial, and in arrest of judgment, said, in reference to this point: The only real question to the decided is, whether the declaration and verdict are so uncertain that judgment cannot with propriety be entered? The ancient rule was, that the sheriff was bound to deliver possession according to the writ of

The rejection of the evidence contained in the depositions of Samuel Ewalt and John Finley is the second error assigned. To understand the force of this exception, it will be necessary to advert to a succinct history of the case.

There was vested in the Penn family a tract of land, consisting of between five and six thousand acres, that included the village of Pittsburgh, which, at that time, consisted of a small number of settlers, very few, if any of whom, had a title to the lots they occupied. This tract was denominated a manor, as was the practice at that time to call large tracts of land, which had been surveyed within the charter of the original proprietor of Pennsylvania. Being desirous of laying out a town at Pittsburgh, Tench Francis, who acted as the attorney of John Penn, Jun., and John Penn, addressed the following letter to George Woods, Esquire.

Philadelphia, 22d April 1784.

Sir :—By directions of Messrs. Penns, I take the liberty to request you to undertake the laying out of the town of Pittsburgh, and dividing all the other parts of the manor into proper lots and farms, and to set a value on each, supposing them clear of any kind of incumbrances ; in doing of which, be pleased to make the proper inquiries, and ascertain the previous claims, pretended or not, of the present settlers, and all others set up. The whole of the manor being intended for immediate sale, I wish you would point out the best method to effect it ; and if agreeable to you to transact this business, inform me on what terms you will do it. All expenses, and your charges for making the above survey, I will pay, &c.

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habere facias possessionem, which would, of course, conform to the judgment, and so long as this rule prevailed, there was much reason in requiring such certainty in the description of the land sued for in the declaration or verdict, as would enable the sheriff safely to execute his writ, without going out of it to obtain information of the particular parcel which had been recovered, and of which possession was delivered. But when this rule was relaxed, which it has long been, and a new principle introduced, by which the plaintiff was to point out to the officer the particular parcel of land which, in execution of the writ, he is to deliver possession of, and is to take possession, at his peril, of only that to which he has title; the reason for the strictness formely required in describing the land sued for, necessarily ceased, as did the rule founded upon it. And it may now be safely laid down, that it is sufficient so to describe the lands, that the defendant may know whether he is in possession of, or claims title to, that which is sued for, or to some part of it, so as to prepare for his defence. That the declaration in this case is certain to this extent, cannot admit of a doubt. Indeed, I am by no means prepared to say, that this declaration would not stand the test of the severity of the ancient rule. The location of the land, its position and width, are stated with all convenient certainty, and nothing is wanting to the most precise identification of it, but to describe its length and the number of acres contained in it, which have never been supposed to be necessary in this species of action; certainly, not for more than a century past.

The defendant can never be injured by an uncertainty in describing in the declaration the particular land sued for, unless he is thereby prevented from fully defending his title to that which he claims and is in possession of. If the plaintiff take possession, under his execution, of land which was not recovered, or of more than he has recovered, he thereby makes himself a trespasser ; besides which, the defendant may be relieved in a summary way, upon motion Neither can the defendant suffer any injury from this uncertainty, in the action for mesne profits, for although the judgment is conclusive as to the title, yet the plaintiff can recover only the value of the profits received by the defendants, in consequence of the ouster complained of in the ejectment. As to the length of time the defendant has occupied, the judgment proves nothing, nor as to the value. The plaintiff must, therefore, prove how long the defendant had enjoyed the premises, as well as their value.

In the month of May or June of the same year, Woods laid out the town of Pittsburgh, and also surveyed into out-lots and small plantations, the residue of the manor; and made return to his principal of a copy of the town plat and the other *surveys. This return, and the whole proceedings of Woods, were sanctioned by the following letter. [*502

Philadelphia, 30th September 1784.

Dear Sir :—As attorney to John Penn, Junior, and John Penn, Esquires, late proprietors of Pennsylvania, I hereby approve of the plan you have made of the town of Pittsburgh, and now confirm the same, together with the division of the out-lots and the other parts of the manor of Pittsburgh. The several appliers, agreeable to your list furnished me, may depend on having deeds for their lots and plantations, whenever they pay the whole of the purchase-money, &c. Tench Francis.

George Woods, Esquire.

The original plat of the town of Pittsburgh, which was made by Woods, was given in evidence to the jury; from which it appears, that the town was laid out into lots, streets and alleys, from the junction of the Allegheny and Monongahela rivers, extending up the latter to Grant street. With the exception of Water street, which lies along the bank of the Monongahela, all the streets and alleys of the town were distinctly marked by the surveyor, and their width laid down. Near the junction of the rivers, the space between the southern line of the lots and the Monongahela river is narrow, but it widens as the lots extend up the river.

It was contended by the defendants in the ejectment, that the before-described slip of land was dedicated by the surveyor, when he laid out the town, to the public, as a street, or for other public uses. As the lot for which the ejectment was brought is situated in this narrow strip of land, the fact of dedication becomes material.

From the plan of the town, it does not appear, that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given, and its northern boundary; but the space to the south is left open to the river. All the streets leading south, terminate at Water street; and no indication is given in the plat, or in any part of the return of the surveyor, that Water street did not extend to the river, as it appears to do by the face of plat.

The depositions of Ewalt and Finley were offered by the defendants, to prove the declarations of Woods, at the time *the survey of the town was made. Ewalt stated, that the survey was about to be commenced [*503 at a point which would have required him to remove his house, and that, at his instance, the place of beginning was changed. On a remonstrance being made by several persons who had assembled, that Water street would be too narrow, Mr. Woods observed to the party, "these houses will not remain or stand very long; you will build new houses and dig cellars, and bank out Water street as wide, till it comes to low water-mark, if you please." He observed, "that this street, to low water-mark, should be for the use of the citizens and the public for ever."

Finley states, that Woods declared to the people of the town, that he would not change the old military plan; but that "Water street should be left open to the river's edge, at low water-mark, for the use of said town;

that they, the citizens, might use the same as landings, build walls, make wharves, or plant trees, at their pleasure."

Several objections are made to the competency of this testimony. It is insisted, that the declarations of Woods respecting the ground in controversy, did not come within the scope of his authority; and if they did, still, that they ought not to be received in evidence. Woods had authority to fix upon the plan of the town, and survey it. He had the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on everything so far as related to the town, which would add to its beauty, convenience and value. These were clearly within the scope of his powers, as they were essentially connected with the plan of the town, on which he was authorized to determine at his discretion.

But it is said, that his acts, until sanctioned, were not binding upon his principal; and that as his principal was not present, his sanction, which was subsequently given, cannot be extended beyond what appears upon the town plat, which was returned by the agent. The sanction, when given, related back to the original transaction; and gave equal effect to it as if the principal had been present. So far as valuations had been made of the
*504] lots *occupied by persons who had no titles, and who were to obtain titles on paying the prices fixed by Woods, it is very clear, that the principal could not be bound, by the act of confirmation, beyond what appeared upon the face of the return; nor, if the agent had attempted, by any covert means, to give to the citizens of the town, ground which he did not designate on his return, and which did not tend, directly, to increase the value of the town lots. But if the ground dedicated for a street or any other public use was essentially connected with the town lots, and must have enhanced their value at the sale, the increased value, thus realized, and a long acquiescence, would estop the original owner of the fee from asserting his claim, though the ground dedicated had not been so designated on the map.

There is nothing, however, on the plat which shows any limits to the width of Water street, short of the river on the south. If a line had been drawn along its southern limit, there would have been great force in the argument, that the ground between such limit and the water was reserved by the proprietors. This would have been the legal consequence from such a survey, unless the contrary had been shown.

It must be admitted, that the declarations of an agent, respecting things done within the scope of his authority, are not evidence to charge his principal, unless they were made at the time the act was done, and formed a part of the transaction. The declarations referred to were a part of the *res gestæ;* they were explanatory of the act then being done; and they do not, as was contended, contradict the return, but tend to explain and confirm it. The southern limit of Water street was the point of inquiry before the jury; it was a question of boundary, and governed by the same rules of evidence which are of daily application in such a case. In this view, were not the declarations of the person who fixed the boundary, legal evidence? Not declarations casually made at a different time from that at which the survey was executed, but at the very time the act was done. The proof of such

declarations should have been admitted by the circuit court; because, under the circumstances, they formed a part of the transaction.[1]

The declarations of a surveyor which contradict his official *return, are clearly not evidence; nor ought they to be received, where he has [*505 no power to exercise a discretion, as explanatory of his return, while he is still living, and may be examined as a witness. The exception taken to the rejection of Coates's deposition is abandoned.

Several exceptions were made to the charge of the court to the jury. 1. "In saying, that the property in question passed to Wilson, unless the jury should decide, that the whole ground to the river was not only dedicated as a street, but that it must be capable of being used as such; that it was used as a highway or street, and that the slip of land, if it was not wholly given to the public as a street, or so much of it as was not so given, vested in the proprietors, as the undisputed owners of it." As the fee to this property was vested in the Penn family, at the time the town was laid out, it is a clear proposition, that such parts of the land as were not conveyed to the purchasers, or dedicated to the public, remained in the proprietors. But that part of the charge which instructed the jury, that it must appear that the ground to the river was not only capable of being used as a street, but had been so used, is conceived to be erroneous. From the evidence in the cause, it appears, that the northern bank of the Monongahela, from its junction with the Allegheny to the extent of the town plat, still remains elevated in many places; but several of the streets leading south have been extended to the river, and they have been so graduated as to admit of an easy approach to the water. When complaint was made to Woods, that Water street would be too narrow, he observed, that its width might be artificially extended, for the convenience of the citizens, to the river. From this, it appears, that the ground was not then in a condition to be used as a street; and that much labor was required to place it in that situation. But if it were dedicated for that purpose, at the time the survey of the town was made, it is essential, that it shall have been used as such within a

[1] WASHINGTON, Justice, in rejecting this evidence, on the trial, said: The evidence offered is altogether inadmissible. The authority of Woods was confined to the laying out of this town, which, of course, included the acts of surveying and plotting the lots and streets, so as to exhibit a plan of the town. His work, when completed, was binding upon no person, until it received the confirmation of the owner of the ground, either expressly, or to be presumed from his subsequent acts. Woods so understood his authority, for he returned the survey, soon after it was made, to Mr. Francis, who by his letter to Woods, in September 1784, approved and confirmed the same. He might have rejected it altogether, had he chosen to do so, and directed another survey to be made, upon a different plan. But having confirmed it, it afterwards became a muniment of title, to which the purchasers of lots, and all persons connected with this town, including the grantors, had a right to look, as evidence of title, and by which they were bound. To permit now the parol declarations of Woods to alter, or in any way to affect, this delineation of the town, and this muniment of so many titles of which it is the evidence, would be to violate one of the best established rules of evidence, and to let in the most extensive mischief. It is one thing to prove acts tending to explain and to point out the true boundaries of a survey, and quite another, to give evidence of the *parol declarations* of the officer who made it, which might be misunderstood, and of which purchasers, as well as vendors, looking at the plan, and relying upon it, could have no notice. Woods was the agent of the Penns; but he had no authority to bind them, even by his *acts*, until they were confirmed; how then could he bind them by his declarations, which, forming no part of his report, accompanying the plan, could not be, and therefore, were not, approved and confirmed?

limited time? This would hardly be pretended, as it regards other streets in the town. Suppose, Market street, or Wood street, leading north and
*506] south, had not been *improved by the city of Pittsburgh, until this time, could the original proprietors claim it as their property? If the dedication of these streets to the public were a matter of doubt, and a jury were about to inquire into the fact, it is admitted, that their not having been improved or used as streets, would be a circumstance which the jury might weigh against the proof of dedication. But it would most clearly be error, for the court to instruct the jury, that unless the ground claimed for these streets was in a situation to be used as streets, and had been so used, there could have been no dedication. This appears to have been the purport of the instruction to the jury, in regard to Water street. The words used were, that the jury must be "satisfied, not merely that the open space was used by the inhabitants of Pittsburgh or others, but that it was used as a highway or street; and that in weighing the evidence on this point, they would naturally inquire, whether, from the nature of the ground, it was capable of being so used." From this instruction, the jury were required to find against the right asserted in behalf of the city, unless the ground referred to had been used as a street or highway. This substituted the use for the right; and made the latter to depend upon the former. The right was not necessarily connected with the use within a limited period; as no such condition appears to have been imposed at the time it was granted. Whilst the circuit court might have called the attention of the jury to the fact, that the ground in controversy never having been used as a street, was a circumstance which they ought to weigh against the dedication contended for, it was error in them to say, in substance, there could be no right, without the use. This withdrew from the jury the main point of inquiry, by substituting another, the existence or non-existence of which was not inconsistent with the principal fact. It was not essential for the city to show that the entire strip of land referred to had been used as a street, but it was essential to establish that it had been dedicated as such.

2. The second objection to the charge is, that the court instructed "the jury, that no title in the corporation had been shown to a single foot of ground within the city; and that the acts of ownership, exercised by the corporation, were altogether inconsistent with the right asserted in behalf of
*507] the *public; and plainly conveying to the jury the opinion, that the improper or peculiar use made of the ground in question by the corporation, gave the plaintiff a right to recover." The inference drawn in the conclusion of this assignment of error may not be fully sustained by the language of the court; but they did instruct the jury, that the acts of "ownership exercised by the corporation, in the way which had been stated, were altogether inconsistent with the right asserted in behalf of the public; since, if the whole of this ground, to low water-mark on the river, had been dedicated for a street, it was vested as such in the public, subject to be regulated and preserved by the corporation, and could not legally be treated and used as private property by that body." The court here refer to certain wharves, which have been constructed by the city, along the Monongahela, and on the ground claimed to be Water street. Connected with these wharves is a graduated pavement, so as to render access to them from the city easy; and a tax is imposed on steamboats and other vessels for the use of them.

If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant. It does not appear, however, that the construction of wharves on the river, and the pavement of the ground, have, in the least degree, obstructed its use as a street. The pavement has, undoubtedly, promoted the public convenience; and if the whole line of the street were graduated and paved to the water, as a public way, it would be much more valuable than in its present condition. The wharves cause no obstructions to the use of this ground as a street; and whether the city authorities have transcended their power in raising a revenue from them, by the improvements which have been made, is a question not necessarily involved in the case. If that part of this ground which is connected with the *water has been appropriated to other [*508
uses than as a right of way, they are not inconsistent with such right; but if such had been the case, on that ground, the jury could not have rendered a verdict against the city. Such uses might have tended to show, that the dedication of this ground for a street, as contended for, had not been made; but no other or greater effect should have been given to them, had they been fully established, and their inconsistency with the right asserted clearly made out.

3. The third objection taken to the charge is, that the court instructed "the jury, that the deeds of Ormsby, and to Craig and Bayard, were inconsistent with a dedication of a space south of the Water street lots to the river; and that these deeds conveyed the ground to the river, subject to the easement over a part of it." The deed of Ormby to Gregg and Sidney bears date the 5th day of November, in the year of our Lord 1798, and was for "a certain lot of ground, situate in the town of Pittsburgh aforesaid, marked in the plan of said town, No. 183, bounded by Front street, the river Monongahela, and lots Nos. 182 and 184; it being the same lot or piece of ground which the Honorable John Penn, and John Penn, Jun., late proprietors of Pennsylvania, by their indenture, bearing date the 2d day of October, 1784, did grant and convey unto the said Ormsby."

The deed to Craig and Bayard from the Penns bears date the 31st day of December 1784; and conveyed to the grantees, "and their heirs and assigns, thirty-two lots or pieces of ground, situate in a point formed by the junction of the two rivers Monongahela and Allegheny, in the town of Pittsburgh, marked in the general plan of said town, made by Colonel Woods, numbers one, &c.; which said plan is recorded, or intended to be recorded, in the office for the recording of deeds for the county of Westmoreland." The said lots are bounded northwardly by the said Allegheny river, eastwardly by Morberry or Mulberry street, southwardly by Penn street, and south-westwardly by the Monongahela river. *The agreement under which this deed was executed, [*509
is dated on the 22d day of January 1784, which was about six months before the town was surveyed. By this agreement, the Penns sold to Craig and Bayard, "a certain tract of land, in their manor of Pittsburgh, lying

and being in a point formed by the junction of the rivers Monongahela and Allegheny ; bounded on two sides by the rivers aforesaid," &c.

As this last deed covers ground which had been sold before the town was laid out, it is not preceived how it could be considered as inconsistent with the dedication contended for. It is true, the deed was not executed until after the town plat was formed ; but it was executed by force of a purchase made prior to the survey of the town, and the purchaser had a right to insist on the boundaries designated in the agreement. If the present contest were limited to the ground embraced in this agreement, and included in the general description of the deed, it might become a serious question, whether the description, in the deed, of the lots, by their numbers, as designated on Woods's plan of the town, would not control that part of the description which refers to the Monongahela river. But if it were admitted, that this deed conveyed the land to the river, it could, under the circumstances, have no other effect than to restrict the dedication of the ground for a street, to the extent of the deed. The deed from Ormsby called for the lot, by its number, as marked on the plan of the town, and bounded by Front street the river Monongahela, and lots Nos. 182 and 184. The construction given to these calls was, that the ground to the river was conveyed, subject to the easement over a part of it. And this deed, the jury was instructed, was inconsistent with the dedication of the ground to the water as a street.

It is contended on the part of the defendant in error, that the charge given to the jury on this point was the legal construction of the deed, and consequently, was a matter for the court to determine. The right of the court to decide on the legal effect of written instruments cannot be controverted ; but the question of boundary is always a matter of fact for the determination of the jury. It is the province of a court, to instruct the jury
*510] *that they should fix the boundaries of the tract in controversy, by an examination of the whole evidence ; and that artificial or natural boundaries called for, control a call for course and distance. But it would withdraw the facts from the jury, if the court were to fix the boundaries called for, and then determine on the legal effect of the instrument.

Suppose, the controversy had been between the city of Pittsburgh and the persons claiming under Ormsby, who asserted a right to the ground, under his deed, to the river. The city, in such a case, would have contended, before the jury, that taking the calls of the deed together, they would limit the conveyance to the lot designated on the plan of the town ; and would not this have been a question for the jury to determine, under the instruction of the court—an instruction, which should lay down the general principles of law in such a case, and the legal effect that would result from a certain state of facts ; but which should not take from the jury the right of determining on the limits of the lot, from the calls in the deed ? These calls are established by evidence extrinsic of the deed ; they are matters of fact, for the investigation of the jury.

In principle, there is no difference between the case under consideration and questions of boundary, which are of daily occurrence. It is as much the province of a jury to determine the limits of a lot in a city or town, as the limits of any tract of land, however large or small. And, if the court, on a question of boundary, may fix the limits of the grant, and then say

what the legal effect of it shall be, there is nothing left for the action of the jury.

The deed from Ormsby called for a lot, designated on the town plat 183, bounded by Front street, the river Monongahela, and lots Nos. 182 and 184. The plat of the town which is referred to as containing a designation of the boundaries of the lot, fixes those boundaries as satisfactorily as any natural objects could fix them. Front street is called for, which lies parallel with Water street, as the northern boundary of the lot; and the adjoining lots lying east and west of it, are named as the eastern and western boundaries. *From this description, can any one doubt the intention of the grantor, and the understanding of the grantee? Does lot 183, as [*511 marked on the plan of the town, extend to the river? This will not be pretended; nor that lots 182 and 184 extend to the river. The call for the river, then, in the deed in question, is inconsistent with the other calls in the deed. By the town plat, the southern boundary of the lot is limited by Water street, and by a call for this boundary, it is as fixed and certain as the call for the river. The same may be said of the eastern and western boundary of the lot. Shall these calls be all disregarded, or controlled by the single call for the natural boundary? In a late case, this court decided, that a call in a patent for a different county from that in which the land was situated, might be controlled by other calls in the patent. Such was the charge given to the jury in the court below, and it was sustained by this court.

The circuit court, therefore, instead of saying to the jury, that the calls in this deed, and the one to Craig and Bayard, were inconsistent with the dedication of the ground referred to, should have instructed them, that the different calls ought to be taken together; and that the calls for the river might be controlled by the other calls in the deeds, if the jury should be satisfied, that such call had been inserted through inadvertence or mistake.

4. The fourth and last exception taken to the charge of the court is, that they erred in instructing the jury, "that if a street or streets leading to the Monongahela river were necessary to the enjoyment, by the inhabitants, of their property in the town, derived from persons under whom the plaintiff claimed, they are entitled to have them laid off over the land in dispute, of right, and not of favor; and that the law points out a mode by which this right may be enforced." This instruction does not involve a point which was material in the case; and though it were erroneous, it might not afford ground for the reversal of the judgment of the circuit court. Whether this right existed or not, it is not conceived how it could have had any influence with the jury.

The court seem to refer to the law of Pennsylvania, regulating the opening of public roads. But the establishment or *a public road cannot [*512 be claimed as a matter of right. An application must be made, in the first instance, by petition to the court of quarter sessions; a view of the proposed road is directed, and its establishment depends upon the report of the viewers and other necessary sanctions. This law, however, it is insisted, could have no operation in the city of Pittsburgh; that its streets and alleys are opened and regulated under the corporate authorities, and not by the provisions of the road law.

It is not deemed necessary, in deciding the points raised in this case, to

notice all the questions discussed by the counsel, in their arguments at the bar. Whether Water street extended to low or high water-mark, can be of no importance in the present controversy. If its southern boundary be limited by high water-mark, it is clear, that the proprietors parted with all their right. It is admitted by both parties, that the river Monongahela, being a navigable stream, belongs to the public; and a free use of it may be rightfully claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend, that between this boundary and the public right, a private and hostile right could exist, would not only be unreasonable, but against law.

Tench Francis, the attorney in fact for the Penn family, and the agent who succeeded him, must be considered, for some purposes, as the principal in these transactions. His principals were in Europe; and to his discretion and superintendence, they, of necessity, consigned the management of their property in this country. The long acquiescence, therefore, in the plan of the town, as returned by Woods, affords a strong presumption against the right asserted by the plaintiff below in this action. The town was laid out in the spring or summer of 1784; no act was done by the proprietors, showing any claim to the land in controversy, until September 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family, hostile to that which was exercised by the city, in the use of this ground, to the extent to which its
*513] means enabled it to improve, *and the public convenience seemed to require. A title which has remained dormant for so great a number of years, and while the property was used for public purposes, and necessarily within the knowledge of the agents of the proprietors, is now asserted, under doubtful circumstances of right. In some cases, a dedication of property to public use, as, for instance, a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been sufficient evidence of dedication. This lapse of time, connected with the public use and the determination expressed by the agent, at the time the town was laid out, to dispose of the whole of the manor, affords strong grounds to presume, that no reservation of any part of the manor was intended to be made; and that the slip of land in controversy was not reserved. These were facts proper for the consideration of the jury, in determining the fact of dedication. They were calculated to have a strong influence to rebut the presumptions relied on by the plaintiff in the court below.

If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment, by the statute of limitations.

By the common law, the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road.

In the discussion of this case, the same doctrine has been applied by the counsel for the defendant in error to the streets and alleys of a town ; but in deciding the points raised by the bill of exceptions it is not necessary to determine this question. Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from *the individual over whose soil a public road is established, and who continues [*514 to hold the land on both sides of it. Whether the purchasers of town lots are not, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to the adjoining lots, is a point not essentially involved in this case.

If the jury shall find, that the ground in question was dedicated to the public, as a street or highway, or for other public purposes, to the river, either at high or low water-mark, the right of the city will be established, and the plaintiff in the ejectment must consequently fail to recover.

Upon a deliberate consideration of the points involved in the case, this court are clearly of the opinion, that the judgment of the circuit court was erroneous, and it is, therefore, reversed, and the cause remanded for further proceedings.

Judgment reversed.[1]

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[1] In the circuit court, the following charge was delivered to the jury (which is subjoined for a better understanding of the case) by—

WASHINGTON, Justice.—Whether the surveys of the plaintiffs or of the defendants in this controversy, will most subserve the interests and the prosperity of the inhabitants of Pittsburgh, is a question which neither the court or the jury can very well answer. This, however, is manifest to both, that it is not a question involved in that issue, which, and which alone, you are sworn and affirmed to try and decide. That issue is, whether the plaintiff has shown to your satisfaction, such a right to the property in dispute, as ought to entitle him to recover the possession of it? Considerations such as have been pressed upon your attention by counsel, can never tend to promote the ends of justice, and never will be regarded by a conscientious court or jury.

The case which you have now to pass upon is by no means a complicated one. There is, in truth, but one question upon which the controversy mainly turns, and whatever difficulty may attend the decision of it, is to be solved by the jury, since its rests altogether upon the evidence which has been laid upon them. The object of the court will be, to clear away those matters which do not seem materially to affect the case, in order that that question may be the more distinctly perceived. To do this, the claim set up by the defendants to the property in dispute, will be first examined. The defendants are merely officers of the corporation of Pittsburgh, and, of course, assert no title in themselves to this property. But they set up a title in the corporation, and in case that cannot be maintained, still, they insist, that the plaintiff cannot recover in this action, upon the ground, that the entire space between the southern row of lots fronting the Monongahela and that river, was dedicated by owners of this manor in the year 1784, to the public, as a street or highway.

As to the title of the corporation, it is proper to premise, that this must, in all cases, be maintained by the same muniment of transfer as would be necessary in the case of an individual. In the year 1784, and down to the period of conveyance to Alexander Wilson, this slip of land, if it was not wholly given to the public as a street, or so much of it as was not so given, was vested in the Penns, as the undisputed owners of it. It has not been shown in evidence, that a grant or transfer of it was, at any time, made by them, to the corporation, or the town, before it was incorporated, or to any person, for the use of that body, or the inhabitants thereof. No right of possession in the corporation has been proved, or even asserted, arising from length of time.

But it is claimed, as appurtenant or incident to the right of the inhabitants and lot-owners, who cannot enjoy, it is contended, the property granted to them, without the use of this slip of ground, whereby they may have free access to the river. Were this species of title to be admitted to exist in the lot-owners and inhabitants of the city, it would, nevertheless, be difficult to discern, how this admission would maintain the claim of the corporation to hold

and enjoy this property for their use and benefit, to the exclusion of the enjoyment thereof by the inhabitants. For, if it belongs to the corporation, they may use it in any way most beneficial to the body corporate, and most injurious to the individual corporators or inhabitants of the town, But I cannot understand, how one piece of land can be incident to another piece of land; and if it could, still it has not appeared in evidence, that the corporate body is entitled to a foot of land, within the limits of the city, or to any other right but that of governing the city. If the claim in behalf of the inhabitants be merely of right of way, or reasonable access to the river, that presents quite a different subject of inquiry, which will be attended to, after I have stated for your information, the rule of law which applies to the subject. That is, that where anything is granted, the law implies a grant of those things, without which the principal subject cannot be enjoyed, as incident thereto; as, if a lease be made of land, with all the mines therein, and there be no mine opened upon the land, the lessee has an incidental right to excavate the earth, for the purpose of obtaining the minerals, without which, the grant, in respect to them, would be of no value. So, and for the same reason, if a grant be made of a close, surrounded by the lands of the grantor, the grantee has a right to a way of passage over the lands of the grantor. But this right is confined strictly to the necessity upon which it is founded, and cannot exceed its just demands. The grantee, therefore, cannot claim a right to as many roads as may suit his whim or convenience, nor can he exercise any privilege, but that of a right of way; if he go, unnecessarily, out of his way, upon other parts of the grantor's land, he is a trespasser. Now, to apply these principles to the present case.

A street or streets, it is insisted, leading to the river Monongahela, are necessary to the enjoyment, by the inhabitants, of their property in the town, derived from the persons under whom the plaintiff claims. If this be so, they are entitled to have them laid off over the land in dispute, if it be private property (which is the great question in the cause), of right and not of favor; and the law points out a mode by which this right may be enforced. But the right of soil is not, as I conceive, thereby divested out of the owner of the other parts of the ground; which, beyond all question, remains in him, as it was before the street shall have been laid out. The only difference in this respect, between the city of Philadelphia and Pittsburgh, is, that William Penn granted expressly to the former, this privilege of streets leading from Front street to the river, which the law would have implied as an incident, and which may be implied, in relation to the latter city. But the ground lying to the east of Front street, and between the streets running to the Delaware, remained the undisputed property of the proprietary, and as such, was used, or granted away by him. If the ground in controversy, then, was not dedicated to the public as a street, it remained in the Penns, subject to the incidental right which has been spoken of; and the only right of the corporation would be to regulate and to preserve such streets as should be laid out, running over it, to the river.

This brings us to the great question in the cause; was the whole of the ground lying between the lots fronting on the Monongahela, and that river, dedicated by the Penns, for a street, or only so much thereof as might be necessary for such an easement? And this leads to an examination of the plaintiff's title. The only direct evidence of such dedication is the survey and plan of George Woods, returned to and confirmed by the authorized agent of the Penns. The survey was made on the 31st of May 1784, and received the approbation of that agent, on the 30th of September, in the same year. The deed to Alexander Wilson bears date the 26th December 1814, and it conveys to him all the land lying between the south line of Water street, and the low-water mark of the Monongahela river, from Grant street to the confluence of the Allegheny and Monongahela rivers. That a street running south of the line of lots on that river was granted by the name of Water street, is satisfactorily proved not only by the plan referred to, but by the subsequent grants of the those lots, all of which call for Water street as their south-western boundary. The question which this plan gives rise to, is whether the whole of this slip of land, to the river, was dedicated to the public as a street or, whether a street of undefined width, but such as convenience might require, was intended to be appropriated?

The defendant's counsel insist, that the plan itself furnishes direct proof that the whole space was laid out, and intended, as a street, the south line of it being distinctly marked, running along the margin of the river. This is denied on the other side, who insist, that the line referred to, merely marks the margin of the river, and not the line of a street; and in confirmation of this assertion, they refer to the Allegheny river, as it is laid down on the plan, where the same line is discoverable, and yet it is agreed by both sides, that no street was laid off, or intended to be, along the river; all the subsequent grants of lots facing it, running across the vacant space bordering on the river, to the river. They further rely on the testimony of Vickroy, who made the survey under the

direction of Woods, who states, that no line was, in fact, run on the river Monongahela, south of the lots facing the same. It will be for you to say, whether the appearance of this line, on the river, in connection with the other lot lines, was intended to indicate, or does indicate, the southern boundary of the street, or not?

The other evidence in the cause, relied upon to strengthen and confirm that which is termed direct, is of a presumptive character. The defendants insist, that this evidence establishes a long and uninterrupted use and enjoyment of this slip of ground by the inhabitants of Pittsburgh, not short of 45 years. They rely further upon the long acquiescence in the enjoyment, and in various acts of the ownership exercised by the corporation, in authorizing the construction of wharves into the river, imposing tolls, and the like; upon the evidence of Mr. Coates, the agent of the Penns, since the year 1800, who was authorized by them to sell and survey all their lands in this state, that he had no knowledge that this slip of land belonged to the Penns; and lastly, that although all the lots in the plan of this town were sold by the agents of the Penns, yet the ground in dispute was never laid off into lots, or offered for sale by those agents.

There is no doubt, in point of law, that the uninterrupted use by the public of a way over the ground of an individual for public convenience, for a length of time, affords a presumption of a grant of it by the owner, for that purpose; and that a much shorter time will suffice to raise this presumption, than would affect the title of an individual, in ordinary cases. But the presumption in these cases, as in all others, may be repelled, by evidence tending to show an assertion of right by the owner, and a denial of the use assumed by the public. In answer to the acquiescence insisted upon by the plaintiffs, two grants have been given in evidence by the plaintiffs, both dated in the year 1784, the one from the Penns to Ormsby, for two lots, in October, and the other to Craig & Bayard, for 32 lots, in December of that year, both of which call for the river Monongahela for their southern boundary. The defendants' counsel endeavor to remove the weight of this evidence, by insisting, that although such are the calls of those grants, still, as they refer, in express terms, to the lots as numbered in Woods's plan, they were, in reality, bounded, and were intended to be bounded, by Water street, and not by the river. That the survey having been made, the plan completed and confirmed, and Water street marked on it, as dedicated to the public, the Penns had no right, nor did they intend to exercise any, to extend these grants beyond the north line of Water street.

Whatever weight the jury may give to these grants, as evidence to refute the alleged acquiescence by the Penns, will be for them to decide; but the court cannot yield to the arguments of the defendant's counsel, as to their legal effect. To do so, would, in my apprehension, be to subvert two of the best-established rules for the construction of deeds. The one is, that they are always to be construed most strongly against the grantor, where there is an ambiguity in their language; and the other is, that a meaning is to be given to every expression in them, if it can reasonably be done. Now, the lots conveyed by these deeds are those marked on Woods's plan, but then, they are to the river. If they are to be bounded by Water street, the intention of the parties, as shown by the expression of the deeds, will be frustrated. By extending the two lines of these lots pointing to the river, a meaning is given to every expression in those deeds—and what is to prevent this extension? It is said, that by doing so, they must run across a public highway or street, which would split each lot into two lots. But this would by no means be the case. The land on both sides of the street (if you should say the street does not cover the whole of the ground) belonged to the Penns, and they had a right to grant each of these lots, as entire parcels, to the river, subject only to the easement over it which they had previously granted to the public. These observations apply to the deed to Ormsby. But they apply with increased force to that to Craig & Bayard, who were equitably entitled to the ground granted to them in December 1784, in virtue of their written agreement with the Penns, in the January preceding, by which, the latter were bound to convey the same to them, bounded on one side by the Allegheny river, and on the other, by the Monongahela. After that agreement, it was not competent to the Penns to incumber that ground with a road, or in any other way, without the consent of Craig & Bayard. By accepting the conveyence, without objection, and with the knowledge that Water street had, in the meantime, been granted (as may for the present be presumed), they consented to take the ground, so incumbered, not by force of some new contract, of which not the slightest evidence has been given, save the grant itself, but as a fulfilment and execution of the old one.

As to the long use of this disputed piece of ground by the public, it will be for you to say, whether, in point of fact, such use has been proved? In point of law, you must be satisfied, not merely, that it was used by the inhabitants

*Samuel A. Worcester, Plaintiff in error, *v.* State of Georgia.

Return to writ of error.—Appellate jurisdiction.—Indian nations.

A writ of error was issued to "the judges of the superior court for the county of Gwinnett, in the state of Georgia," commanding them to send to the supreme court of the United States, the record and proceedings in the said superior court of the county of Gwinnett, between the state of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment in that court. The record of the court of Gwinnett was returned, certified by the clerk of the court, and was also authenticated by the seal of the court; it was returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney-general of the state, more than thirty days before the commencement of the term to which the writ of error was returnable.

The judiciary act, so far as it prescribes the mode of proceeding, appears to have been literally pursued. In February 1797, a rule was made on this subject, in the following words: "It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court." This has been done. But the signature of the judge has not been added to that of the clerk; the law does not require it; the rule does not require it.[1]

The plaintiff in error was indicted in the superior court for the county of Gwinnett, in the state of Georgia, "for residing, on the 15th July 1831, in that part of the Cherokee nation, attached, by the laws of the state of Georgia, to that county, without a license or permit from the governor of the state, or from any one authorized to grant it, and without having taken the oath to support and defend the constitution and laws of the state of Georgia, and uprightly to demean himself as a citizen thereof, contrary to the laws of the said state." To this indictment, he pleaded, that he was, on the 15th July 1831, in the Cherokee nation, out of the jurisdiction of the court of Gwinnett county; that he was a citizen of Vermont, and entered the Cherokee nation as a missionary, under the authority of the President of the United States, and had not been required by him to leave it, and that with the permission and approval of the Cherokee nation, he was engaged in preaching the Gospel; that the state of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee nation, by which that nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guarantied to them by the United States; and that the laws of Georgia, under which the plaintiff in error was indicted, were repugnant to the treaties, and unconstitutional and void, and also that they are repugnant to the act of congress of March 1802, entitled, "an act to regulate trade and intercourse with the Indian tribes." The superior court of Gwinnett overruled the plea, and the plaintiff in error was tried and convicted, and sentenced "to hard labor in the penitentiary for four years:" *Held*, that this was a case in which the supreme court of the United States

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of Pittsburgh or others; but that it was used as a highway or street; and in weighing the evidence on this point, you will naturally inquire, whether, from the nature of the ground, it was capable of being so used. As to acts of ownership, exercised by the corporation, in the way which has been stated, it is manifest, that they are altogether inconsistent with the right asserted in behalf of the public, since, if the whole of this ground, to low-water mark on the river, was dedicated for a street, it was vested as such in the public, subject to be regulated and improved by the corporation, and could not legally be taxed or used as private property by that body. If, upon the whole, you shall decide that this ground was granted or dedicated as a street, the plaintiff cannot recover in this suit. If otherwise, and that the spot in dispute in this suit constituted no part of the street, it passed to Wilson under the deed to him, and consequently, to the plaintiff, who has deduced his title to the same, regulately from him.

[1] If the clerk of the state court neglect to make a return to the writ, the court will grant a rule on him to make a return, on or before the first day of the next term, or show cause why he has not done so. United States *v.* Booth, 18 How. 476. And where the state court directed its clerk to make no return to the writ, the supreme court permitted a certified copy of the record to be filed and docketed, with the same effect as if returned by the clerk, upon the writ of error, and that the case stand for argument, without further notice. Id.

had jurisdiction, by writ of error, under *the 25th section of the "act to establish the judicial courts of the United States," passed in 1789.

The indictment and plea of this case draw in question the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption specially set up and claimed under them." They also draw into question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and, of course, imposed on it the duty, of exercising jurisdiction in this case. The record, according to the judiciary act and the rule and practice of the court, is regularly before the court.

The act of the legislature of Georgia, passed 22d December 1830, entitled, "an act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians," &c., enacts, that "all white persons, residing within the limits of the Cherokee nation, on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency, the governor, or from such agent as his excellency, the governor, shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labor, for a term not less than four years." The 11th section authorizes the governor, "should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organize a guard," &c. The 13th section enacts, "the said guard, or any member of them, shall be and they are hereby authorized and empowered, to arrest any person legally charged with, or detected in, a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this state, to be dealt with according to law." The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent thereto.

The principle, "that discovery of parts of the continent of America 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," acknowledged by all Europeans, because it was the interest of all to acknowledge it; gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; no one of which could annul the previous rights of those who had not agreed to it; it regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man; it gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined, in each case, by the particular government which asserted and could maintain this *pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both [*517 territorial and political, but no attempt, so far as it is known, has been made to enlarge them; so far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant; so far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves; the first of these charters was made, before possession was taken of any part of the country. They purport generally to convey the soil, from the Atlantic to the South Sea; this soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power, by them, to govern the people, or occupy the lands, from sea to sea, did not enter the mind of any man; they were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and

no more. This was the exclusive right of purchasing such lands as the natives were willing to sell; the crown could not be understood to grant, what the crown did not affect to claim, nor was it so understood.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them; he also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The third article of the treaty of Hopewell acknowledges the Cherokees to be under the protection of the United States of America, and of no other power. This stipulation is found in Indian treaties, generally; it was introduced into their treaties with Great Britain; and may probably be found in those with other European powers: its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation. The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain, was acknowledged by the others. This was the general state of things in time of peace; it was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it; goods, indispensable to their comfort, in the shape of presents, were received from the same land. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection, only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, no dominion over their persons; *it merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

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This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made, neither the British government, nor the Cherokees, ever understood it otherwise.

The same stipulation, entered into with the United States, is undoubtedly to be construed in the same manner; they receive the Cherokee nation into their favor and protection; the Cherokees acknowledge themselves to be under the protection of the United States, and of no other power; protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.

So, with respect to the words, "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other; it could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting-grounds, or whether an occasional village and an occasional cornfield interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood; they had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens of the other; the only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions 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, as they think proper." To construe the expression "managing all their affairs," into a surrender of self-government, would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them; the great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it; the commissioners brought forward the claim, with the profession that their motive was, "the benefit and comfort to the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the

regulation of all affairs connected with their trade; but cannot be true, as respects the management of their affairs; the most important of these, is the cession of their lands, and security against intruders on them. Is it credible, that they could have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? Is it equally inconceivable, that they could have supposed themselves, by a phrase thus slipped into an article, on another and more interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade; such a measure could not be *"for their benefit and comfort," nor for "the prevention of injuries and oppression;" such a construction would be inconsistent with the spirit of this [*519 and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war; it would convert a treaty of peace, covertly, into an act annihilating the political existence one of the parties. Had such a result been intended it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation, capable of main taining the relations of peace and war; and ascertain the boundaries between them and the United States.

The treaty of Holston, negotiated with the Cherokees, in July 1791, explictly recognising the national character of the Cherokees, and their right of self-government; thus gurantying their lands; assuming the duty of protection; and, of course, pledging the faith of the United State for that protection; has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians; some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide, that all intercourse with them shall be carried on exclusively by the government of the Union.

The Indian nations had always been considered as distinct, independent, political communites retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discover of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning; we have applied them to Indians as we have applied them to the other nations of the earth; they are applied to all in the same sense.

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States; various acts of her legislature have been cited in the argument, including the contract of cession, made in the year 1802, all tending to prove her acquiescence in the universal conviction, that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territority was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States.

*In opposition to the original right, possessed by the undisputed occupants of every [*520 country, to this recognition of that right, which is evidenced by our history in every change through which we have passed, are placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims, by the treaty of peace. The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his

crown. These newly-asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards, that of the United States; these articles are associated with others, recognising their title to self-government; the very fact of repeated treaties with them recognises it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe; "tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign, and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties, and with the acts of congress; the whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently, void, and the judgment a nullity.

The acts of the legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of congress for regulating this intercourse and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation, with its permission, and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States; he was seized
*521] while performing, under the *sanction of the chief magistrate of the Union, those duties which the humane policy adopted by congress had recommended; he was apprehended, tried and condemned, under color of a law which has been shown to be repugnant to the constitution, laws and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court; it cannot be less clear, when the judgment affects personal liberty, and inflicts disgraceful punishment—if punishment could disgrace, when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law, than if it affected his property; he is not less entitled to the protection of the constitution, laws and treaties of his country.

ERROR to the Superior Court for the county of Gwinnett, in the state of Georgia. On the 22d December 1830, the legislature of the state of Georgia passed the following act:

"An act to prevent the exercise of assumed and arbitary 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 of the state within the aforesaid territory.

"§ 1. Be it enacted, &c., that after the 1st day of February 1831, it shall not be lawful for any person or persons, under color or pretence of authority

from said Cherokee tribe, or as head-men, chiefs or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians or others living among them, for the purpose of legislating (or for any other purpose whatever). And persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment therefor, and on conviction, shall be punished by confinement at hard labor in the penitentiary, for the space of four years.

"§ 2. That after the time aforesaid, it shall not be lawful for any person or persons, under pretext of authority from the Cherokee tribe, or as representatives, chiefs, head-men or warriors of said tribe, to meet or assemble as a council, assembly, *convention, or in any other capacity, for the purpose of making laws, orders or regulations for said tribe. [*522 And all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to an indictment, and on conviction thereof, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

"§ 3. That after the time aforesaid, it shall not be lawful for any person or persons, under color or by authority of the Cherokee tribe, or any of its laws or regulations, to hold any court or tribunal whatever, for the purpose of hearing and determining causes, either civil or criminal; or to give any judgment in such causes, or to issue, or cause to issue, any process against the person or property of any of said tribe. And all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment, and on conviction thereof, shall be imprisoned in the penitentiary at hard labor, for the space of four years.

"§ 4. That after the time aforesaid, it shall not be lawful for any person or persons, as a ministerial officer, or in any other capacity, to execute any precept, command or process issued by any court or tribunal in the Cherokee tribe, on the persons or property of any of said tribe. And all persons offending against the provisions of this section shall be guilty of a trespass, and subject to an indictment, and on conviction thereof, shall be punished by fine and imprisonment in the jail or in the penitentiary, not longer than four years, at the discretion of the court.

"§ 5. That after the time aforesaid, it shall not be lawful for any person or persons to confiscate, or attempt to confiscate, or otherwise to cause a forfeiture of the property or estate of any Indian of said tribe, in consequence of his enrolling himself and family for emigration, or offering to enrol for emigration, or any other act of said Indian, in furtherance of his intention to emigrate. And persons offending against the provisions of this section shall be guilty of high misdemeanor, and on conviction, shall undergo an imprisonment in the penitentiary at hard labor, for the space of four years.

*"§ 6. That none of the provisions of this act shall be so construed as to prevent said tribe, its head-men, chiefs, or other representatives, from meeting any agent or commissioner, on the part of this state, or the United States, for any purpose whatever. [*523

"§ 7. That all white persons residing within the limits of the Cherokee nation, on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as

his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years: provided, that the provisions of this section shall not be so construed as to extend to any authorized agent or agents of the government of the United States, or of this state, or to any person or persons who may rent any of those improvements which have been abandoned by Indians who have emigrated west of the Mississippi: provided, nothing contained in this section shall be so construed as to extend to white females, and all male children under twenty-one years of age.

"§ 8. That all white persons, citizens of the state of Georgia, who have procured a license in writing from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, to reside within the limits of the Cherokee nation, and who have taken the following oath, viz: 'I, A. B., do solemnly swear (or affirm, as the case may be) that I will support and defend the constitution and laws of the state of Georgia, and uprightly demean myself as a citizen thereof, so help me God!' shall be, and the same are hereby declared exempt and free from the operation of the seventh section of this act.

"§ 9. That his excellency the governor be, and he is hereby, authorized to grant licenses to reside within the limits of the Cherokee nation, according to the provisions of the eighth section of this act.

*524] "§ 10. *That no person shall collect or claim any toll from any person, for passing any turnpike gate or toll-bridge, by authority of any act or law of the Cherokee tribe, or any chief, or head-men, or men of the same.

"§ 11. That his excellency the governor be, and he is hereby, empowered, should he deem it necessary, either for the protection of the mines, or for the enforcement of the laws of force within the Cherokee nation, to raise and organize a guard, to be employed on foot, or mounted, as occasion may require, which shall not consist of more than sixty persons, which guard shall be under the command of the commissioner or agent appointed by the governor, to protect the mines, with power to dismiss from the service any member of said guard, on paying the wages due for services rendered, for disorderly conduct, and make appointments to fill the vacancies occasioned by such dismissal.

"§ 12. That each person who may belong to said guard, shall receive for his compensation at the rate of fifteen dollars per month, when on foot, and at the rate of twenty dollars per month, when mounted, for every month that such person is engaged in actual service; and in the event, that the commissioner or agent, herein referred to, should die, resign, or fail to perform the duties herein required of him, his excellency the governor is hereby authorized and required to appoint, in his stead, some other fit and proper person to the command of said guard; and the commissioner or agent having the command of the guard aforesaid, for the better discipline thereof, shall appoint three sergeants, who shall receive at the rate of twenty dollars per month, while serving on foot, and twenty-five dollars per month, when mounted, as compensation whilst in actual service.

"§ 13. That the said guard, or any member of them, shall be, and they

are hereby, authorized and empowered, to arrest any person legally charged with, or detected in, a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior or justice of inferior court of this state, to be dealt *with according to law; and the pay and support of said guard be provided out of the fund already appropriated for the protection of the gold mines." [*525

The legislature of Georgia, on the 19th December 1829, passed the following act:

"An act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carrol, De Kalb, Gwinnett, Hall and Habersham, and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1828 upon this subject.

"§ 1. Be it enacted, &c., that from and after the passing of this act, all that part of the unlocated territory, within the limits of this state, and which lies between the Alabama line and the old path leading from the Buzzard Roost on the Chattahoochee, to Sally Hughes's, on the High-tower river; thence to Thomas Pelet's, on the old federal road; thence with said road to the Alabama line be and the same is hereby added to, and shall become a part of, the county of Carroll.

"§ 2. That all that part of said territory lying and being north of the last-mentioned line, and south of the road running from Charles Gait's ferry, on the Cattahoochee river, to Dick Roe's, to where it intersects with the path aforesaid, be and the same is hereby added to, and shall become a part of, the county of De Kalb.

"§ 3. That all that part of the said territory lying north of the last-mentioned line, and south of a line commencing at the mouth of Baldridge's creek; thence up said creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line, be and the same is hereby added to, and shall become part of, the county of Gwinnett.

"§ 4. That all that part of the said territory lying north of said last-mentioned line, and south *of a line to commence on the Chestatee river, at the mouth of Yoholo creek; thence up said creek to the top of the Blue ridge; thence to the head-waters of Notley river; thence down said river to the boundary line of Georgia, be and the same is hereby added to, and shall become a part of, the county of Hall. [*526

"§ 5. That all that part of said territory lying north of said last-mentioned line, within the limits of this state, be and the same is hereby added to, and shall become a part of, the county of Habersham.

"§ 6. That all the laws, both civil and criminal, of this state, be and the same are hereby extended over said portions of territory, respectively; and all persons whatever, residing within the same, shall, after the 1st day of June next, be subject and liable to the operation of said laws, in the same manner as other citizens of this state, or the citizens of said counties, respect-

ively ; and all writs and processes whatever, issued by the courts or officers of said courts, shall extend over, and operate on, the portions of territory hereby added to the same, respectively.

"§ 7. That after the 1st day of June next, all laws, ordinances, orders and regulations, of any kind whatever, made, passed or enacted by the Cherokee Indians, either in general council, or in any other way whatever, or by any authority whatever of said tribe, be and the same are hereby declared to be null and void, and of no effect, as if the same had never existed ; and in all cases of indictment or civil suits, it shall not be lawful for the defendant to justify under any of said laws, ordinances, orders or regulations ; nor shall the courts of this state permit the same to be given in evidence on the trial of any suit whatever.

"§ 8. That it shall not be lawful for any person or body of persons, by arbitrary power, or by virtue of any pretended rule, ordinance, law or custom of said Cherokee nation, to prevent by threats, menaces, or other means, or endeavor to prevent by threats, any Indian of said nation, residing within the chartered limits of this state, from enrolling as an emigrant, or actually emigrating or removing from said nation ; nor shall it be lawful for any person or body of persons, by arbitrary power, or by virtue of any pretended rule, *ordinance, law or custom of said nation, to punish, in any manner, or to molest either the person or property, or to abridge the rights or privileges of any Indian, for enrolling his or her name as an emigrant, or for emigrating or intending to emigrate, from said nation.

*527]

"§ 9. That any person or body of persons offending against the provisions of the foregoing section, shall be guilty of a high misdemeanor, subject to indictment, and on conviction, shall be punished by confinement in the common jail in any county of this state, or by confinement at hard labor in the penitentiary, for a term not exceeding four years, at the discretion of the court.

"§ 10. That it shall not by lawful for any person or body of persons, by arbitrary power, or under color of any pretended rule, ordinance, law or custom of said nation, to prevent or offer to prevent, or deter any Indian head-man, chief or warrior of said nation, residing within the chartered limits of this state, from selling or ceding to the United States, for the use of Georgia, the whole or any part of said territory, or to prevent or offer to prevent, any Indian head-man, chief or warrior of said nation, residing as aforesaid, from meeting in council or treaty any commissioner or commissioners on the part of the United States, for any purpose whatever.

"§ 11. That any person or body of persons offending against the provisions of the foregoing sections, shall be guilty of a high misdemeanor, subject to indictment, and on conviction, shall be confined at hard labor in the penitentiary, for not less than four nor longer than six years, at the discretion of the court.

"§ 12. That it shall not be lawful for any person or body of persons, by arbitrary force, or under color of any pretended rules, ordinances, law or custom of said nation, to take the life of any Indian, residing as aforesaid, for enlisting as an emigrant ; attempting to emigrate ; ceding, or attempting to cede, as aforesaid, the whole or any part of the said territory ; or meeting or attempting to meet, in treaty or in council, as aforesaid, any commissioner or commissioners aforesaid ; and any person or body of persons offending

against the provisions of this section, shall be guilty of *murder, subject to indictment, and on conviction, shall suffer death by hanging.

"§ 13. That, should any of the foregoing offences be committed under color of any pretended rules, ordinances, custom or law of said nation, all persons acting therein, either as individuals or as pretended executive, ministerial or judicial officers, shall be deemed and considered as principals, and subject to the pains and penalties hereinbefore described.

"§ 14. That for all demands which may come within the jurisdiction of a magistrate's court, suit may be brought for the same in the nearest district of the county to which the territory is hereby annexed; and all officers serving any legal process on any person living on any portion of the territory herein named, shall be entitled to recover the sum of five cents for every mile he may ride to serve the same, after crossing the present limits of the said counties, in addition to the fees already allowed by law; and in case any of the said officers should be resisted in the execution of any legal process issued by any court or magistrate, justice of the inferior court, or judge of the superior court of any of said counties, he is hereby authorized to call out a sufficient number of the militia of said counties to aid and protect him in the execution of this duty.

§ 15. That no Indian, or descendant of any Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness in any court of this state to which a white person may be a party, except such white person resides within the said nation."

In September 1831, the grand jurors for the county of Gwinnett in the state of Georgia, presented to the superior court of the county the following indictment:

"Georgia, Gwinnett county:—The grand jurors, sworn, chosen and selected for the county of Gwinnett, in the name and behalf of the citizens of Georgia, charge and accuse Elizur Butler, Samuel A. Worcester, James Trott, Samuel Mays, Surry Eaton, Austin Copeland and Edward D. Losure, white persons of said county, with the offence of 'residing within the limits of the Cherokee nation, without a license:' for that the said Elizur Butler, Samuel A. *Worcester, James Trott, Samuel Mays, Surry Eaton, [*529
Austin Copeland and Edward D. Losure, white persons as aforesaid, on the 15th day of July 1831, did reside in that part of the Cherokee nation attached by the laws of said state to the said county, and in the county aforesaid, without a license or permit from his excellency the governor of said state, or from any agent authorized by his excellency the governor aforesaid to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the state of Georgia, and uprightly to demean themselves as citizens thereof; contrary to the laws of said state, the good order, peace and dignity thereof."

To this indictment, the plaintiff in error pleaded specially, as follows: "And the said Samuel A. Worcester, in his own proper person, comes and says, that this court ought not to take further cognisance of the action and prosecution aforesaid, because he says, that on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee nation; and that the said supposed crime, or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee nation,

out of the jurisdiction of this court, and not in the county Gwinnett, or elsewhere within the jurisdiction of this court. And this defendant saith, that he is a citizen of the state of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation, in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment. And this defendant further saith, that this prosecution the state of Georgia ought not to have or maintain, because he saith, that several treaties have, from time to
*530] time, been entered *into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November 1785; at Holston, on the 2d day of July 1791; at Philadelphia, on the 26th day of June 1794; at Tellico, on the 2d day of October 1798; at Tellico, on the 24th day of October 1804; at Tellico, on the 25th day of October 1805; at Tellico, on the 27th day of October 1805; at Washington City, on the 7th day of January 1805; at Washington City, on the 22d day of March 1816; at the Chickasaw Council House, on the 14th day of September 1816; at the Cherokee Agency, on the 8th day of July 1817; and at Washington City, on the 27th day of February 1819: all which treaties have been duly ratified by the senate of the United States of America; and by which treaties the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory; and, by which treaties, the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guarantied to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several states composing the union of the United States; and it is thereby specially stipulated, that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear, by reference to the aforesaid treaties. And this defendant saith, that the several acts charged in the bill of indictment, were done, or omitted to be done, if at all, within the said territory so recognised as belonging to the said nation, and so, as aforesaid, held by them, under the guarantee of the United States; that for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said state; and that the laws of the state of Georgia, which profess to add the said territory to the several adjacent
*531] counties of the said state, and to extend the laws of Georgia over the said *territory, and persons inhabiting the same; and, in particular,

the act on which this indictment against this defendant is grounded, to wit, 'an act 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 of the state within the aforesaid territory,' are repugnant to the aforesaid treaties; which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the —— day of March 1802, entitled, 'an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers;' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offence or offences alleged in the bill of indictment, or any of them; and therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court; and the jurisdiction of the superior court of the county of Gwinnett was sustained by the judgment of the court. The defendant was then arraigned, and pleaded "not guilty:" and the case come on for trial on the 15th of September 1831, when the jury found the defendants in the indictment guilty. On the same day, the court pronounced sentence on the parties so convicted, as follows: *"The *[532
State *v.* B. F. Thompson and others. Indictment for residing in the Cherokee nation without license. Verdict, guilty. The State *v.* Elizur Butler, Samuel A. Worcester and others. Indictment for residing in the Cherokee nation without license. Verdict, guilty. The defendants, in both of the above cases, shall be kept in close custody by the sheriff of this county, until they can be transported to the penitentiary of this state, and the keeper thereof is hereby directed to receive them, and each of them, into his custody, and keep them, and each of them, at hard labor in said penitentiary, for and during the term of four years."

A writ of error was issued, on the application of the plaintiff in error, on the 27th of October 1831, which, with the following proceedings thereon, was returned to this court.

"United States of America, ss:—The President of the United States to the Honorable the judges of the Superior Court for the county of Gwinnett, in the state of Georgia, greeting:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, for the county of Gwinnett, before you, or some of you, between the state of Georgia, plaintiff,

and Samuel A. Worcester, defendant, on an indictment, being the highest court of law in said state in which a decision could be had in said suit, a manifest error hath happened, to the great damage of the said Samuel A. Worcester, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said supreme court, to be then and there held; that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

*533] *"Witness, the Honorable John Marshall, Chief Justice of the said Supreme Court, the first Monday of August, in the year of our Lord 1831. Wm. Thos. Carroll,

Clerk of the Supreme Court of the United States.

"Allowed by—Henry Baldwin.

"United States of America, to the state of Georgia, greeting: You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the superior court for the county of Gwinnett, in the state of Georgia, wherein Samuel A. Worcester is plaintiff in error, and the state of Georgia is defendant in error, to show cause, if any there be, why judgment rendered against the said Samuel A. Worcester, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. Witness, the Honorable Henry Baldwin, one of the justices of the supreme court of the United States, this 27th day of October, in the year of our Lord 1831. Henry Baldwin.

"State of Georgia, county of Gwinnett, set:—On this 26th day of November, in the year of our Lord 1831, William Potter personally appeared before the subscriber, John Mills, a justice of the peace in and for said county, and being duly sworn on the holy evangelists of Almighty God, deposeth and saith, that on the 24th day of November instant, he delivered a true copy of the within citation to his exellency, Wilson Lumpkin, Governor of the state of Georgia, and another true copy thereof he delivered, on the 22d day of November instant, to Charles J. Jenkins, Esq., Attorney-General of the state aforesaid, showing to the said governor and attorney-general, respectively, at the times of delivery herein stated, the within citation. Wm. Potter."

"Sworn to and subscribed before me, the day and year above written.

John Mills, J. P."

*534] This writ of error was returned to the supreme court with *copies of all the proceedings in the superior court of the county of Gwin-

nett, as stated, and accompanied with certificates of the clerk of that court in the following terms:

"Georgia, Gwinnett county: I. John G. Park, clerk of the superior court of the county of Gwinnett, and state aforesaid, do certify that the annexed and foregoing is a full and complete exemplification of the proceedings and judgments had in said court against Samuel A. Worcester, one of the defendants in the case therein mentioned, as they remain of record in the said superior court. Given under my hand, and seal of the court, this 28th day of November 1831. JOHN G. PARK, Clerk."

"I also certify, that the original bond, of which a copy is annexed (the bond was in the usual form), and also a copy of the annexed writ of error, were duly deposited and filed in the clerk's office of said court, on the 10th day of November, in the year of out Lord 1831. Given under my hand and seal aforesaid, the day and date above written. JOHN G. PARK, Clerk."

The case of Elizur Butler, plaintiff in error, *v.* The State of Georgia, was brought before the supreme court in the same manner.

The case was argued for the plaintiffs in error, by *Sergeant* and *Wirt*, with whom also was *Elisha W. Chester.*

The following positions were laid down and supported by *Sergeant* and *Wirt.*

1. That the court had jurisdiction of the question brought before them by the writ of error; and the jurisdiction extended equally to criminal and to civil cases.

2. That the writ of error was duly issued, and duly returned, so as to bring the question regularly before the court, under the constitution and laws of the United States; and oblige the court to take cognisance of it.

3. That the statute of Georgia under which the plaintiffs in error were indicted and convicted, was unconstitutional and void. Because: *1. By the constitution of the United States, the establishment and regulation of intercourse with the Indians belonged, exclusively, to the government of the United States. 2. The power thus given, exclusively, to the government of the United States had been exercised by treaties and by acts of congress, now in force, and applying directly to the case of the Cherokees; and that no state could interfere, without a manifest violation of such treaties and laws, which by the constitution were the supreme law of the land. 3. The statute of Georgia assumed the power to change these regulations and laws; to prohibit that which they permitted; and to make that criminal which they declared innocent or meritorious; and to subject to condemnation and punishment free citizens of the United States who had committed no offence. 4. That the indictment, conviction and sentence being founded upon a statute of Georgia, which was unconstitutional and void; were themselves also void and of no effect, and ought to be reversed. [*535

These several positions were supported, enforced and illustrated by argument and authority. The following authorities were referred to: Judiciary Act of 1789, § 25 (1 U. S. Stat. 85); *Miller* v. *Nicols*, 4 Wheat. 311; *Craig* v. *State of Missouri*, 4 Pet. 410, 429; *Fisher* v. *Cockerell*, 5 Ibid. 248; *Ex parte Kearney*, 7 Wheat. 38; *Cohens* v. *Virginia*, 6 Ibid.

264; *Martin* v. *Hunter*, 1 Ibid. 304, 315, 361; 1 Laws U. S. 468, 470, 472, 482, 484, 486, 453; Blunt's Historical Sketch 106–7; Treaties with the Cherokees, 28th Nov. 1785; 2d July 1791; 26th July 1794; 2d Oct. 1798; 3 Laws U. S. 27, 125, 284, 303, 344, 460; 12 Journ. Congress 82; Blunt's Hist. Sketch 113, 110, 111, 114; Federalist, No. 42; 1 Laws U. S. 454; *Holland* v. *Pack*, Peck 151; *Johnson* v. *McIntosh*, 8 Wheat. 543; *Cherokee Nation* v. *State of Georgia*, 5 Pet. 1, 16, 27, 31, 48; *Ware* v. *Hylton*, 3 Dall. 199; *Hughes* v. *Edwards*, 9 Wheat. 489; *Fisher* v. *Harnden*, 1 Paine 55; *Hamilton* v. *Eaton*, Mart. (N. C.) 79; *McCullough* v. *State of Maryland*, 4 Wheat. 316; 2 Laws U. S. 121; 3 Ibid. 460; 6 Ibid. 750; *Gibbons* v. *Ogden*, 9 Wheat. 1.

*536] *MARSHALL, Ch. J., delivered the opinion of the court.—This cause, in every point of view in which it can be placed, is of the deepest interest. The defendant is a state, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States. The plaintiff is a citizen of the state of Vermont, condemned to hard labor for four years in the penitentiary of Georgia; under color of an act which he alleges to be repugnant to the constitution, laws and treaties of the United States. The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behoves this court, in every case, more especially in this, to examine into its jurisdiction, with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry, whether the record is properly before the court. It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned, and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error, issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney-general of the state, more than thirty days before the commencement of the term to which the writ of error was returnable. The judiciary act, §§ 22, 25 (1 U. S. Stat. 84–5), so far as it prescribes the mode of proceeding, appears to have been literally pursued. In February 1797, a rule was made on this subject, in the following words: "It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true *copy of the record, and of all proceedings in the same, under his hand and the seal of the court." This has been done. But the signature of the judge has not been added to that of the clerk; the law does not require it—the rule does not require it.

*537]

In the case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 361, an exception was taken to the return of the refusal of the state court to enter a prior judgment of reversal by this court; because it was not made by the judge of the state court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel* v. *Van Ness*, 8 Wheat. 312, also a writ of error to a state court, the record was authenti-

cated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar, that in regard to this process, the law makes no distinction between a criminal and civil case; the same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given. *Mc Culloch* v. *State of Maryland*, 4 Wheat. 310, was a *qui tam* action, brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown* v. *State of Maryland* was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways. The record, then, according to the judiciary act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, does it exhibit a case cognisable by this tribunal?

The indictment charges the plaintiff in error and others, being white persons, with the offence of "residing within the limits of the Cherokee nation, without a license," and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." The defendant in the state court appeared in proper person, and filed the following plea:

"And the said Samuel A. Worcester, in his own proper person, comes and says, that this court ought not to take *further cognisance of the action and prosecution aforesaid, because he says, that on the 15th [*538 day of July, in the year 1831, he was, and still is, a resident in the Cherokee nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee nation, out of the jurisdiction of this court, and not in the county of Gwinnett, or elsewhere within the jurisdiction of this court. And this defendant saith, that he is a citizen of the state of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment. And this defendant further saith, that this prosecution the state of Georgia ought not to have or maintain, because he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November 1785; at Holston, on the 2d day of July 1791; at Philadelphia, on the 26th day of June 1794; at Tellico, on the 2d day of October 1798; at Tellico, on the 24th day of October 1804; at Tellico, on the 25th day of October 1805; at Tellico, on the 27th day of October 1805; at Washington City, on the 7th day of January 1805; at Washington City, on the 22d day of March 1816; at the Chickasaw Council House, on the 14th day of September 1816; at the Cherokee Agency, on the 8th

day of July 1817; and at Washington City, on the 27th day of February, 1819; all which treaties have been duly ratified by the senate of the United States of America; and by which treaties, the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing *the United States of America, in reference to acts done within their own territory; and by which treaties, the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guarantied to them all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several states composing the union of the United States; and it is thereby specially stipulated, that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorized thereto, by the President of the United States; all of which will more fully and at large appear, by reference to the aforesaid treaties. And this defendant saith, that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognised as belonging to the said nation, and so, as aforesaid, held by them, under the guarantee of the United States; that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said state; and that the laws of the state of Georgia, which profess to add the said territory to the several adjacent counties of the said state, and to extend the laws of Georgia over the said territory, and persons inhabiting the same; and, in particular, the act on which this indictment against this defendant is grounded, to wit, 'an act 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 of the state within the aforesaid territory,' are repugnant to the aforesaid treaties, which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, *as above recited; also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the —— day of March 1802, entitled, 'an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers:' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offence or offences alleged in the bill of indictment,

*539]

*540]

or any of them ; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court ; and the prisoner being arraigned, plead not guilty. The jury found a verdict against him, and the court sentenced him to hard labor, in the penitentiary, for the term of four years.

By overruling this plea, the court decided, that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the 25th section of the "act to establish the judicial courts of the United States." The plea avers, that the residence, charged in the indictment, was under the authority of the President of the United States, and with the permission and approval of the Cherokee nation. That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void. That the said act is also unconstitutional ; because it interferes with, and attempts to regulate and control the intercourse with the Cherokee nation, which belongs, exclusively, to congress ; and because also, it is repugnant to the statute of the United States, entitled, "an act to *regulate [*541 trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the 25th section of the judiciary act. That section enumerates the cases in which the final judgment or decree of a state court may be revised in the supreme court of the United States. These are, "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity ; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission." The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians ; if not so, their construction is certainly drawn in question ; and the decision has been, if not against their validity, "against the right, privilege or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of its validity." It is, then, we think, too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and of course, imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them

We must examine the defence set up in this plea; we must inquire and decide, whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States.

*542] *It has been said at the bar, that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence. If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded. It enacts, that "all white persons residing within the limits of the Cherokee nation, on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labor, for a term not less than four years." The 11th section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, "to raise and organize a guard," &c. The 13th section enacts, "that the said guard or any member of them, shall be and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this state, to be dealt with according to law." The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction. The first step, then, in the inquiry, which the constitution and laws impose on this court, is an examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their *own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either, by the other, should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufacturers, and whose general employment was war, hunting and fishing. Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on

*543]

agriculturists and manufacturers? But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent, at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, 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." 8 Wheat. 573. This principle, acknowledged by all [*544
Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between the Europeans and the natives was determined in each case, by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made, before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from *sea [*545
to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more.

This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several defences, to encounter, expulse, repel and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations." The charter to Connecticut concludes a general power to make defensive war with these terms: "and upon just causes to invade and destroy the natives or other enemies of the said colony." The same power, in the same words, is conferred on the government of Rhode Island. This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "And because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates and robbers, may probably be feared, therefore, we have given," &c. The instrument then confers the power of war. These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure. The same clause is introduced into the charter to Lord Baltimore. *The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces "at present waste and desolate." It recites, "and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war, by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages." These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth, that these grants asserted a title against Europeans only, and were considered as blank paper, so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.

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The charters contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of

one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of *words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in profes- [*547 sions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs, nor interfered with their self-government, so far as respected themselves only.

The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says, "Lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but as you know that, as your white brethren cannot feed you when you visit them, unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties *with your people will be faith- [*548 fully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the King of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them. The proclamation proceeds: "And we do further declare it to be our royal will and pleasure,

for the present, as aforesaid, to reserve, under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories lying to the westward of, the sources of the rivers which fall into the sea, from the west and northwest as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained. And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation, issued by Governor Gage, in 1772, contains the following passage : "Whereas, many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations ; particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans ; such her claims, and such her practical exposition of the charters she had granted ; she considered them as nations capable of maintaining the relations of peace and war ; of governing themselves, under her protection ; and she *549] *made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our revolution commenced. The influence of our enemy was established ; her resources enabled her to keep up that influence ; and the colonists had much cause for the apprehension, that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress revolved, "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies." The early journals of congress exhibit a most anxious desire to conciliate the Indian nations. Three Indian departments were established ; and commissioners appointed in each, "to treat with the Indians, in their respective departments, in the name and on the behalf of the united colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions." The most strenuous exertions were made, to procure those supplies on which Indian friendships were supposed to depend ; and everything which might excite hostility was avoided.

The first treaty was made with the Delawares, in September 1778. The language of equality in which it is drawn, evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States. "1. That all offences or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance. 2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding

generations; and if either of the parties are engaged in a just and necessary war, with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," &c. 3. The third article stipulates among other things, a free *passage for the American troops through the Delaware nation; and engages that they shall be furnished with provisions and other necessaries at their value. [*550 "4. For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties, and natural justice," &c. 5. The fifth article regulates the trade between the contracting parties, in a manner entirely equal. 6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States, by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas, the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the states aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, 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 hath been bounded by former treaties, as long as the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into." The parties further agree, that other tribes, friendly to the interest of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress. This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe. The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

*During the war of the revolution, the Cherokees took part with the British. After its termination, the United States, though desir- [*551 ous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for congress which was before felt for the King of Great Britain. This may account for the language of the treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact, that every one makes his mark; no chief was capable of signing his name. It is probable, the treaty was interpreted to them.

The treaty is introduced with the declaration, that "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 of America, on the following conditions." When the United States gave peace, did

they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us, that the United States were at least as anxious to obtain it as the Cherokees? We may ask further, did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," them, has no real importance attached to it. The first and second articles stipulate for the mutual restoration of prisoners, and are of course equal. The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power. This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a *great degree, to the *552] particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things, in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands—no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character. This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

The same stipulation, entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first president. The fourth article draws the boundary between the Indians and the citizens of the United States. But in describing this boundary, the term "allotted" and the term "hunting-ground" are used.

Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out?" The actual subject of contract was the dividing line between *553] the two nations, *and their attention may very well be supposed to

have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed, that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood, is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used. So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn-field, interrupted, and gave some variety to the scene. These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians for their hunting-grounds; and stipulates, that, if he shall not remove within six months, the Indians may punish him. The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation. The ninth article is in these words: "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions 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, as they think proper."

To construe the expression "managing all their affairs," *into a surrender of self-government, would be, we think, a perversion of [*554 their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable, that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and

oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokee as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the state of Georgia and the Cherokee nation, the treaty of *Holston was negotiated, in July 1791. The existing constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was perhaps less mindful of high-sounding expressions, denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and in pursuance of this desire, the first article declares, that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation. The second article repeats the important acknowledgment, that the Cherokee nation is under the protection of the United States of America, and of no other sovereign whosoever.

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The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate, for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States, which had before subsisted with Great Britain. This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners. The fourth article declares, that "the boundary between the United States and the Cherokee nation shall be as follows, beginning," &c. We hear no more of "allotments" or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each—the ability of each to establish this boundary, is acknowledged by the other. To preclude for ever all disputes, it is agreed, *that it shall be plainly marked by commissioners, to be appointed by each party; and in order to extinguish for ever all claims of the Cherokees to the ceded lands, an additional consideration is to be paid by the

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United States. For this additional consideration, the Cherokees release all right to the ceded land, for ever. By the fifth article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them. By the sixth article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it. By the seventh article, the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded. The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport. The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognising the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and, of course, pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force. To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest *a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that [*557
of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

In 1819, congress passed an act for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive. It enacts, "that, for the purpose of providing against the further decline and final extinction of the Indian tribes, adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced, with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties." This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this

object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted, that the general words of the act comprehend them. Their advance in the "habits and arts of civilization," rather encouraged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country, by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. *Is this the rightful exercise of power, or is it usurpation?

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While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies, acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction, that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared these united colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first, in the name of these united colonies; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on, under the direction, and with the forces of the United States, and the efforts to make peace by treaty were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, reapectively, unless a state be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not *members of any of the states; provided, that the legislative power of any state within its own limits be not infringed or violated."

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The ambiguous phrases which follow the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to

annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation," are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We *have applied them to [*560
Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence, that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of session made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any state, within whose chartered limits they might reside, by a boundary line, established by treaties; that within their boundary, they possessed rights with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parceling

out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims, by the treaty of peace. The actual state of things, at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly-asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognising their title to self-government. The very fact of repeated treaties with them recognises
*561] it; and the settled *doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the view which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary
*562] that separates *the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself. They are in hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties. The forcible seizure and abduction of the plaintiff in error, who was residing in the nation, with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized, while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried and condemned, under color of a law which has been shown to be repugnant to the constitution, laws and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear, when the judgment affects personal liberty, and inflicts disgraceful punishment—if punishment could disgrace, when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law, than if it affected his property. He it not less entitled to the protection of the constitution, laws and treaties of his country. This point has been elaborately argued, and after deliberate consideration, decided, in the case of *Cohens* v. *Commonwealth of Virginia*, 6 Wheat. 264.

It is the opinion of this court, that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the state of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties and laws of the *United States, and ought, therefore, to be reversed and annulled. [*563

McLean, Justice.—As this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country; and as there are some points in the case on which I wish to state, distinctly, my opinion, I embrace the privilege of doing so. With the decision just given, I concur.

The plaintiff in error was indicted under a law of Georgia, "for residing in that part of the Cherokee nation, attached, by the laws of said state, to the county of Gwinnett, without a license or permit from his excellency the governor of the state, or from any agent authorized by his excellency the governor to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the state of Georgia, and uprightly to demean himself as a citizen thereof." On this indictment, the defendant was arrested, and on being arraigned before the superior court for Gwinnett county, he filed, in substance, the following plea:

He admits, that on the 15th of July 1831, he was, and still continued to be, a resident in the Cherokee nation, and that the crime, if any were committed, was committed at the town of New Echota, in said nation, out of the jurisdiction of the court. That he is a citizen of Vermont, and that he entered the Indian country in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it. That he was, at the time of his arrest, engaged in preaching the Gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the Cherokee nation, and in accordance with the humane

policy of the government of the United States, for the improvement of the Indians. He then states, as a bar to the prosecution, certain treaties made *564] between the United States and the Cherokee Indians, by *which the possession of the territory they now inhabit was solemnly guarantied to them; and also a certain act of congress, passed in March 1802, entitled "an act to regulate trade and intercourse with the Indian tribes." He also alleges, that this subject, by the constitution of the United States, is exclusively vested in congress; and that the law of Georgia, being repugnant to the constitution of the United States, to the treaties referred to, and to the act of congress specified, is void, and cannot been forced against him.

This plea was overruled by the court, and the defendant pleaded not guilty. The jury returned a verdict of guilty; and the defendant was sentenced by the court, to be kept in close custody, by the sheriff of the county, until he could be transported to the penitentiary of the state, and the keeper thereof was directed to receive him into custody, and keep him at hard labor in the penitentiary, during the term of four years. Another individual was included in the same indictment, and joined in the plea to the jurisdiction of the court, and was also included in the sentence; but his name is not adverted to, because the principles of the case are fully presented in the above statement. To reverse this judgment, a writ of error was obtained, which, having been returned, with the record of the proceedings, is now before this court.

The first question which it becomes necessary to examine, is, whether the record has been duly certified, so as to bring the proceedings regularly before the tribunal. A writ of error was allowed, in this case, by one of the justices of this court, and the requisite security taken. A citation was also issued, in the form prescribed, to the state of Georgia, a true copy of which, as appears by the oath of William Potter, was delivered to the governor, on the 24th day of November last; and another true copy was delivered, on the 22d day of the same month, to the attorney-general of the state. The record was returned by the clerk, under the seal of the court, who certifies, that it is a full and complete exemplification of the proceed- *565] ings and judgment had in the case; and he *further certifies, that the original bond, and a copy of the writ of error, were duly deposited and filed in the clerk's office of said court, on the 10th day of November last. Is it necessary, in such a case, that the record should be certified by the judge who held the court?

In the case of *Martin* v. *Hunter's Lessee*, which was a writ of error to the conrt of appeals of Virginia, it was objected, that the return to the writ of error was defective, because the record was not so certified; but the court, in that case, said, "the forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the legislature to be regulated and changed as this court may, in its discretion, deem expedient." By a rule of this court, "the return of a copy of a record of the proper court, annexed to the writ of error, is declared to be a sufficient compliance with the mandate of the writ. The record, in this case, is duly certified by the clerk of the court of appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return cannot prevail." 1 Wheat. 304. In 9 Ibid. 526, in the case of *Stewart* v. *Ingle and others*, which was a writ of error to the circuit court

for the district of Columbia, a *certiorari* was issued, upon a suggestion of diminution in the record, which was returned by the clerk with another record; whereupon, a motion was made for a new *certiorari*, on the ground, that the return ought to have been made by the judge of the court below, and not by the clerk. The writ of *certiorari*, it is known, like the writ of error, is directed to the court. Mr. Justice WASHINGTON, after consultation with the judges, stated that, according to the rules and practice of the court, a return made by the clerk was a sufficient return.

To ascertain what has been the general course of practice on this subject, an examination has been made into the manner in which records have been certified from state courts to this court; and it appears, that in the year 1817, six causes were certified, in obedience to writs or error, by the clerk, under the seal of the court. In the year 1819, two were so certified, one of them being the case of *McCullough* v. *State of Maryland.* *In the year 1821, three cases were so certified; and in the year 1823, [*566 there was one. In 1827, there was five, and in the ensuing year, seven. In the year 1830, there were eight causes so certified, in five of which a state was a party on the record. There were three causes thus certified in the year 1831, and five in the present year. During the above periods, there were only fifteen causes from state courts, where the records were certified by the court or the presiding judge, and one of these was the case of *Cohens* v. *State of Virginia.*

This court adopted the following rule on this subject in 1797: "It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, may make the return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand, and the seal of the court." The power of the court to adopt this rule cannot be questioned; and it seems to have regulated the practice ever since its adoption. In some cases, the certificate of the court, or the presiding judge, has been affixed to the record; but this court has decided, where the question has been raised, that such certificate is unnecessary. So far as the authentication of the record is concerned, it is impossible to make a distinction between a civil and a criminal case. What may be sufficient to authenticate the proceedings in a civil case, must be equally so in a criminal one. The verity of the record is of as much importance in the one case as the other. This is a question of practice; and it would seem that, if any one point in the practice of this court can be considered as settled, this one must be so considered.

In the progress of the investigation, the next inquiry which seems naturally to arise, is, whether this is a case in which a writ of error may be issued. 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 *validity of a treaty, or statute of, or an [*567 authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or

statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined, and reversed or affirmed, in the supreme court of the United States." Doubts have been expressed, whether a writ of error to a state court is not limited to civil cases. These doubts could not have arisen from reading the above section. Is not a criminal case as much a suit as a civil case? What is a suit, but a prosecution; and can any one suppose, that it was the intention of congress, in using the word "suit," to make a distinction between a civil prosecution and a criminal one? It is more important that jurisdiction should be given to this court in criminal than in civil cases, under the 25th section of the judiciary act. Would it not be inconsistent, both with the spirit and letter of this law, to revise the judgment of a state court, in a matter of controversy respecting damages, where the decision is against a right asserted under the constitution or a law of the United States; but to deny the jurisdiction, in a case where the property, the character, the liberty and life of a citizen may be destroyed, though protected by the solemn guarantees of the constitution?

But this is not an open question; it has long since been settled by the solemn adjudications of this court. The above construction, therefore, is sustained both on principle and authority. The provisions of the section apply as well to criminal as to civil cases, where the constitution, treaties or laws of the United States come in conflict with the laws of a state; and the latter is sustained by the decision of the court.

*568] It has been said, that this court can have no power to arrest *the proceedings of a state tribunal, in the enforcement of the criminal laws of the state. This is undoubtedly true, so long as a state court in the execution of its penal laws, shall not infringe upon the constitution of the United States, or some treaty or law of the Union. Suppose, a state should make it penal for an officer of the United States to discharge his duties within its jurisdiction; as, for instance, a land officer, an officer of the customs, or a postmaster, and punish the offender by confinement in the penitentiary; could not the supreme court of the United States interpose their power, and arrest or reverse the state proceedings? Cases of this kind are so palpable, that they need only to be stated, to gain the assent of every judicious mind. And would not this be an interference with the administration of the criminal laws of a state?

This court have repeatedly decided, that they have no appellate jurisdiction in criminal cases from the circuit courts of the United States; writs of error and appeals are given from those courts only in civil cases. But even in those courts, where the judges are divided on any point, in a criminal case, the point may be brought before this court, under a general provision in cases of division of opinion.

Jurisdiction is taken in the case under consideration, exclusively by the provisions of the 25th section of the law which has been quoted. These provisions, as has been remarked, apply, indiscriminately, to criminal and civil cases, wherever a right is claimed under the constitution, treaties or laws of the United States, and the decision, by the state court, is against such right. In the present case, the decision was against the right expressly set up by the defendant, and it was made by the highest judicial tribunal

of Georgia. To give jurisdiction in such a case, this court need look no further than to ascertain whether the right, thus asserted, was decided against by the state court. The case is clear of difficulty on this point.

The name of the state of Georgia is used in this case, because such was the designation given to the cause in the state court. No one ever supposed, that the state, in its sovereign capacity, in such a case, is a party to the cause. The form of *the prosecution here must be the same as it was in the state court; but so far as the name of the state is used, [*569 it is matter of form. Under a rule of this court, notice was given to the governor and attorney-general of the state, because it is a part of their duty to see that the laws of the state are executed. In prosecutions for violations of the penal laws of the Union, the name of the United States is used in the same manner. Whether the prosecution be under a federal or state law, the defendant has a right to question the constitutionality of the law.

Can any doubt exist as to the power of congress to pass the law, under which jurisdiction is taken in this case? Since its passage, in 1789, it has been the law of the land; and has been sanctioned by an uninterrupted course of decisions in this court, and acquiesced in by the state tribunals, with perhaps, a solitary exception; and whenever the attention of the national legislature has been called to the subject, their sanction has been given to the law by so large a majority as to approach almost to unanimity. Of the policy of this act, there can be as little doubt, as of the right of congress to pass it.

The constitution of the United States was formed, not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the states; but by a combined power, exercised by the people, through their delegates, limited in their sanctions, to the respective states. Had the constitution emanated from the people, and the states had been referred to, merely as convenient districts, by which the public expression could be ascertained, the popular vote throughout the Union would have been the only rule for the adoption of the constitution. This course was not pursued; and in this fact, it clearly appears, that our fundamental law was not formed, exclusively, by the popular suffrage of the people. The vote of the people was limited to the respective states in which they resided. So that it appears, there was an expression of popular suffrage and state sanction, most happily united, in the adoption of the constitution of the Union.

Whatever differences of opinion may exist, as to the means *by [*570 which the constitution was adopted, there would seem to be no ground for any difference as to certain powers conferred by it. Three co-ordinate branches of the government were established; the executive, legislative and judicial. These branches are essential to the existence of any free government, and that they should possess powers, in their respective spheres, co-extensive with each other. If the executive have not powers which will enable him to execute the functions of his office, the system is essentially defective; as those duties must, in such case, be discharged by one of the other branches. This would destroy that balance which is admitted to be essential to the existence of free government, by the wisest and most enlightened statesmen of the present day. It is not less important, that the legislative power should be exercised by the appropriate branch of

the government, than that the executive duties should devolve upon the proper functionary. And if the judicial power fall short of giving effect to the laws of the Union, the existence of the federal government is at an end. It is in vain, and worse than in vain, that the national legislature enact laws, if those laws are to remain upon the statute book as monuments of the imbecility of the national power. It is in vain, that the executive is called to superintend the execution of the laws, if he have no power to aid in their enforcement. Such weakness and folly are, in no degree, chargeable to the distinguished men through whose instrumentality the constitution was formed. The powers given, it is true, are limited; and no powers, which are not expressly given, can be exercised by the federal government; but, where given, they are supreme. Within the sphere allotted to them, the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the state governments. The powers exclusively given to the federal government are limitations upon the state authorities. But with the exception of these limitations, the states are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power.

*571] *It has been asserted, that the federal government is foreign to the state governments; and that it must, consequently, be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither foreign to the state governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the state governments. Where, by the constitution, the power of legislation is exclusively vested in congress, they legislate for the people of the Union, and their acts are as binding, as are the constitutional enactments of a state legislature, on the people of the state. If this were not so, the federal government would exist only in name. Instead of being the proudest monument of human wisdom and patriotism, it would be the frail memorial of the ignorance and mental imbecility of its framers. In the discharge of his constitutional duties, the federal executive acts upon the people of the Union, the same as a governor of a state, in the performance of his duties, acts upon the people of the state. And the judicial power of the United States acts in the same manner on the people. It rests upon the same basis as the other departments of the government. The powers of each are derived from the same source, and are conferred by the same instrument. They have the same limitations and extent.

The supreme court of a state, when required to give effect to a statute of the state, will examine its constitution, which they are sworn to maintain, to see if the legislative act be repugnant to it; and if repugnancy exist, the statute must yield to the paramount law. The same principle governs the supreme tribunal of the Union. No one can deny that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature, or of congress, which is repugnant to it, can be of any validity. Now, if an act of a state legislature be repugnant to the constitution of the state, the state court will declare it void; and if such act be repugnant to the constitution of the Union, or a law made under that constitution, which is declared to be the supreme law of the land, is it not

equally void? And under *such circumstances, if this court should shrink from a discharge of their duty, in giving effect to the supreme law of the land, would they not violate their oath, prove traitors to the constitution, and forfeit all just claim to the public confidence?

It is sometimes objected, if the federal judiciary may declare an act of a state legislature void, because it is repugnant to the constitution of the United States, it places the legislation of a state within the power of this court. And might not the same argument be urged with equal force against the exercise of a similar power, by the supreme court of a state. Such an argument must end in the destruction of all constitutions, and the will of the legislature, like the acts of the parliament of Great Britain, must be the supreme and only law of the land. It is impossible to guard an investiture of power so that it may not, in some form, be abused; an argument, therefore, against the exercise of power, because it is liable to abuse, would go to the destruction of all governments. The powers of this court are expressly, not constructively, given by the constitution; and within this delegation of power, this court are the supreme court of the people of the United States, and they are bound to discharge their duties, under the same responsibilities as the supreme court of a state; and are equally, within their powers, the supreme court of the people of each state.

When this court are required to enforce the laws of any state, they are governed by those laws. So closely do they adhere to this rule, that during the present term, a judgment of a circuit court of the United States, made in pursuance of decisions of this court, has been reversed and annulled, because it did not conform to the decisions of the state court, in giving a construction to a local law. But while this court conforms its decision to those of the state courts, on all questions arising under the statutes and constitution of the respective states, they are bound to revise and correct those decisions, if they annul either the constitution of the United States or the laws made under it. It appears, then, that on all questions arising under the laws of a state, the decisions of the courts of such state form a rule for the decisions of this court, and that on all questions arising under the laws of the United States, the decisions of this court *form a rule for the decisions of the state courts. Is there anything unreasonable in this? [*573
Have not the federal, as well as the state courts, been constituted by the people? Why, then, should one tribunal more than the other be deemed hostile to the interests of the people?

In the second section of the third article of the constitution, it is declared, that "the judicial power shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. Having shown that a writ of error will lie in this case, and that the record has been duly certified, the next inquiry that arises is, what are the acts of the United States which relate to the Cherokee Indians and the acts of Georgia; and were these acts of the United States sanctioned by the federal constitution?

Among the enumerated powers of congress, contained in the eighth section of the first article of the constitution, it is declared, "that congress shall have power to regulate commerce with foreign nations, and among the Indian tribes." By the articles of confederation, which were adopted on the 9th day of July 1778, it was provided, "that the United States, in con-

gress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck, by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; 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." As early as June 1775, and before the adoption of the articles of confederation, congress took into their consideration the subject of Indian affairs. The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorized to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties, designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was
*574] permitted to trade with them, *without a license from one or more of the commissioners of the respective departments. In April 1776, it was "resolved, that the commissioners of Indian affairs, in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a schoolmaster, to teach their youth reading, writing and arithmetic; also, a blacksmith, to do the work of the Indians." The general intercourse with the Indians continued to be managed under the superintendence of the continental congress.

On the 28th of November 1785, the treaty of Hopewell was formed, which was the first treaty made with the Cherokee Indians. The commissioners of the United States were required to give notice to the executives of Virginia, North Carolina, South Carolina and Georgia, in order that each might appoint one or more persons to attend the treaty, but they seem to have had no power to act on the occasion. In this treaty, it is stipulated, that "the commissioners plenipotentiary of the United States in congress assembled, give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions." 1. The Cherokees to restore all prisoners and property taken during the war. 2. The United States to restore to the Cherokees all prisoners. 3. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other sovereign whatsoever. 4. The boundary line between the Cherokees and the citizens of the United States was agreed to as designated. 5. If any person, not being an Indian, intrude upon the land "allotted" to the Indians, or, being settled on it, shall refuse to remove within six months after the ratification of the treaty, he forfeits the protection of the United States, and the Indians were at liberty to punish him as they might think proper. 6. The Indians are bound to deliver up to the United States any Indian who shall commit robbery, or other cap-
*575] ital crime, on a white person living within their protection. *7. If the same offence be committed on an Indian by a citizen of the United States, he is to be punished. 8. It is understood, that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practised on either side, except where there is a manifest violation of this treaty; and then, it shall be preceded, first, by a demand of justice; and, if refused, then by a declaration of hostilities. That the Indians may have full confidence in the justice of the United States respecting their interests,

they shall have a right to send a deputy of their choice, whenever they think fit, to congress.

The treaty of Holston was entered into with the same people, on the 2d day of July 1791. This was a treaty of peace, in which the Cherokees again placed themselves under the protection of the United States, and engaged to hold no treaty with any foreign power, individual state, or with individuals of any state. Prisoners were agreed to be delivered up on both sides; a new Indian boundary was fixed; and a cession of land made to the United States, on the payment of a stipulated consideration. A free unmolested road was agreed to be given through the Indian lands, and the free navigation of the Tennessee river. It was agreed, that the United States should have the exclusive right of regulating their trade, and a solemn guarantee of their land, not ceded, was made. A similar provision was made, as to the punishment of offenders, and as to all persons who might enter the Indian territory, as was contained in the treaty of Hopewell. Also, that reprisal or retaliation shall not be committed, until satisfaction shall have been demanded of the aggressor.

On the 7th day of August 1786, an ordinance for the regulation of Indian affairs was adopted, which repealed the former system. In 1794, another treaty was made with the Cherokees, the object of which was to carry into effect the treaty of Holston. And on the plains of Tellico, on the 2d of October 1798, the Cherokees, in another treaty, agreed to give a right of way, in a certain direction, over their lands. Other engagements were also entered into, which need not be referred to. Various other treaties were made by the United States with *the Cherokee Indians, [*576
by which, among other arrangements, cessions of territory were procured and boundaries agreed on. In a treaty made in 1817, a distinct wish is expressed by the Cherokees, to assume a more regular form of government, in which they are encouraged by the United States. By a treaty held at Washington, on the 27th day of February 1819, a reservation of land is made by the Cherokees for a school fund, which was to be surveyed, and sold by the United States for that purpose. And it was agreed, that all white persons, who had intruded on the Indian lands, should be removed.

To give effect to various treaties with this people, the power of the executive has frequently been exercised; and at one time, General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories. On the 30th of March 1802, congress passed an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. In this act, it is provided, that any citizen or resident in the United States, who shall enter into the Indian lands to hunt, or for any other purpose, without a license, shall be subject to a fine and imprisonment. And if any person shall attempt to survey, or actually survey, the Indian lands, he shall be liable to forfeit a sum not exceeding $1000, and be imprisoned not exceeding twelve months. No person is permitted to reside as a trader within the Indian boundaries, without a license or permit. All persons are prohibited, under a heavy penalty, from purchasing the Indian lands; and all such purchases are declared to be void. And it is made lawful for the military force of the United States to arrest offenders against the provisions of the act. By

the 17th section, it is provided, that the act shall not be so construed as to "prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road, from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair said road." Nor was the act to be so construed as to prevent persons from travelling from Knoxville to Price's settlement, *provided they shall travel in the track or path which is usually travelled, and the Indians do not object; but if they object, then all travel on this road to be prohibited, after proclamation by the president, under the penalties provided in the act. Several acts having the same object in view, were passed prior to this one; but as they were repealed either before, or by, the act of 1802, their provisions need not be specially noticed.

*577]

The acts of the state of Georgia, which the plaintiff in error complains of, as being repugnant to the constitution, treaties, and laws of the United States, are founded on two statutes. The first act was passed the 12th of December 1829; and is entitled, "an act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, Dekalb, Gwinnett and Habersham; and to extend the laws of the state over the same, and to annul all laws made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1828 on this subject." This act annexes the territories of the Indians, within the limits of Georgia, to the counties named in the title, and extends the jurisdiction of the state over it. It annuls the laws, ordinances, orders and regulations, of any kind, made by the Cherokees, either in council or in any other way, and they are not permitted to be given in evidence in the courts of the state. By this law, no Indian, or the descendant of an Indian, residing within the Creek or Cherokee nation of Indians, shall be deemed a competent witness in any court of the state, to which a white person may be a party, except such white person reside within the nation. Offences under the act are to be punished by confinement in the penitentiary, in some cases not less than four nor more than six years, and in others, not exceeding four years.

The second act was passed on the 22d day of December 1830, and is entitled, "an act to prevent the exercise of assumed and arbitrary power, by all persons, on 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 of the state within the aforesaid territory." By the first section of this act, it is made a penitentiary offence, after the 1st day of February 1831, for any person or persons, under color or pretence of authority from the said Cherokee tribe, or as head-men, chiefs or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians, for the purpose of legislating, &c. They are prohibited from making laws, holding courts of justice, or executing process. And all white persons, after the 1st of March 1831, who shall reside within the limits of the Cherokee nation, without a

*578]

license or permit from his excellency the governor, or from such agent as his exellency the governor shall authorize to grant such permit or license, or who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor; and upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years. From this punishment, agents of the United States are excepted, white females, and male children under twenty-one years of age. Persons who have obtained license, are required to take the following oath: "I, A. B., do solemnly swear, that I will support and defend the constitution and laws of the state of Georgia, and uprightly demean myself as a citizen thereof. So help me God!" The governor is authorized to organize a guard, which shall not consist of more than sixty persons, to protect the mines in the Indian territory, and the guard is authorized to arrest all offenders under the act.

It is apparent, that these laws are repugnant to the treaties with the Cherokee Indians which have been referred to, and to the law of 1802. This repugnance is made so clear by an exhibition of the respective acts, that no force of demonstration can make it more palpable. By the treaties and laws of the United States, rights are guarantied to the Cherokees, both as it respects their territory and internal polity. By the laws of Georgia, these rights are *abolished; and not only abolished, but an ignominious punishment is inflicted on the Indians and others, for the exercise of [*579 them. The important question then arises, which shall stand, the laws of the United States, or the laws of Georgia? No rule of construction, or subtlety of argument, can evade an answer to this question. The response must be, so far as the punishment of the plaintiff in error is concerned, in favor of the one or the other. Not to feel the full weight of this momentous subject, would evidence an ignorance of that high responsibility which is devolved upon this tribunal, and upon its humblest member, in giving a decision in this case.

Are the treaties and law which have been cited, in force? and what, if any, obligations, do they impose on the federal government within the limits of Georgia? A reference has been made to the policy of the United States on the subject of Indian affairs, before the adoption of the constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts, in relation to them, by the United States. For this object, it might not be improper to notice how they were considered by the European inhabitants, who first formed settlements in this part of the continent of America.

The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear, that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation, to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil. In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a

limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more *conciliatory mode was preferred, and one which was better calculated to impress the Indians, who *580] were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration. This policy has obtained from the earliest white settlements in this country, down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites ; but the soil, thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians. At no time has the sovereignty of the country been recognised as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognised as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession. In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.

Before the adoption of the constitution, the mode of treating with the Indians was various. After the formation of the confederacy, this subject was placed under the special superintendence of the united colonies ; though, subsequent to that time, treaties may have been occasionally entered into between a state and the Indians in its neighborhood. It is not considered to be at all important to go into a minute inquiry on this subject. By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to *establish post-offices, and to declare war. It is enumerated *581] in the same section, and belongs to the same class of powers. This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and, at other times, by enactments of congress. In this respect, they have been placed, by the federal authority, with but few exceptions, on the same footing as foreign nations.

It is said, that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them. What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. Is it essential, that each party shall possess the same attributes of sovereignty, to give force to the treaty ? This will not be pretended ; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty. Under the constitution, no state can enter into any treaty ; and it is believed, that, since its adoption, no state, under its own authority, has held a treaty with the Indians.

It must be admitted, that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the supreme court of the United States; and yet, having the right of self-government, they, in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offences, under their own laws, and in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers, gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest *them of the right of self-government, [*582
nor destroy their capacity to enter into treaties or compacts. Every state is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend, that the word "allotted," in reference to the land guarantied to the Indians, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties? The inquiry is not, what station shall now be given to the Indian tribes in our country? but what relation have they sustained to us, since the commencement of our government? We have made treaties with them; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?

The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised in forming treaties with the Indians. Nations differ from each other in condition, and that of the same nation may change by the revolutions of time, but the *principles of justice [*583
are the same. They rest upon a base which will remain beyond the endurance of time. After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties which

have been formed with them, and the ratifications by the president and senate, been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes, we have acquired accessions of territory, of incalculable value to the Union. Except by compact, we have not even claimed a right of way through the Indian lands. We have recognised in them the right to make war. No one has ever supposed, that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors. In the executive, legislative and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

But can the treaties which have been referred to, and the law of 1802, be considered in force within the limits of the state of Georgia? In the act of cession, made by Georgia to the United States, in 1802, of all lands claimed by her, west of the line designated, one of the conditions was, "that the United States should, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title to lands within the state of Georgia." One of the counsel, in the argument, endeavored to show, that no part of the country now inhabited by the Cherokee Indians, is within what is called the chartered limits of Georgia. It appears, that the charter of Georgia was surrendered *by the trustees, and that, like the state of South Carolina, she became a regal colony. The effect of this change was, to authorize the crown to alter the boundaries, in the exercise of its discretion. Certain alterations, it seems, were subsequently made; but I do not conceive it can be of any importance to enter into a minute consideration of them. Under its charter, it may be observed, that Georgia derived a right to the soil, subject to the Indian title, by occupancy. By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the state of Georgia. This line, having been thus recognised, cannot be contested on any question which may incidentally arise for judicial decision.

*584]

It is important, on this part of the case, to ascertain in what light Georgia has considered the Indian title to lands, generally, and particularly, within her own boundaries; and also as to the right of the Indians to self-government. In the first place, she was a party to all the treaties entered into between the United States and the Indians, since the adoption of the constitution. And prior to that period, she was represented in making them, and was bound by their provisions, although it is alleged, that she remonstrated against the treaty of Hopewell. In the passage of the intercourse law of 1802, as one of the constituent parts of the Union, she was also a party. The stipulation made in her act of cession, that the United States should extinguish the Indian title to lands within the state, was a distinct recognition of the right in the federal government to make the extinguishment; and also, that, until it should be made, the right of occu-

pancy would remain in the Indians. In a law of the state of Georgia, "for opening the land-office and for other purposes," passed in 1783, it is declared, that surveys made on Indian lands were null and void; a fine was inflicted on the person making the survey, and, if not paid by the offender, he was punished by imprisonment. By a subsequent act, a line was fixed for the Indians, which was a boundary between them and the whites. A similar provision is found in other laws of Georgia, passed before the adoption *of the constitution. By an act of 1787, severe corporal punishment was inflicted on those who made or attempted to make surveys, [*585 "beyond the temporary line designating the Indian hunting-ground."

On the 19th of November 1814, the following resolutions were adopted by the Georgia legislature. "Whereas, many of the citizens of this state, without regard to existing treaties between the friendly Indians and the United States, and contrary to the interest and good policy of this state, have gone, and are frequently going over, and settling and cultivating the lands allotted to the friendly Indians for their hunting-ground, by which means the state is not only deprived of their services in the army, but considerable feuds are engendered between us and our friendly neighboring Indians: Resolved, therefore, by the senate and house of representatives of the state of Georgia, in general assembly met, that his excellency, the governor, be and is hereby requested to take the necessary means to have all intruders removed off the Indian lands, and that proper steps be taken to prevent future aggressions."

In 1817, the legislature refused to take any steps to dispose of lands acquired by treaty with the Indians, until the treaty had been ratified by the senate; and, by a resolution, the governor was directed to have the line run between the state of Georgia and the Indians, according to the late treaty. The same thing was again done in the year 1819, under a recent treaty. In a memorial to the President of the United States, by the legislature of Georgia, in 1819, they say, "it has long been the desire of Georgia, that her settlements should be extended to her ultimate limits." "That the soil within her boundaries should be subjected to her control; and that her police organization and government should be fixed and permanent." "That the state of Georgia claims a right to the jurisdiction and soil of the territory within her limits." "She admits, however, that the right is inchoate—remaining to be perfected by the United States, in the extinction of the Indian title; the United States, *pro hâc vice* as their agents."

The Indian title was also distinctly acknowledged by the act *of [*586 1796, repealing the Yazoo act. It is there declared, in reference to certain lands, that "they are the sole property of the state, subject only to the right of the treaty of the United States, to enable the state to purchase, under its pre-emption right, the Indian title to the same," and also, that the land is vested in the "state, to whom the right of pre-emption to the same belongs, subject only to the controlling power of the United States, to authorize any treaties for, and to superintend the same." This language, it will be observed, was used long before the act of cession.

On the 25th of March 1825, the governor of Georgia issued the following proclamation: "Whereas, it is provided in said treaty, that the United States shall protect the Indians against the encroachments, hostilities and impositions of the whites, so that they suffer no imposition, molestation or

injury in their persons, goods, effects, their dwellings, or the lands they occupy, until their removal shall have been accomplished, according to the terms of the treaty," which had been recently made with the Indians. I have, therefore, thought proper to issue this my proclamation, warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians, within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment, by the authorities of the state, and the United States. All good citizens, therefore, pursuing the dictates of good faith, will unite in enforcing the obligations of the treaty as the supreme law," &c.

Many other references might be made to the public acts of the state of Georgia, to show that she admitted the obligation of Indian treaties, but the above are believed to be sufficient. These acts do honor to the character of that highly respectable state.

Under the act of cession, the United States were bound, in good faith, to extinguish the Indian title to lands within the limits of Georgia, so soon as it could be done peaceably and on reasonable terms. *The state of Georgia has repeatedly remonstrated to the president on this subject, and called upon the government to take the necessary steps to fulfil its engagement. She complained, that whilst the Indian title to immense tracts of country had been extinguished elsewhere, within the limits of Georgia, but little progress had been made; and this was attributed, either to a want of effort on the part of the federal government, or to the effect of its policy towards the Indians. In one or more of the treaties, titles in fee-simple were given to the Indians, to certain reservations of land; and this was complained of by Georgia, as a direct infraction of the condition of the cession. It has also been asserted, that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit, and to render the purchase of their title more difficult, if not impracticable.

*587]

A full investigation of this subject may not be considered as strictly within the scope of the judicial inquiry which belongs to the present case. But, to some extent, it has a direct bearing on the question before the court; as it tends to show how the rights and powers of Georgia were construed by her public functionaries. By the first president of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians. Through the agency of the government, they have been partially induced, in some parts of the Union, to change the hunter state for that of the agriculturist and herdsman. In a letter addressed by Mr. Jefferson to the Cherokees, dated the 9th of January 1809, he recommends them to adopt a regular government, that crimes might be punished and property protected. He points out the mode by which a council should be chosen, who should have power to enact laws; and he also recommended the appointment of judicial and executive agents, through whom the law might be enforced. The agent of the government, who resided among them, was recommended to be associated with their council, that he

might give the necessary advice on all subjects relating to their government. *In the treaty of 1817, the Cherokees are encouraged to adopt a regular form of government. [*588

Since that time, a law has been passed, making an annual appropriation of the sum of $10,000, as a school fund, for the education of Indian youths, which has been distributed among the different tribes where schools had been established. Missionary labors among the Indians have also been sanctioned by the government, by granting permits, to those who were disposed to engage in such a work, to reside in the Indian country.

That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit, is extremely probable; and that it increased the difficulty of purchasing their lands, as by act of cession the general government agreed to do, is equally probable.

Neither Georgia, nor the United States, when the cession was made, contemplated that force should be used in the extinguishment of the Indian title; nor that it should be procured on terms that are not reasonable. But may it not be said, with equal truth, that it was not contemplated by either party, that any obstructions to the fulfilment of the compact should be allowed, much less sanctioned, by the United States? The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still much has been done. Whether the advantages of this policy should not have been held out by the government to the Cherokees within the limits of Georgia, as an inducement for them to change their residence and fix it elsewhere, rather than by such means to increase their attachment to their present home, as has been insisted on, is a question which may be considered by another branch of the government. Such a course might, perhaps, have secured to the Cherokee Indians all the advantages they have realized from the paternal superintendence of the government; and have enabled it, on peaceable and reasonable terms, to comply with the act of cession.

Does the intercourse law of 1802 apply to the Indians who *live within the limits of Georgia? The 19th section of that act provides, [*589 "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." This provision, it has been supposed, excepts from the operation of the law, the Indian lands which lie within any state. A moment's reflection will show that this construction is most clearly erroneous. To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a state; not only within the limits of a state, but within the common exercise of its jurisdiction. No one will pretend, that this was the situation of the Cherokees who lived within the state of Georgia in 1802; nor, indeed, that such is their present situation. If, then, they are not embraced by the exception, all the provisions of the act of 1802 apply to them.

In the very section which contains the exception, it is provided, that the

use of the road from Washington district to Mero district should be enjoyed, and that the citizens of Tennessee, under the orders of the governor, might keep the road in repair. And in the same section, the navigation of the Tennessee river is reserved, and a right to travel from Knoxville to Price's settlement, provided the Indians should not object. Now, all these provisions relate to the Cherokee country; and can it be supposed, by any one, that such provisions would have been made in the act, if congress had not considered it as applying to the Cherokee country, whether in the state of Georgia, or in the state of Tennessee? The exception applied, exclusively, to those fragments of tribes which are found in several of the states, and which came literally within the description used.

Much has been said against the existence of an independent power within a sovereign state; and the conclusion has been drawn, that the Indians, as a matter of right, cannot enforce their own laws within the territorial limits of a state. The refutation of this argument is found in our past history.

*590] *That fragments of tribes, having lost the power of self-government, and who lived within the ordinary jurisdiction of a state, have been taken under the protection of the laws, has already been admitted. But there has been no instance, where the state laws have been generally extended over a numerous tribe of Indians, living within the state, and exercising the right of self-government, until recently. Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that state, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But even the state of New York has never asserted the power, it is believed, to regulate their concerns, beyond the suppression of crime.

Might not the same objection to this interior independent power, by Georgia, have been urged, with as much force as at present, ever since the adoption of the constitution? Her chartered limits, to the extent claimed, embraced a great number of different nations of Indians, all of whom were governed by their own laws, and were amenable only to them. Has not this been the condition of the Indians within Tennessee, Ohio and other states? The exercise of this independent power surely does not become more objectionable, as it assumes the basis of justice and the forms of civilization. Would it not be a singular argument, to admit, that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated; but that it must be suppressed, so soon as it shall be administered upon the enlightened principles of reason and justice? Are not those nations of Indians who have made some advances in civilization better neighbors than those who are still in a savage state? And is not the principle, as to their self-government, within the jurisdiction of a state, the same?

When Georgia sanctioned the constitution, and conferred on the national legislature the exclusive right to regulate commerce or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians within her limits? This will not be pretended. If such had been the construction of her own powers, would they not have been exercised?

*591] *Did her senators object to the numerous treaties which have been formed with the different tribes, who lived within her acknowledged

boundaries? Why did she apply to the executive of the Union, repeatedly to have the Indian title extinguished; to establish a line between the Indians and the state, and to procure a right of way through the Indian lands? The residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.

How is the question varied, by the residence of the Indians in a territory of the United States? Are not the United States sovereign within their territories? And has it ever been conceived, by any one, that the Indian governments, which exist in the territories, are incompatible with the sovereignty of the Union? A state claims the right of sovereignty, commensurate with her territory; as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.

Is it incompatible with state sovereignty, to grant exclusive jurisdiction to the federal government over a number of acres of land, for military purposes? Our forts and arsenals, though situated in the different states, are not within their jurisdiction. Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians, as has been given to them over any other subjects? Is there any doubt as to this investiture of power? Has it not been exercised by the federal government, ever since its formation, not only without objection, but under the express sanction of all the states?

The power to dispose of the public domain is an attribute *of sovereignty. Can the new states dispose of the lands within their [*592 limits, which are owned by the federal government? The power to tax is also an attribute of sovereignty; but can the new states tax the lands of the United States? Have they not bound themselves, by compact, not to tax the public lands, nor until five years after they shall have been sold? May they violate this compact, at discretion? Why may not these powers be exercised by the respective states? The answer is, because they have parted with them, expressly for the general good. Why may not a state coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the federal government. Has not the power been as expressly conferred on the federal government, to regulate intercourse with the Indians; and is it not as exclusively given, as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians, exercising the right of self-government; and consequently, include those who reside within the limits of a state, as well as others. Such has been the uniform construction of this power by the federal government, and of every state government, until the question was raised by the state of Georgia.

Under this clause of the constitution, no political jurisdiction over the

Indians has been claimed or exercised. The restrictions imposed by the law of 1802, come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts, restrictive of trade, under the power to regulate commerce with foreign nations. In the regulation of commerce with the Indians, congress have exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to, act upon our own citizens in their foreign commercial intercourse.

*593] *It will scarcely be doubted by any one, that, so far as the Indians, as distinct communities, have formed a connection with the federal government, by treaties; that such connection is political, and is equally binding on both parties. This cannot be questioned, except upon the ground, that in making these treaties. the federal government has transcended the treaty-making power. Such an objection, it is true, has been stated, but it is one of modern invention, which arises out of local circumstances; and is not only opposed to the uniform practice of the government, but also to the letter and spirit of the constitution.

But the inquiry may be made, is there no end to the exercise of this power over Indians, within the limits of a state, by the general government? The answer is, that, in its nature, it must be limited by circumstances. If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper, need not now be considered; if, indeed, it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government, within the limits of a state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional. The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title, and especially, by the compact with the state of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say, that the same moral rule which should regulate the affairs of private life, should not be regarded by communities or nations. But a sound national policy does require, that the Indian tribes within our states should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities. At best, they can enjoy a very limited

*594] independence within *the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give

way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

This state of things can only be produced by a co-operation of the state and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised, it cannot be obstructed by the state. It is a power given by the constitution, and sanctioned by the most solemn acts of both the federal and state governments; consequently, it cannot be abrogated at the will of a state. It is one of the powers parted with by the states, and vested in the federal government. But if a contingency shall occur, which shall render the Indians who reside in a state, incapable of self-government, either by moral degradation, or a reduction of their numbers, it would undoubtedly be in the power of a state government, to extend to them the *ægis* of its laws. Under such circumstances, the agency of the general government, of necessity, must cease. But if it shall be the policy of the government, to withdraw its protection from the Indians who reside within the limits of the respective states, and who not only claim the right of self-government, but have uniformly exercised it; the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

The plaintiff, who prosecutes this writ of error, entered the Cherokee country, as it appears, with the express permission of the President, and under the protection of the treaties of the United States, and the law of 1802. He entered, not to corrupt the morals of this people, nor to profit by their substance; but to *teach them, by precept and example, the Christian religion. If he be unworthy of this sacred office; if he had [*595 any other object than the one professed; if he sought, by his influence, to counteract the humane policy of the federal government towards the Indians, and to embarrass its efforts to comply with its solemn engagement with Georgia; though his sufferings be illegal, he is not a proper object of public sympathy.

It has been shown, that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and, consequently, must be considered as the supreme laws of the land. These laws throw a shield over the Cherokee Indians. They guarantied to them their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition. But by the enactments of the state of Georgia, this shield is broken in pieces—the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them, for the exercise of those rights which have been most solemnly guarantied to them by the national faith. Of these enactments, however, the plaintiff in error has no right to complain, nor can he question their validity, except in so far as they affect his interests. In this view, and in this view only, has it become necessary, in the present case, to consider the repugnancy of the laws of Georgia to those of the Union.

Of the justice or policy of these laws, it is not my province to speak; such considerations belonging to the legislature by whom they were passed.

They have, no doubt, been enacted under a conviction of right, by a sovereign and independent state, and their policy may have been recommended by a sense of wrong under the compact. Thirty years have elapsed since the federal government engaged to extinguish the Indian title, within the limits of Georgia. That she has strong ground of complaint, arising from this delay, must be admitted; but such considerations are not involved in the present case; they belong to another branch of the government. We can look only to the law, which defines our power, and marks out the path of our duty.

*596] Under the administration of the laws of Georgia, a citizen of *the United States has been deprived of his liberty; and claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the states in this Union, that, being repugnant to the constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty.

Baldwin, Justice, dissented, stating, that in his opinion, the record was not properly returned upon the writ of error; and ought to have been returned by the state court, and not by the clerk of that court. As to the merits, he said, his opinion remained the same as was expressed by him in the case of the *Cherokee Nation* v. *State of Georgia*, at the last term. The opinion of Mr. Justice Baldwin was not delivered to the reporter.

This cause came on to be heard, on the transcript of the record from the superior court for the county of Gwinnett, in the state of Georgia, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the act of the legislature of the state of Georgia, upon which the indictment in this case is founded, is contrary to the constitution, treaties and laws of the United States; and that the special plea in bar pleaded by the said Samuel A. Worcester, in manner aforesaid, and relying upon the constitution, treaties and laws of the United States aforesaid, is a good bar and defence to the said indictment, by the said Samuel A. Worcester; and as such ought to have been allowed and admitted by the said superior court for the county of Gwinnett, in the state of Georgia, before which the said indictment was pending and tried; and that there was error in the said superior court of the state of Georgia, in overruling the plea so pleaded as aforesaid. It is, therefore, ordered and adjudged, that the judgment ren-

*597] dered in *the premises, by the said superior court of Georgia, upon the verdict upon the plea of not guilty, afterwards pleaded by the said Samuel A. Worcester, whereby the said Samuel A. Worcester is sentenced to hard labor in the penitentiary of the state of Georgia, ought to be reversed and annulled. And this court, proceeding to render such judgment as the said superior court of the state of Georgia should have rendered, it is further ordered and adjudged, that the said judgment of the said superior court be and hereby is reversed and annulled; and that judgment be and hereby is awarded, that the special plea in bar, so as aforesaid

pleaded, is a good and sufficient plea in bar in law to the indictment aforesaid; and that all proceedings on the said indictment do for ever surcease; and that the said Samuel A. Worcester be and hereby is henceforth dismissed therefrom, and that he go thereof quit, without day. And that a special mandate do go from this court, to the said superior court, to carry this judgment into execution.

In the case of BUTLER, plaintiff in error, *v.* THE STATE OF GEORGIA, the same judgment was given by the court, and a special mandate was ordered from the court to the superior court of Gwinnett county, to carry the judgment into execution.

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*NATHANIEL CRANE, Plaintiff in error, *v.* The Lessee of HENRY GAY MORRIS *et al.*, and of JOHN JACOB ASTOR *et al.*, Defendant in error. [*598

Nonsuit.—Presumption of fact.—Estate in land.—Evidence.

Upon a deliberate review of the questions of law discussed and decided in the case of Carver *v.* Astor, 4 Pet. 1, the court are entirely satisfied with the opinion and judgment pronounced on that occasion.

The circuit court has no authority whatever to order a peremptory nonsuit, against the will of the plaintiff; this point has been repeatedly settled by this court, and is not now open for controversy.

The circuit court cannot be called upon, when a case is before a jury, to decide on the nature and effect of the whole evidence introduced in support of the plaintiff's case, part of which is of a presumptive nature, and capable of being urged with more or less effect to the jury.

An ejectment for a tract of land was tried, upwards of seventy years after the date of a lease, recited to have been executed in a deed of release of the premises in dispute, but which lease was not produced on the trial; under these circumstances, the lapse of time would alone be sufficient to justify a presumption of the due execution and loss of the lease, proper to be left to the jury.

The general rule of law is, that a recital of one deed in another, binds the parties and those who claim under them by matters subsequent; technically speaking, such a recital operates as an estoppel, which works on the interest in the land, and binds parties and privies—privies in blood, privies in estate, and privies in law.

If the recital of a lease in a deed of release be admitted to be good evidence of the execution of the lease, it must be good evidence of the very lease stated in the recital, and of the contents, so far as they are stated therein, for they constitute its identity.

That a husband, even before marriage, may, in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage be consummated, will be protected by a court of equity against any antecedent contracts and conveyances secretly made by the wife, in fraud of those marital rights, may be admitted; but they are mere equities, and in no just sense, constitute any legal or equitable estate in her lands or other property, antecedent to the marriage.

The solemn probate of a deed, by a witness, upon oath, before a magistrate, for the purpose of having it recorded, and the certificate of the magistrate of its due probate, upon such testimony are certainly entitled to more weight as evidence, than the mere unexplained proof of the handwriting of a witness, after his death; the one affords only a presumption of the due execution of the deed, from the mere fact that the signature of the witness is to the attestation clause; the other is a deliberate affirmation by the witness, upon oath, before a competent tribunal, of the material facts to prove the execution.

Whenever evidence is offered to the jury, which is in its nature *primâ facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever *just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evi- [*599

dence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right would be an invasion of their privilege to respond to matters of fact.

ERROR to the Circuit Court for the Southern District of New York. In that court, the defendants in error instituted an action of ejectment to recover from the defendant a tract of land situated in the town of Carmel, in the county of Putnam, in the state of New York.

The title exhibited by the plaintiff, on the trial in the circuit court, was the same with that, an abstract of which is given in the case of *Carver* v. *Astor*, 4 Pet. 1. It was founded on a patent from William III. to Adolph Philipse, dated 17th June 1697, for a large tract of land, including the premises, situated in the then province, now the state of New York. Frederick Philipse, the great-nephew and heir-at-law of the patentee, Adolph Philipse, to whom the land granted by the patent had descended, devised his estate in fee-tail to his four children, in equal parts. One of the children of Frederick Philipse having died soon after her father, and the whole estate having, by a common recovery suffered in 1753, by the three surviving children, become vested jointly in them in fee-simple, a partition of all the lands under the patent was made in 1754, by which certain portions of the same were allotted to the respective surviving devisees of Frederick Philipse, in severalty, Mary Philipse being one of the parties to the said partition. Mary Philipse, one of the said devisees, afterwards intermarried with Colonel Roger Morris.

The plaintiffs gave in evidence a deed, dated the 13th January 1758, purporting to be a marriage-settlement executed by Mary Philipse and Roger Morris, of the first and second part, and by Johanna Philipse and Beverley Robinson, of the third and fourth parts. (See 4 Pet. 7.) The plaintiffs then proved a title in them, by regular conveyances, from the children and heirs of Roger Morris and Mary his wife, they being deceased; having also proved that the persons under whom the said title was held, *600] were such *children and heirs. Roger Morris and Mary his wife were attainted by an act of the legislature of New York, passed 22d October 1779.

The plaintiffs gave in evidence, by several witnesses, and by the production of receipts for rent, that Roger Morris, for several years before the war of the revolution, was in possession of certain lots, part of the estate held by Mary his wife, at the time of her marriage, and when the marriage-settlement deed was executed; one of which lots, No. 5, was that for which this ejectment was instituted. Joseph Crane proved, that his father lived on the farm then occupied by the defendant, part of lot No. 5, under Roger Morris, from before the war of the revolution; and continued in the occupation thereof until his death.

A deed from the commissioners of forfeited estates, executed according to the act of assembly of New York, passed 22d October 1779, produced by the defendant, on notice, was read in evidence; by which the said commissioners, on the 1st day of June 1780, conveyed the premises in question, being part of No. 5, in this suit, to John Crane; who, on the 26th day of September 1826, conveyed the same, by deed, produced on the same notice, to the defendant.

Upon these proofs the plaintiff rested his case. The counsel for the

defendant thereupon objected, and insisted, that unless the deed called a marriage-settlement deed was accompanied or preceded by a lease, the plaintiff could not recover in this action; that without a lease, the said deed could only operate as a deed of bargain and sale; and the statute of uses would only execute the first use to the bargainees, Johanna Philipse and Beverley Robinson, who took the legal estate in the land; and that the plaintiff could not recover, without producing the lease or accounting for its non-production. And because no lease had been produced, and no evidence given to account for its non-production, the counsel for the defendant moved the circuit court to nonsuit the plaintiff; but the said circuit court, before the said justice and judge, then and there overruled the said objection, and refused to grant the said motion for a nonsuit, and decided, that the said plaintiff was entitled to recover, without producing any lease, or accounting for its non-production, inasmuch as the recital in the release *was evidence of such a lease having been executed; to which said [*601
opinion and decision of the said circuit court, the counsel for the said
defendant then and there, on the said trial, excepted.

And thereupon, the counsel for the said defendant, to maintain and prove the said issue on his part, produced and read in evidence conveyances by way of lease and release, severally dated 26th September 1765, and 18th September 1771; which were given in evidence. The leases were executed by Roger Morris, and by Roger Morris and Mary his wife, formerly Mary Philipse; and the releases by Roger Morris and wife, to William Hill, Joseph Merritt and James Rhodes. These deeds did not mention or profess to be made under or in pursuance of any deed or deeds of marriage-settlement, or that they were made in the execution of any power. And by the releases, Roger Morris covenanted for himself and his heirs, that he was lawfully seised of the premises granted, in fee-simple, and that he had good right, full power and lawful authority to grant, bargain and sell the same as aforesaid; and the said releases also contained the usual covenants for quiet enjoyment, against all former incumbrances, and grants of general warranty, and for further assurance. The parties of the first part, in the said releases, were described as follows:

"Between the Honorable Roger Morris, of the city of New York, Esquire, and Mary his wife, late Mary Philipse, one of the daughters and devisees of the Honorable Frederick Philipse, Esquire, deceased, of the one part:" and the description of the land granted, commenced as follows, to wit: "All that certain farm and plantation, situate, lying and being in the county of Duchess aforesaid, and known and distinguished by farm No. 36, of lot No. 5, of the lands formerly granted by letters-patent to Adolph Philipse, Esquire; from whom the same descended to the said Frederick Philipse, Esquire, as his heir-at-law; the lands so granted by the same letters-patent, being usually called and known by the several names of Fredericksburgh, and Philipse upper patent; which said farm or plantation, No. 36, begins," &c.

The counsel for the defendant then read in evidence a deed of partition, executed by the devisees of Frederick Philipse (before the intermarriage of Roger Morris and Mary Philipse) *and Henry Beekman and others, [*602
executed January 18th, 1758, by which the boundary line between
the patent to Adolph Philipse and Colonel Henry Beekman was declared

and established. Also, an exemplification of a deed dated 18th February 1771, between Roger Morris and others, relative to the lines of the patent to Adolph Philipse, and those of other patents for adjoining lands.

The counsel for the defendant then produced and read in evidence, certain improving leases for life, executed by Roger Morris and Mary his wife, for parts of the land held by the said Mary under the patent to Adolph Philipse, and the deed of partition. These leases were severally dated on the 23d October 1765, and on the 21st day of June 1773, and 16th June 1773.

The counsel for the defendant then produced and read in evidence, the books of records from the office of the register of the city and county of New York; from which it appeared, that deeds and conveyances of land (as well as various other instruments in writing) had been acknowledged by the grantors, or proved by the subscribing witness, and recorded, from a period anterior to the year of 1785, down to the close of the war of the revolution; and that during the whole period of the war, except from March to September, in the year 1783, deeds had been acknowledged or proved and recorded, but from March 1st, 1783, to March 17th, 1784, no deeds had been recorded; some of which were acknowledged or proved before the members of his majesty's council, others before aldermen of the said city; some before masters in chancery, and others before the judges of county courts in other counties; and it also appeared, that deeds of lands, in other counties of the state, were recorded in the city and county of New York; and it also appeared, as to the deeds proved, before and after the close of the war (and of the last class a considerable number had been proved before Judge Hobart), that the certificates of proof stated the delivery, as well as the execution of the deed. The particular character of the deeds and conveyances was not examined into or stated; but the records were produced for the purpose of showing the fact of the proving and recording of deeds and conveyances, and the form or manner in which it was done.

*603] And thereupon, the plaintiff read in evidence a part of the *deposition of Thomas Barclay, in which he testified, that he knew Colonel Roger Morris, and his wife Mary, about the year 1759; they were then married, and lived in the city of New York.

And thereupon, the proofs having closed, and the counsel for both parties having summed up the said cause to the jury, the counsel for the plaintiff submitted to the said circuit court the following points:

I. That the acts or declarations of the parties to the settlement, after the birth of the children, form no ground of presumption in this action, against the delivery of the settlement deed.

II. That Roger Morris stood in the character of a grantee in that deed, and that a possession of the deed by him is evidence of its delivery, because the settlement gave him a larger interest in the lands than his mere marital rights.

III. That the actual signing and sealing of this deed by Beverley Robinson and Johanna Philipse, as well as by the other parties, and the attestation by the subscribing witnesses, that the deed was signed, sealed and delivered in their presence, by all the parties, as proved on the part of the plaintiff,

are, in judgment of law, complete evidence of such delivery, and of an acceptance of the estates therein granted and limited.

And thereupon, the counsel for the defendant submitted to the said circuit court, the following points in writing, on the question of a delivery of the settlement deed of January 13th, 1758; upon which points the said counsel prayed the said circuit court to charge and instruct the jury, as matters of law arising upon the proofs and allegations of the parties.

I. (1) That it was necessary to the validity of the deed that it should have passed into the hands of the trustees, or one of them, or some person for them, with the intent that it should take effect as a conveyance. (2) It is not enough, that the trustees, as well as the other parties, signed and sealed, unless the deed was also delivered to and accepted by them, or some person on their behalf.

II. (1) The evidence arising from the proof of the deed by William Livingston, in 1787, is no stronger than that arising from the proof of the handwriting and death of the subscribing witnesses. *(2) In either case, [*604
it is only *primâ facie* evidence, or evidence from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence which raises a contrary presumption.

III. That in the absence of all proof, that the trustees, or any other person for them, ever had the deed, and there being no proof of a holding under it, the fact that the deed came out of the hands of Morris, in 1787, is sufficient of itself to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses.

IV. (1) If the jury, from the evidence, believe that the deed was signed and sealed on the day of its date, and that all William Livingston and Sarah Williams witnessed, was what took place at that time, and that the deed was not delivered before the execution of the Beekman deed, on the 18th of January 1758, then there is no evidence of a delivery. (2) It being conceded by the plaintiff's counsel, that the deed was not delivered, at the time of the execution of the Beekman deed, on the 18th of January 1758, then, if the jury believe the deed was signed, sealed and witnessed, on the day it bears date, there is no evidence of a delivery. (3) If the jury believe the deed was not delivered on the day it was signed, sealed and witnessed, then there is no evidence of a delivery.

V. The acts and omissions of Morris and wife, so far as they go to induce the belief that the deed was not perfected by a delivery, are of the same force and effect against the children and their grantee, as they would be against Morris and wife themselves.

VI. The jury, in judging of the acts said to be hostile to the settlement deeds, if they may determine with what intent those acts were done, must gather that intent from the acts themselves.

VII. Although the deeds to Hill, Merritt and Rhodes, would, in law, be a good execution of the power contained in the settlement deed, supposing that to have been duly delivered; yet upon the question whether that deed was or was not perfected by a delivery, those deeds contain evidence that the *parties were acting as the owners of the land in fee, and not as [*605
tenants for life executing a power.

VIII. The evidence upon the one side or the other should not be sub-

mitted to the jury as *primâ facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole, determine whether or not the deed was delivered.

And thereupon, the opinion of the said circuit court upon the points submitted on the part of the defendant was delivered in substance as follows: To the first point, and the second branch of it, the said court gave the instructions as asked on the part of the defendant. Upon the second of the said points, the said circuit court overruled and refused to give the same to the jury; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the second branch of the said second point, the said circuit court gave the instructions as follows: the proof by William Livingston, and the proof of the handwriting and death of the witnesses, are only *primâ facie* evidence, from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence, which raises a contrary presumption. Upon the said third point, the said circuit court overruled and refused to give the instructions therein prayed for to the jury; to which said decision and opinion of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the said fourth point the said circuit court overruled and refused to give the instructions therein prayed for as matter of law, but said, that it was evidence for the consideration of the jury; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the second branch of the said fourth point, the said court overruled and refused to give the instruction therein prayed for to the jury, saying, that such supposed concession was denied by the plaintiff's counsel, and they refused to give any instruction thereon; to which said opinion and decision
*606] of the *said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the third branch of the said fourth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the said fifth point, the said circuit court gave the instruction, as prayed for, to the jury. Upon the said sixth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury, without adding to the said point the following words, to wit, "connected with the other evidence in the cause;" and with that addition, gave the said instruction to the jury; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the said seventh point, the said circuit court overruled and refused to give the instruction as prayed, but gave the instruction following: "Although the deeds to Hill, Merritt and Rhodes would, in law, be a good execution of the power contained in the settlement deed, supposing that to have been delivered; yet, upon the question of whether that deed was or was not perfected by delivery, those deeds are competent evidence, from which the jury may judge whether Morris and his wife intended to act as if no marriage-settlement had been executed, or under the power contained in the marriage-settlement;" to which said opinion and decision of the said circuit

court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the said eighth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury ; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there on the said trial, also excepted.

And the opinion of the said circuit court, upon the points submitted by the counsel for the plaintiff, was delivered in substance as follows, to wit: Upon the first of those points, that the acts of Morris and *wife were proper evidence to be considered by the jury in determining whether [*607 the settlement deed was delivered or not. Upon the second of those points, that, strictly speaking, Morris could neither be considered as grantor nor grantee in the settlement deed, and therefore, the mere possession of the deed by him was no affirmative proof on either side, as to the fact of delivery ; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the third of those points, that if by "complete evidence," it was intended that the plaintiff's evidence was conclusive, or such as could not be controverted, the said instruction should not be given to the jury.

The jury found a verdict for the plaintiff in the ejectment, and judgment having been entered thereon, the defendant prosecuted this writ of error.

The case was argued by *Beardsley* and *Hoffman*, for the plaintiff in error; and by *Ogden* and *Wirt*, for the defendant.

The counsel for the *plaintiff* in error presented the following points for the consideration of the court, which were fully argued by the counsel for the defendant.

The plaintiff below should have been nonsuited : 1. Unless the marriage-settlement release of 1758 was accompanied or preceded by a lease, it could only operate as a deed of bargain and sale, and the statute of uses could only execute the first use. 2. The recital of a lease in the release was competent evidence to prove that a lease was originally executed, but was not, until the non-production of the lease was accounted for, competent evidence of the contents of such lease. The lease, therefore, should have been produced or its non-production accounted for.

The court erred in instructing the jury, "that strictly speaking Morris could neither be considered as grantor nor grantee in the settlement deed." The court erred in instructing the jury, that the mere possession of the deed by Morris was no affirmative proof on either side as to the fact of delivery. *The court erred in refusing to instruct the jury, that the evidence [*608 arising from the proof of the settlement deed by William Livingston, in 1787, was no stronger than that arising from the proof of handwriting and death of the subscribing witnesses. The court erred in refusing to instruct the jury, that in the absence of all proof that the trustees, or any other person for them, ever had the settlement deed, and there being no proof of a holding under it, the fact that it came out of the hands of Morris, in 1787, is sufficient of itself to rebut any presumption of a delivery, arising from the proof of the death by William Livingston, or the proof of the handwriting and death of the subscribing witnesses. The court erred in refusing to instruct the jury, that if they believed the deed was signed and

sealed on the day of its date, and that all William Livingston and Sarah Williams witnessed, was what took place at that time, and that the deed was not delivered before the Beekman deed on the 18th January 1758, then there was no evidence of a delivery. The court erred in refusing to instruct the jury, that if they believed the deed was not delivered on the day it was signed, sealed and witnessed, then there was no evidence of a delivery. The court erred in refusing to instruct the jury, unqualifiedly, that in judging of the acts said to be hostile to the delivery of the settlement deed, if they were to determine the intent with which those acts were done, they must gather that intent solely from the acts themselves. The court erred in refusing to instruct the jury, that the deeds to Hill, Merritt and Rhodes contained evidence that the parties were acting as owners of the land in fee, and not as tenants for life. The court erred in refusing to instruct the jury that they should not look at the evidence upon one side or the other, as *primâ facie* or presumptive evidence, either for or against a delivery; but that they should consider and weigh the whole evidence together, and, from the whole, determine whether or not the deed was delivered.

Story, Justice, delivered the opinion of the court.—Many of the ques-
*609] tions which have been discussed in this *case arose in the suit of *Carver* v. *Astor*, 4 Pet. 1; which was founded upon the same title, and substantially upon the same evidence, as is presented in the present record. As, upon a deliberate review, we are entirely satisfied with the opinion and judgment pronounced on that occasion (which was indeed most thoroughly and anxiously considered), we do not propose to go at large into the reasoning now, but to confine ourselves to the new grounds of argument which have been so earnestly pressed upon the court, and to the instructions prayed and refused, or given, by the circuit court, to the prejudice of the plaintiff in error.

In the progress of the cause, after the plaintiff had given the evidence in support of his cause, the counsel for the defendant insisted, "That unless the deed, called the marriage-settlement deed, which was given in evidence, was accompanied or preceded by a lease, the plaintiff could not recover in this action; that without a lease, the said deed could only operate as a bargain and sale, and the statute of uses could only execute the first use to the bargainees, Johanna Philipse and Beverley Robinson, who took the legal estate in the land, and that the plaintiff could not recover, without producing the lease, or accounting for its non-production. And because no lease had been produced, and no evidence given to account for its non-production, the counsel for the defendant moved the circuit court to nonsuit the plaintiff; but the circuit court overruled the objection, and refused to grant the motion for a nonsuit; and decided, that the plaintiff was entitled to recover, without producing any lease, or accounting for its non-production, inasmuch as the recital in the release was evidence of such a lease having been executed;" to which opinion and decision, the defendant excepted. This constitutes the subject-matter of the first ground, now assigned for error on behalf of the defendant before this court.

It might be a sufficient answer to the motion for a nonsuit, to declare, that the circuit court had no authority whatsoever to order a peremptory nonsuit against the will of the plaintiff. This point has been repeatedly

settled by this court, and is not now open for controversy. *Elmore* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabaud*, 5 Ibid. 476. But independent of this ground, which would be conclusive, there *is another, which seems equally so; and that is, that it called upon the court to decide [*610 upon the nature and effect of the whole evidence introduced in support of the plaintiff's case, part of which was necessarily of a presumptive nature, and capable of being urged with more or less effect to the jury.

It is to be recollected, that the marriage-settlement deed was dated, and purported to be executed, in January 1758, and was designed to operate as a conveyance by way of lease and release, and the sole object of the lease was to give effect to the release, as a common-law conveyance, and not as a mere bargain and sale. It stated, "that in consideration of a marriage intended to be had and solemnized between the said Roger Morris and Mary Philipse (two of the parties to the indenture), and the settlement hereafter made by the said Roger Morris on the said Mary Philipse, and for and in consideration of the sum of five shillings, &c., the said Mary Philipse hath granted, &c., and by these presents doth grant, &c., unto the said Johanna Philipse and Beverley Robinson (the trustees under the settlement), in their actual possession now being, by virtue of a bargain and sale to them thereof, made, for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession, and to their heirs, all those several lots, &c." The recital, therefore, explicitly admits the existence of the lease, and the possession under it, and bound the parties, as well as those who as privies claim under them. It will be recollected also, that the trial of the present case was in June 1830, upwards of seventy years after the date of the lease, which was confessedly an instrument of a fugitive and temporary nature, and intended to serve merely as a means of giving full operation to the release. Under such circumstances, if no other objection existed to the title, the lapse of time would alone be sufficient to justify a presumption of its due execution and loss, and non-production by the plaintiff, proper to be left to the jury; and thus justify the court in refusing a nonsuit. In the case of *Carver* v. *Astor*, this court observed, that such a recital of a lease, in a release, may, under circumstances, be used as evidence even against strangers. Thus, "if the existence and loss of the lease be established by other evidence, then the *recital is admissible, as secondary proof, in [*611 the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, then the recital will, of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease." In the present case, there was *primâ facie* evidence of the due execution of the release, and evidence also of a possession by Morris and his wife, of the premises in controversy, for many years afterwards, consistent with, if not necessarily flowing from, that instrument. Under such circumstances, it would have been unjustifiable on the part of the circuit court to have directed a nonsuit, the effect of which would have been to have excluded the jury from weighing the whole evidence, even if the case had been against a party who was a stranger to the title.

But the defendant is in no just sense a stranger to the title. He claims

in privity of estate, by a title derived from the state of New York, whose sole title is founded upon that of Morris and his wife, and is subsequent to the release. The general rule of law is, that a recital of one deed in another, binds the parties, and those who claim under them by matters subsequent. Technically speaking, such a recital operates as an estoppel, which works on the interest of the land, and binds parties and privies, privies in blood, privies in estate, and privies in law. Between such parties, the original lease need not at any time be produced. The recital of it in the release is conclusive. It is not offered as secondary, but as primary proof; not as presumptive evidence, but as evidence operating by way of estoppel, which cannot be averred against, and forms a muniment of the title. It is otherwise, where the recital is offered against strangers claiming by an adverse title, or by persons claiming from the same parties by a title anterior and paramount. In such cases, the lease itself is the primary evidence; and its loss or non-production must be accounted for, before the recital can be let in as secondary evidence of its execution or contents. But even there (as has been already intimated), a long lapse of time furnishes a reasonable presumption of the loss. The argument of the bar is, that the recital *may be conclusive of the existence of the lease, in favor of the lessees, but not for or against any other persons claiming under them, by distinct conveyance. If the recital be conclusive in favor of the lessees, it must be equally conclusive in their favor as releasees, since the latter works upon the possession acquired under the lease. But in truth, the recital, as an estoppel, binds all privies, whether claiming by the same or by a distinct instrument. It is the privity which constitutes the bar, and not the fact of taking by the very deed which contains the recital. It is also said, that the recital of a lease in a release, is competent evidence to prove that the lease was originally executed, but not, until its non-production is accounted for, competent evidence of the contents of the lease. If the recital of a lease be admitted to be good evidence of the execution, it must be good evidence of the execution of the very lease stated in the recital, and of the contents, so far as they are stated therein, for they constitute its identity. But the argument itself can apply only where the recital is offered as secondary evidence. In the present case, it is offered, not as secondary, but as primary and conclusive.

*612]

The whole subject underwent a more elaborate consideration of this court in the case of *Carver* v. *Astor*, and the doctrine now asserted, was reasoned out, both upon principle and authority. The language of the court upon that occasion was, "we are of opinion, not only that the recital of the lease in the deed of marriage-settlement was evidence between these parties (and the present defendant is in a similar predicament), of the original existence of the lease, but that it was conclusive evidence between these parties, of that original existence, and superseded the necessity of introducing any other evidence to establish it." And after a review of the authorities, it was added, "We think, then, that upon authority, the recital of the lease in the deed of release, in the present case, was conclusive evidence upon all persons claiming under the parties in privity of estate, as the present defendant in ejectment does claim. And independently of authority, we should have arrived at the same result, upon principle; for the recital constitutes a part of the title, and establishes a possession under the lease, necessary to give

the release its intended operation. It works upon the interest in the land, and creates an *estoppel, which runs with the land, against all persons in privity under the releasees. It was as much a muniment of the title, as any covenant therein running with the land." And it was then added, "this view of the matter dispenses with the necessity of examining all the other exceptions as to the nature and sufficiency of the proof of the original existence and loss of the lease, and of the secondary evidence to supply its place." In every view of the matter, then, the nonsuit was properly denied. [*613

The next error assigned grows out of an instruction to the jury, asked of the court by the counsel for the plaintiff. The prayer was, "that Roger Morris stood in the character of a grantee in the deed (the settlement), and that a possession of the deed by him is evidence of its delivery, because the settlement gave him a larger interest in the lands than his mere marital rights." The court refused to give this instruction, and declared that, "strictly speaking, Morris could neither be considered as grantor nor grantee in the settlement deed, and therefore, the mere possession of the deed by him was no affirmative proof on either side as to the fact of delivery;" to which opinion and decision, the counsel for the defendant excepted. It is somewhat singular, that the defendant should have excepted to the refusal to grant the prayer asked by the plaintiff, since the remarks made by the court seem to have been rather reasons for the refusal, that an instruction to the jury; and if those reasons were not well founded, it was no prejudice to the defendant. But waiving this consideration, let us see, if the circuit court was wrong in stating, that, strictly speaking, Morris could neither be considered as grantor or grantee in the settlement. The plaintiff contended, that he was exclusively grantee, and the defendant's counsel now contend, that he was exclusively grantor. This is a point, which must be decided by an examination of the terms of the settlement deed.

That a husband, even before marriage, may, in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage is consummated, will be protected by a court of equity against any antecedent contracts and conveyances secretly made by the wife in fraud of those marital rights, may be admitted. But they are mere *equities, and in no just sense constitute any legal or equitable estate in her lands or other property, antecedent to the marriage. [*614

In the present settlement deed, which is by indenture tripartite, Mary Philipse purports to be the party of the first part, Roger Morris of the second part, and Johanna Philipse and Beverley Robinson (the trustees) of the third part. Mary Philipse alone, without any co-operation on the part of Morris, purports to grant, and does grant to the trustees, all the lands mentioned in the deed (including the premises in controversy), as her own property, upon certain uses specified in the *habendum*, and among others, after the marriage, to the use of herself and her husband, during their joint lives, and the life of the survivor of them, with certain subsequent uses and powers, not material to be mentioned. If the settlement deed stopped here, the case would be too plain to admit of doubt. Mary Philipse must, in law, be deemed the sole grantor of the lands, and the trustees and Morris must be deemed grantees, and to take in that character exclusively. In the close of the indenture is the following clause: "And the said Roger Mor-

ris, for and in consideration of the premises, and the sum of five shillings, &c., doth hereby, for himself, his heirs, executors and administrators, covenant, promise, grant and agree, to and with the said Johanna Philipse and Beverley Robinson, their and each of their heirs, &c., that in case the said Mary Philipse shall survive him, the said Roger Morris, that then and in such case, immediately after his death, all and singular the moneys and personal estate whatsoever, whereof he shall die possessed, shall be accounted the proper money and estate of the said Mary Philipse, during her natural life, and after her decease, in case there be no issue begotten between the said Roger Morris and Mary Philipse, that then the said moneys and personal estate shall and may be had and taken by the executors and administrators of the said Roger Morris, &c.; but if such child or children shall survive the said Roger Morris and Mary Philipse, then the said money and estate to be divided among them in such shares and proportions as he, the said Roger Morris, shall think fit, at any time hereafter, by his last will and testament, or otherwise, to order and direct."

It is obvious, from the language of this clause, that it can operate only by way of covenant. It conveys no present interest in *any personal property whatsoever; and affects to dispose only of the moneys and personal estate of which Morris shall die possessed, at whatever time they may have been acquired. It leaves him at full liberty to dispose of all the personalty, that he shall at any time possess, during his lifetime, *toties quoties*. As a grant, it would be utterly void from its uncertainty. As a covenant, it has a sensible and just operation in favor of the trustees. In legal contemplation, then, this clause makes Morris, strictly speaking, only a covenantor, and not a grantor. But as to the real estate passed to the trustees by the indenture, to which alone the instruction could properly apply, he was clearly a mere grantee. If, therefore, there was any error in the circuit court on this point, it was not an error prejudicial to the defendant, but to the plaintiff, as to its bearing on the question of the possession and delivery of the settlement deed.

*615]

But looking to the whole provisions of that deed, it might well be stated, that strictly speaking, Morris could neither be considered as grantor or grantee. He was not grantor, in any sense, except as to the personalty, and as to that, he was properly a covenantor. And technically speaking, at the time of the execution of the deed, the trustees were the grantees in the deed, though by the operation of the statute of uses, the use to Morris, carved out of their seisin, drew to it the seisin and possession of the estate, as soon as that use, by his subsequent marriage, had a legal existence. Under such circumstances, the direction that the mere possession of the deed by Morris was no affirmative proof, on either side, of the fact of the delivery, was at least as favorable to the defendants as the law would justify; and consequently, he has nothing to complain of.

We now come to the instructions asked of the court by the counsel for the defendant. And in the first place, it is argued, that the court erred in refusing to instruct the jury that "the evidence arising from the proof of the deed of William Livingston, in 1787, is no stronger than that arising from the proof of the handwriting and death of the subscribing witnesses." But this instruction, so asked, is not upon any matter of law, but upon the mere weight of evidence, which the court was not bound to give, and which

was matter for the proper consideration of the jury. But if it had been *otherwise, we are not prepared to admit, that the instruction ought to have been given. The solemn probate of a deed by a witness, [*616 upon oath, before a magistrate, for the purpose of having it recorded, and the certificate of the magistrate of its due probate, upon such testimony, are certainly entitled to more weight as evidence, than the mere unexplained proof of the handwriting of a witness, after his death. The one affords only a presumption of the due execution of the deed, from the mere fact that the signature of the witness is to the attestation clause; the other is a deliberate affirmation by the witness, upon oath, before a competent tribunal, of the material facts to prove the execution. And there were, in the present case, circumstances, which gave an enhanced value and weight to this probate.

In the next place, it is argued, that the court erred in refusing to give the instruction, "that in the absence of all proof, that the trustees, or any person for them, ever had the deed, and there being no proof of a holding under it, the fact that the deed came out of the hands of Morris, in 1787, is sufficient, of itself, to rebut any presumption of a delivery, arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses." This instruction plainly called upon the court to decide mere matters of fact, which were in controversy before the jury, and upon the assumption of such matters of fact, to direct the jury that they rebutted other matters of fact. It was no part of the duty of the court, to decide upon the relative weight and force of these facts. They exclusively belonged to the jury; and the instruction was properly refused.

The same answer may be given to the refusal to give the instructions prayed for in all the various branches embraced in the fourth instruction of the defendant. They are as follows: "1. If the jury, upon the evidence, believe, that the deed was signed and sealed on the day of its date, and that William Livingston and Sarah Williams witnessed what took place at that time, and that the deed was not delivered, before the execution of the Beekman deed, on the 18th of January 1758, then there is no evidence of a delivery. 2. It being conceded by the plaintiff's counsel, that the deed was not delivered at the time of the execution of the Beekman deed, on *the 18th of January 1758, then if the jury believe the deed was signed, [*617 sealed and witnessed on the day it bears date, there is no evidence of delivery. 3. If the jury believe the deed was not delivered on the day it was signed, sealed and witnessed, then there is no evidence of a delivery."

The supposed concession by the plaintiff's counsel, was utterly denied by them at the time; and of course, was properly deemed by the court as out of the case. The whole scope of all these instructions was, to call upon the court to decide, as matter of law, upon the evidence before the jury, what portion of it was or was not proof of a delivery of the deed, and how far certain supposed facts controlled or might control the effect of all the other evidence upon the same point. There was positive evidence before the jury of the delivery of the deed, from the probate of it by Governor Livingston before Judge Hobart. How then could the court be called upon to say, that there was no evidence? The circumstances alluded to, and hypothetically put in the instructions, were certainly proper to be left

to the jury, if found by them to be true, to rebut this evidence. They were matter for comment and argument to the jury, by counsel, upon this vital question in the cause. But the court had no right to say, that they would, or ought, to overcome all other evidence in the case, of the delivery of the deed. The jury were not to be told, as matter of law, that if they found or believed one fact, there was no evidence of another independent fact; or because the deed was not delivered on a particular day, therefore, there was no evidence of a delivery at all. They were to judge of the fact of delivery, from all the circumstances of the case; it was their exclusive province; and it was no part of the duty of the court to instruct them, however it might advise them, in respect to the weight of conflicting evidence, or the inferences which they should deduce from one fact, to decide their belief of another. These instructions were, therefore, properly refused; and, indeed, some of them are open to even more serious objections, as logical deductions upon mere matters of fact; the conclusions do not necessarily flow from the premises.

The next objection is, that the court refused to instruct the jury that, "in judging of the acts said to be hostile to the settlement deed, if they *618] may determine with what intent these *acts were done, they must gather that intent from the acts themselves." The refusal was not unqualified, for the court gave the instruction, with the addition of the words, "connected with the other evidence in the cause." In our opinion, the instruction, without the qualification, was properly refused. In cases where the interests of third persons may be affected by the acts of others, where, as in the present case, the rights of children are to be affected by the acts of parents, it is most material to ascertain the intent with which these acts were done. The intent may restrain, enlarge or explain the acts, so as to change their whole effect in point of evidence. The acts done with one intent may press strongly in point of presumption one way; with another intent, they may afford an equally cogent presumption the other way. How is this intent to be ascertained? It may, indeed, accompany and qualify the acts; but it may, on the other hand, arise and be exclusively provable by extrinsic circumstances. Are these extrinsic circumstances to be shut out from the cause, if they are the sole means of demonstrating the intent? If not, upon what ground are they to be excluded, when they may confirm or qualify or repel any inferences of intent, deducible, ordinarily, from the acts standing alone? No rule of evidence exists, which, in our judgment, could justify such a proceeding; and no authority has been cited, at the bar, in favor of its adoption. One of the grounds of argument at the bar is, that the hostile acts relied on arose from the execution of certain deeds of lease and release, the intent of which might be gathered from the contents of the writings. But the question was not, what were the contents of these deeds, as matters of legal construction, but what was the intent with which they were made; or rather, what was the estate out of which Morris and wife (the grantors) intended to carve them? Were they designed to be an execution of the powers and authority under the settlement deed? Or, if in excess of these powers, were they intended not to be hostile to the interests conferred by that deed? Or were they solely and designedly an exercise of the general rights of husband and wife over the estate of the latter, unfettered by any settlement? Their direct operation was not in contro-

versy. They were introduced for a collateral purpose, as matters of presumption against the validity of the *settlement deed as an executed conveyance. The intent, then, was open to proof as matter *in pais;* [*619 and all the evidence, legally conducting to establish it, was to be considered by the jury in connection. But the instruction does not allude to any deeds whatsoever. It is in the most general terms, and speaks of acts, which may as properly refer to any other thing done *in pais*, as to solemn conveyances. This subject was discussed very much at large in *Carver* v. *Astor*, and the result to which the court arrived, was precisely the same as is now indicated.

The next objection is, that the court refused to instruct the jury, that "although the deeds to Hill, Merrit and Rhodes would, in law, be a good execution of the power contained in the settlement deed, supposing that to have been duly delivered; yet upon the question, whether that deed was or was not perfected by a delivery, these deeds contain evidence that the parties were acting as owners of the land in fee, and not as tenants for life executing a power." But the court gave the following instruction, that "although the deeds to Hill, Merrit and Rhodes would, in law, be a good execution of the power contained in the settlement deed, supposing that to have been delivered, yet upon the question, whether that deed was or was not perfected by delivery, those deeds are competent evidence from which the jury may judge, whether Morris and his wife intended to act as if no marriage-settlement had been executed, or under the power contained in the marriage-settlement." To this instruction, so given, the defendant also excepted. The sole object of introducing the deeds to Hill, Merrit and Rhodes, here referred to (which were introduced on the part of the defendant), was to raise a presumption against the delivery of the settlement deed. The argument seems to have been, that although those deeds might have been a fit and good execution of the power reserved to Morris and his wife by the settlement deed, yet the omission to make any reference to that power, or to state in those deeds, that they were acting under and in virtue of a power, was evidence that they were acting, not under any power, but as owners of the fee. If they were acting as owners of the fee, then that circumstance afforded, *pro tanto*, a presumption against the delivery of the settlement deed; since parties acting under and entitled to act *solely under the power in that deed, would naturally refer to it as the [*620 foundation of their conveyances. Now, so far as the presumption would go, it was fairly and fully left to the jury as evidence, by the very instruction given to the court.

But the instruction which was refused, called upon the court to go further, and to decide as matter of law, that the parties were in fact acting as owners of the land in fee, and not as tenants for life, executing a power. Surely, it will not be pretended, that in order to a due execution of a power, it is necessary, that it should be recited or referred to in the executing instrument of conveyance. The form of the instruction prayed for admits this. It is sufficient, that the power exists, and is intended to be executed; and that intent is matter *in pais*, to be collected from all the circumstances of the case. The deeds of Hill, Merrit and Rhodes contain nothing on their face (as the instruction prayed for concedes) which is inconsistent with or repugnant to the power in the settlement deed; and it demands of

the court, notwithstanding, that in point of fact they were not executed under the power. This was matter of fact and intent, involved in the issue before the jury, and as such, exclusively for their decision. This very point underwent the most deliberate consideration of this court in the case of *Carver* v. *Astor*, upon an exception taken to the charge of the court. It was then treated solely as a matter of fact, for the consideration of the jury; and from that view of it, we do not perceive the slightest reason to depart.

The next and last objection relied on is, that the court refused to instruct the jury, that "the evidence upon the one side or the other should not be submitted to the jury as *primâ facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole, determine whether or not the deed was delivered." That the whole evidence was to be considered and weighed by the jury, upon the points in issue, was indisputable and undisputed. The only question was, whether the defendant had a right to insist upon shutting out from the consideration of the jury the nature of the evidence, as *primâ facie* proof, or otherwise, and to prescribe the order and manner in which it should be examined and weighed by them. We know of no
*621] principle of law upon which such a claim can be *maintained. Whenever evidence is offered to the jury, which is in its nature *primâ facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right would be an invasion of their privilege to respond to matters of fact. The objection is, therefore, overruled.

Upon the whole, the opinion of the court is, that the judgment of the circuit court ought to be affirmed, with costs.

Baldwin, Justice, dissented in writing. The opinion of Mr. Justice Baldwin was not delivered to the reporter.

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

*Samuel Kelly, a citizen of New York, Plaintiff in error, *v.* James Jackson, a citizen of New Jersey, Defendant in error, *ex dem.* Henry Gage Morris, Maria Morris, Thomas Hincks, John Hincks, aliens and British subjects, John Jacob Astor, Theodosius Fowler, Cadwallader D. Colden and Cornelius I. Bogart, citizens of New Jersey.

Effect of primâ facie evidence.

Carver *v.* Astor, 4 Pet. 1, and Crane *v.* Morris, *ante*, p. 598, re-affirmed.

No court is bound, at the mere instance of the party, to repeat over to the jury the same substantial proposition of law, in every variety of form which the ingenuity of counsel may suggest; it is sufficient, if it be once laid down, in an intelligible and unexceptionable manner.

Primâ facie evidence of a fact, is such evidence as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose; they jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it; it would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *primâ facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact, that is, it should operate upon the minds of the jury as decisive, to found their verdict as to the fact; such are understood to be the clear principles of law on this subject.

Error to the Circuit Court for the Southern District of New York. The pleadings and the facts in this case, with the addition of those particularly noticed in the opinion of the court, were the same with those in the preceding case of *Crane* v. *Morris.*

On the trial in the circuit court, after both parties had closed their proofs, the counsel for the defendant submitted to the circuit court the following points in writing, on a question of a delivery of the settlement deed; upon which points the said counsel prayed the circuit court to charge and instruct the jury as matters of law arising upon the proofs and allegations of the parties.

I. (1) It was necessary to the validity of the deed that it should *have passed into the hands of the trustees, or some person for them, with intent that it should take effect as a conveyance. (2) Roger [*623
Morris was a grantor, or stood in the character of a grantor in that deed. (3) The possession by Morris of one part of the deed, does not in itself furnish any evidence of a delivery.

II. (1) The fact that Morris and wife were in possession of the land before the revolution, taking the rents and profits, is not in itself any evidence either for or against the validity of the deed; because they were entitled to the possession, whether the deed was delivered or not. (2) The holding from the marriage to the attainder cannot be said to have been under the settlement deed, until it is first ascertained that the deed had been delivered.

III. (1) The evidence arising from the proof of the deed by William Livingston, is no more conclusive upon the question of a delivery of the deed, than that arising from proof of the handwriting and death of the subscribing witnesses. (2) In either case, it is only *primâ facie* evidence, or evidence from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence, which raises a contrary presumption.

(3) The evidence of a delivery, arising from the proof of the deed by William Livingston, and the proof of the handwriting and death of the subscribing witnesses, is only presumptive evidence, and may be rebutted by evidence of the same character.

IV. (1) In the absence of any direct evidence that the trustees, or any other person for them, ever had the deed, and the possession being equivocal in its character, the fact that the deed came out of the hands of Morris, in 1787, is sufficient of itself to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses. (2) If not sufficient of itself to destroy any presumption of a delivery, it is, at the least, evidence against a delivery, to be considered and weighed by the jury.

V. (1) If the jury, from the evidence, believe that the deed was signed and sealed on the day of its date, and that all William Livingston and Sarah Williams witnessed, was what took *place at that time, and that the deed was not delivered, before the execution of the Beekman deed, on the 18th of January 1758, then there is no evidence of a delivery. (2) If the jury, from the evidence, believe that the deed was signed, sealed and witnessed on the day of its date, and that it was not delivered before the 18th of January 1758, then there is no evidence of a delivery.

*624]

VI. The acts and omissions of Morris and wife, so far as they go to induce the belief that the deed was not perfected by a delivery, are of the same force and effect against the children and their grantee, as they would be against Morris and wife themselves.

VII. Although the deeds to Hill, Merrit and Rhodes would, in law, be a good execution of the power contained in the settlement deed, supposing it to have been duly delivered; yet, upon the question whether that deed was or was not perfected by a delivery, those deeds are competent evidence from which the jury are to judge whether Morris and wife acted as tenants for life, or as the owners of the land in fee.

VIII. The evidence upon the one side or the other should not be submitted to the jury as *primâ facie* or presumptive evidence either for or against a delivery, but the jury should consider and weigh the whole evidence together, and from the whole determine whether or not the deed was delivered.

And thereupon, after the said cause had been summed up to the jury by the counsel for both parties, the opinion and decision of the said circuit court upon the said several points was delivered in substance as follows, to wit: Upon the first point, the circuit court gave the instruction therein prayed for to the jury. Upon the second branch of the first point, the circuit court refused to give the instruction as prayed, saying, that, strictly speaking, Morris could neither be considered as grantor nor grantee in the settlement deed, and therefore, the mere possession of the deed by him was no affirmative proof on either side, as to the fact of delivery; to which decision of the circuit court the counsel for the defendant, then and there, on the trial, also excepted. Upon the second point, the circuit court gave the instruction therein prayed for to the jury. *Upon the second branch of the said second point, the circuit court overruled and refused to give the instruction therein prayed for to the jury; to which said decision and opinion of the circuit court, the counsel for the defendant, then and there, on

*625]

the said trial, also excepted. Upon the third point, and the second and third branches of the same, the circuit court gave the instruction therein prayed for to the jury. Upon the fourth point, the circuit court overruled and refused to give the instruction therein prayed for to the jury; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the second branch of the said fourth point, the circuit court overruled and refused to give the instruction therein prayed for to the jury; the court considering Morris technically neither grantor nor grantee, and therefore, the mere possession of the deed by Morris was no affirmative evidence either for or against the fact of delivery; to which said decision and opinion of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the fifth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury; to which said decision and opinion of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the second branch of the said fifth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury; to which said decision and opinion of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the sixth point, the said circuit court gave the instruction therein prayed for to the jury. Upon the seventh point, the said circuit court gave the instruction following: "Although the deeds to Hill, Merrit and Rhodes would, in law, be a good execution of the power contained in the settlement deed, supposing it to have been duly delivered; yet, upon the question whether that deed was or was not perfected by a delivery, those deeds are competent evidence, from which the jury are to judge whether Morris and *his wife acted under the settlement deed, or as the owners of the land in fee, independent of the [*626 settlement deed; to which said decision and opinion of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted. Upon the eighth point, the said circuit court overruled and refused to give the instruction therein prayed for to the jury, and refused to submit the question of a delivery of the deed to the jury, in the manner or upon the principles stated in the eighth point; and said, that the plaintiff had given *primâ facie* evidence in support of his case, and such as was conclusive, if uncontradicted; and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff was entitled to recover; to which said opinion and decision of the said circuit court, the counsel for the defendant, then and there, on the said trial, also excepted.

The case was argued by *Beardsley* and *Hoffman*, for the plaintiff in error; and by *Ogden* and *Wirt*, for the defendant.

The counsel for the *plaintiff* in error presented in their argument the following points for the decision of the court. The plaintiff below should have been nonsuited. Unless the marriage-settlement release of 1758 was accompanied or preceded by a lease, it could only operate as a deed of bargain and sale, and the statute of uses could only execute the first use. The recital of a lease in the release, was competent evidence to prove that a lease was originally executed, but was not, until the non-production of the lease was accounted for, competent evidence of the contents of such lease.

The lease, therefore, should have been produced or its non-production accounted for.

The court erred in instructing the jury, "that strictly speaking Morris could neither be considered as grantor nor grantee in the settlement deed;" the instruction should have been that Morris was a grantor or stood in the character of a grantor. The court erred in instructing the jury, that the mere possession of the deed by Morris, was no affirmative proof on either
*627] side as to the fact of delivery. *The court erred in refusing to instruct the jury, that in the absence of any direct proof, that the trustees, or any other person for them, ever had the settlement deed, and the possession being equivocal in its character, the fact that it came out of the hands of Morris, in 1787, was sufficient, of itself, to rebut any presumption of a delivery, arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses. The court erred in refusing to instruct the jury, that "in the absence of any direct proof that the trustees, or any other person for them, ever had the settlement deed, and the possession being equivocal in its character, the fact that it came out of the hands of Morris, in 1787, if not sufficient of itself to destroy any presumption of a delivery, was, at the least, evidence against a delivery to be considered and weighed by the jury." The court erred in refusing to instruct the jury, that if they believed the deed was signed and sealed on the day of its date, and that all William Livingston and Sarah Williams witnessed, was what took place at that time, and that the deed was not delivered before the Beekman deed on the 18th January 1758; then there was no evidence of a delivery. The court erred in refusing to instruct the jury, that if they believed the deed was signed, sealed and witnessed on the day of its date, and that it was not delivered before the 18th January 1758; then there is no evidence of a delivery. The court erred in refusing to instruct the jury, that the holding of Morris and wife, from the marriage to the attainder, could not be said to have been under the settlement deed, until it was first ascertained that the deed had been delivered. The court erred, in admitting in evidence the extracts from the journal of the assembly of New York. The court erred in refusing to instruct the jury, that they should not look at the evidence upon one side or the other, as *primâ facie*, or presumptive evidence, either for or against a delivery, but that they should consider and weigh the whole evidence together, and from the whole, determine whether or not the deed was delivered; and in instructing the jury that the plaintiff (below) had given *primâ facie* evidence in support of his case, and such as was conclusive, if uncontradicted;
*628] and that this evidence must be contradicted or disproved by *controlling evidence on the part of the defendant (below), or the plaintiff was entitled to recover.

Story, Justice, delivered the opinion of the court.—Many of the questions arising in this case have been disposed of in the judgment already pronounced in the case of *Crane* v. *Morris*, upon the demise of the same parties; the title and evidence being in each case substantially the same. It will be necessary, therefore, to examine into those objections only, to the ruling of the circuit court at the trial, which are presented by the bill of

exceptions taken by the defendant (now plaintiff in error), and which have not been decided in the other case.

The first objection is to the refusal of the court to instruct the jury, that "Roger Morris was a grantor, or stood in the character of grantor in that (the settlement) deed." This is but a slight variation in form from the point presented in the case of *Crane* v. *Morris*, and the instruction given by the court, "that the mere possession of the deed by Morris was no affirmative proof on either side of the fact of delivery," has been already fully considered.

The next objection is, to the refusal of the court to instruct the jury, that "the holding from the marriage-settlement to the attainder, cannot be said to have been under the settlement deed, until it was first ascertained that the deed had been delivered." This instruction was certainly proper in itself to have been given, if it had not been already substantially given in the other instructions; and if the court had given this reason for the refusal, there would not have been the slightest difficulty in maintaining it; for no court is bound, at the mere instance of the party, to repeat over to the jury the same substantial proportion of law, in every variety of form which the ingenuity of counsel may suggest. It is sufficient, if it be once laid down in an intelligible and unexceptionable manner. The instruction here asked and refused, was but a branch of the next preceding instruction prayed for (which covered the whole ground), and is so put by the defendant. The latter asserted, that "the fact that Morris and wife were in possession of the land, before the revolution, taking the rents and profits, is not of itself any evidence for or against the validity *of the deed, because they were entitled to the possession, whether the deed was [*629 delivered or not." This instruction was given by the court; and the jury had been previously instructed, that it was necessary to the validity of the deed, that it should have passed into the hands of the trustees, or of some person for them, with intent, that it should take effect as a conveyance. Indeed, the whole controversy between the parties turned upon the question of the delivery of the settlement deed, as the tenor of every instruction asked abundantly shows; and therefore, it was necessarily implied in every step, that there could be no holding or possession under the deed, if it was never delivered. It appears to us, then, that no injustice has been done to the defendant, by refusing to give the instruction prayed; since, in a more general form, it had been already given.

The next objection is, to the refusal of the court to instruct the jury, first, that "in the absence of any direct evidence that the trustees, or any other person for them, ever had the settlement deed, and the possession being equivocal in its character, the fact that it came out of the hands of Morris, in 1787, is sufficient, of itself, to rebut any presumption of a delivery, arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses;" and "secondly, that if not sufficient, of itself, to destroy any presumption of a delivery, it is, at least, evidence against a delivery, to be considered and weighed by the jury." The court gave as a reason for refusing this second branch, that Morris was, "technically, neither grantor nor grantee, and therefore, the mere possession of the deed by Morris was no affirmative evidence either for or against the fact of delivery." This instruction has been already dis-

posed of. The other instruction varies from that in the case of *Crane* v. *Morris*, merely in substituting the words "direct evidence," for "all proof;" and the words "and the possession being equivocal in its character," for "and there being no proof of a holding under it." It is obnoxious to the same objection, which was relied upon in that case; for it called upon the court to express an opinion upon the nature, weight and effect of the evidence before the jury, which was no part of its duty. And the whole evidence being before the jury, it was *their exclusive right to decide for themselves upon its credit and cogency.

*630]

The next objection is, to the admission of an extract from the journal of the assembly of the state of New York, for the year 1787, as follows: February 24, 1787. "Mr. Hamilton, from the committee to whom was referred the petition of Johanna Morris, on behalf of herself and the other children of Roger Morris and Mary his wife, setting forth that the said Roger and Mary had been attainted, and their estates sold and conveyed in fee-simple; that by a settlement made previous to their intermarriage, the real estate of the said Mary was vested in Johanna Philipse and Beverley Robinson in fee, to certain uses; among others, after the decease of the said Roger and Mary, to the use of such child or children as they should have between them, and their heirs and assigns, and praying a law to restore to them the remainder of the said estate in fee, reported; that if the facts stated in such petition are true, the ordinary course of law is competent to the relief of the petitioners, and that it is unnecessary for the legislature to interfere. Resolved, that the house do concur with the committee in the said report."

It was objected, first, that the journal of the proceedings in question was not legal or competent evidence against the defendant; and secondly, not so, without producing the petition mentioned in the journal. But the objections were overruled, and the evidence admitted. Now, if the evidence was admissible for any purpose, the objections were rightly overruled. It did not appear to have been offered as proof of any of the facts stated in the petition; but simply of the public legislative proceedings, on the very claim and title now set up by the children of Morris, at the early period of 1787. There were two points of view, in which the evidence might be important, in the actual posture of the case before the jury. In the first place, it might be important to repel the notion, that the claim of the children of Morris asserted in the present suit was stale, and founded upon a dormant deed, never brought forward until a very great lapse of time after its pretended execution; a circumstance which might essentially bear upon the fact of its having ever been delivered and acted upon as a valid instrument. In the *next place, it might add strength to the probate of the deed by Gov-

*631]

ernor Livingston, as his attention could scarcely fail of being called to such public proceedings, occurring at so short a period as within two months before the time of that probate. If his attention was called to these proceedings, the circumstance, that the title was about to become a *lis mota*, would naturally produce an increased caution, and a more anxious desire to recall with perfect accuracy every fact essential to the probate of the deed. It has been asserted at the bar, that these were the very objects for which the extract from the journal was offered; and we cannot say, that, for such purposes, it was not properly admissible. If any improper use as evidence was attempted to be made of it, it might have easily been restained to its appro-

priate use, by an application to the court. The objection, then, to its admission being general, and it being clearly admissible for some purposes, the decision of the court was unexceptionable.

The next objection is, that the court erred in refusing to instruct the jury, that "the evidence upon the one side or the other should not be submitted to the jury as *primâ facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole, determine whether or not the deed was delivered;" and in instructing the jury upon that prayer, "that the plaintiff had given *primâ facie* evidence in support of his case, and such as was conclusive, if uncontradicted; and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff is entitled to recover." The instruction prayed for and refused is precisely the same as exists in the case of *Crane* v. *Morris;* and it is unnecessary to do more than to refer to the opinion there given, for the reasons why this court deem the refusal entirely correct. In regard to the instruction actually given, we do not perceive any solid ground upon which it can be adjudged erroneous. It was given as a response to the instruction asked by the defendant on the great hinge of the controversy, the question as to the delivery of the settlement deed. In a preceding instruction, which the court had given to the jury, upon the application of the defendant himself, the probate of the deed by Governor Livingston, before Judge *Hobart, was treated as *primâ facie* evidence of a delivery. It was there [*632 stated, that the probate was "only *primâ facie* evidence, or evidence from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence, which raises a contrary presumption." Is it not plain, then, that, if not so rebutted, the plaintiff is entitled to recover? What is *primâ facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregarded it. It would be an error on their part, which would require the remedial interposition of the court, In a legal sense, then, such *primâ facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject. The very point, in this very aspect, occurred in the case of *Carver* v. *Astor* (4 Pet. 1), where the court, speaking of the probate of this very deed, used the following language (p. 82): "We are of opinion, that, under these circumstances, and according to the laws of New York, there was sufficient *primâ facie* evidence of the due execution of the indenture, by which we mean, not merely the signing and sealing, but the delivery also, to justify the court in admitting it to be read to the jury; and that in the absence of all controlling evidence, the jury would have been bound to find that it was only executed. We understand such to be the uniform construction of the laws of New York, in all cases where the execution of any deed has been so proved, and has been subsequently recorded.

The oath of a subscribing witness before the proper magistrate, and the subsequent registration, are deemed sufficient *primâ facie* evidence to establish its delivery as a deed. The objection was not indeed seriously pressed at the argument." We have seen no reason, upon the present argument, to
*633] be *dissatisfied with the opinion thus expressed. It appears to us, to be founded in principles of law, which cannot be shaken, without undermining the great securities of titles to estates. The circuit court, in its instruction, did no more than express the same opinion, in language of the same substantial import.

Upon the whole, upon a careful review of the case, we are of opinion that the judgment of the circuit court ought ot be affirmed, with costs.

Baldwin, Justice, dissented in writing. The opinion of Mr. Justice Baldwin was not delivered to the reporter.

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

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*634] *United States, Plaintiffs in error, *v.* George McDaniel, Defendant in error.

Jurisdiction in error.

The declaration was for a balance of accounts of $988.94, and the *ad damnum* was laid at $2000; the bill of exceptions showed, that the United States claimed interest on the balances due them. Under these circumstances, it is no objection to the jurisdiction, that the bill of exceptions was taken by the counsel for the United States, to a refusal of the court to grant an instruction asked by the United States, which was applicable to certain items of credit only, claimed by the defendants, which would reduce the debt below the sum of $1000; the court cannot judicially know what influence that refusal had upon the verdict.

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

A motion was made by *Coxe*, for the defendant, to dismiss this suit for want of jurisdiction; the sum in controversy at the trial being less than $1000, and it appearing from the bill of exceptions, that the only items in controversy on which the instruction excepted to was given by the circuit court, were less than that sum.

Taney, Attorney-General, contrà.

Marshall, Ch. J., delivered the opinion of the court, overruling the motion.—The declaration is for a balance of accounts of $988.94; and the *ad damnum* is laid at $2000. The bill of exceptions shows, that the United States claimed interest on the balance due to them. There is a general verdict for the defendant. Under these circumstances, it is no objection to the jurisdiction, that the bill of exceptions was taken by the counsel for the United States, to a refusal of the circuit court to grant an instruction asked by the United States, which was applicable to certain items of credit only,

claimed by the defendant, which would reduce the debt below the sum of $1000. The court cannot judicially know what influence that refusal had upon the verdict.

Motion denied.

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*Hugh Boyle, Complainant and Appellant, *v.* James W. Zacharie [*635
and Samuel H. Turner.

Discharge in insolvency.

Z. & T. were merchants at New Orleans; B. was a resident merchant at Baltimore; B., in 1818 the owner of the ship Fabius, sent her to New Orleans, consigned to Z. & T. who procured a freight for her, and the ship having been attached for a debt due by B., in New Orleans, Z. & T., in order to release her, and enable her to proceed on her voyage, became security for the debt, and were obliged to pay the same, by the judgment of a court in New Orleans; B., on being informed that Z. & T. had become security for his debt, approved of the same, and promised to indemnify them for any loss they might sustain. On the 23d December 1819, Z. & T. instituted a suit against B., in the circuit court of Maryland, for the recovery of the sum paid by them; and in the same month, B. made application for the benefit of the insolvent act of Maryland, and received a discharge under the same; in May 1821, a judgment was rendered by confession, in the suit in favor of Z. & T., for $3113; and by consent of the parties, a memorandum was entered of record, "this judgment is subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland." The sole effect of this agreement was to save to the party whatever rights he may claim from the legal operation of the insolvent laws of the state of Maryland; it neither admitted their validity, nor varied any rights of Z. & T., if they were entitled to them.

The agreement of B. to indemnify Z. & T. was not, in contemplation of law, a Maryland contract, but a Louisiana contract, by which B. undertook to pay the money in the place where Z. & T. resided, and not in Maryland. The agreement of Z. & T., by which they procured the relief of the ship Fabius, was within their authority as consignees of the ship.

Such a contract would be understood by all the parties to be a contract made in the place where the advance was to be made; and the payment, unless otherwise stipulated, would also be understood to be made there; the case would, in this aspect, fall directly within the authority of Lanusse *v.* Barker, 3 Wheat. 101, 146.

The effect of a discharge under an insolvent law of a state, is at rest, so far as it depends on the antecedent decisions made by this court; the ultimate opinion delivered by Mr. Justice Johnson, in the case of Ogden *v.* Saunders, 12 Wheat. 213, 258, was concurred in and adopted by the three judges who were in the minority on the general question of the constitutionality of state insolvent laws; so far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive.

Appeal from the Circuit Court of Maryland.

The bill filed by the appellant in the circuit court, stated, among other matters, that certain persons at New Orleans, trading under the firm of Vincent, Nolte & Co., having attached *a brig belonging to the plaintiff, for a debt alleged by them to be due from said plaintiff, and which [*636
brig was consigned to the defendants, they, the same defendants, became security for the complainant on the said attachment, and the same having been ultimately decided against the complainant, the defendants paid the amount of the debt and expenses, amounting to $3113.80. That on the 31st day of December 1819, the complainant obtained a final discharge under the insolvent laws of Maryland; and that afterwards, to wit, at the May term 1821, of the said circuit court, the defendants obtained a judgment against him for the said sum of $3113,80, which judgment was entered upon the docket of said court, and agreed to be so received, subject to the legal operation of the discharge of the complainant under the said insolvent laws of

Maryland. That execution had been sued out upon said judgment, and a writ of *fieri facias* had been placed in the hands of the marshal of the district, with directions to levy the same on property acquired by the complainant subsequently to his so obtaining his final discharge under the insolvent laws aforesaid, notwithstanding the said entry on the docket, of its being confessed, and the confession being received, subject to the legal operation of the insolvent laws of Maryland. That besides the above facts, the defendants had also caused to be issued out of some court in Louisiana, an attachment upon the same debt or claim, against the complainant, and had laid the said attachment in the hands of persons indebted to the complainant in a large amount, which persons had refused to pay any part of the debts due by them to the complainant, in consequence of the laying of said attachment in their hands. The bill further stated, that by the provisions of the insolvent laws of Maryland, the complainant was entitled to be protected in the enjoyment of all property acquired by him since the date of his discharge under the said insolvent laws; except such as he might have acquired by gift, descent, or in his own right, by bequest, devise, or in any course of distribution; and that he had not, since his discharge aforesaid, acquired any property in any of the modes thus specified. And further, that no property whatever of which the complainant was possessed, or to which he had any *title, could be lawfully taken in execution under the said judgment, until a *scire facias*, containing proper averments of the acquisition of property by him in some one of the above mentioned modes, should be first issued, and the facts found to be true, either by confession, or by verdict of a jury, or otherwise according to law. And the bill prayed an injunction to be granted restraining and prohibiting the defendants from levying their execution. An injunction to that effect was granted and served in due form.

*637]

The answer of the defendants, the appellees, stated, that in the latter part of the year 1818, the complainant consigned to them at New Orleans, a brig called the Fabius, and that they procured a freight for her to Liverpool; that after the cargo was actually laden on board of her, and she was about to sail, she was attached at the suit of Vincent, Nolte & Company, for a debt due to them by the complainant, and they, the defendants, and one Richard Relff, with a view to the benefit of the complainant, became security for the complainant, and procured the release of the brig. The complainant approved of their acts, and undertook and promised to indemnify them for any loss they might sustain on his account. He afterwards gave the defendants, a security for their liability, on the 1st day of May, 1819.

The contract of indemnity was as follows: "I will see Messrs. Zacharie & Turner paid whatever sum they have to pay Vincent, Nolte & Company, on account of a bill drawn by them on Hugh Boyle for disbursements of the ship Mohawk, original bill, amount, $5451, of which the said Hugh Boyle paid $3000: the balance, the said Hugh Boyle contends, is not due to Vincent, Nolte & Co. When decided it shall be paid. Baltimore, 1st May 1810."

Hugh Boyle, the complainant, and Lemuel Taylor, soon after this circumstance, became insolvent, and the defendants afterwards paid to

Vincent, Nolte & Company, the sum of $3113.80, the amount of the judgment obtained by them against the complainant.

The defendants further stated, that they afterward instituted *a suit in the circuit court of the United States for the district of Maryland, against the complainant, and obtained judgment against him for the amount so paid by them on his account, and proceeded thereon as stated in the complainant's bill. They said, that the discharge of the complainant, by the insolvent laws of the state of Maryland, did not prevent their having the full benefit of the execution issued against the complainant's property, which had been acquired, to a large amount, since the discharge, all of which was liable for the payment of his debts. The answer admitted the issuing of the attachments in New Orleans, against the supposed property of the complainant, but stated that the defendants in the same denied having any funds, and the proceedings were dismissed. [*638

On the 19th of May 1829, the cause was set down for final hearing in the circuit court, and after argument, it was decreed, that the injunction should be dissolved; and the complainant's bill was dismissed. From this decree, the complainant appealed to this court.

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

For the *appellant*, it was contended: 1. That the appellant having been finally discharged under an insolvent law of the state of Maryland, passed and in force at a period of time previous to the making of the contract on which the suit at law was instituted, the injunction properly issued for restraining the further execution of progress which had been levied upon property acquired by the plaintiff in error, subsequently to his said discharge; and that the decree passed upon a final hearing ought not to have dissolved said injunction. 2. That the insolvent law of Maryland, although it discharged both the person of the debtor and his acquisitions of property made after his discharge under the law, is not a law impairing the obligation of contracts, so far as respects debts contracted subsequent to the passage of such law, provided such contract was to be executed or performed in the state of Maryland. *3. That the bill and answer, and the proceedings filed with them, show that this contract was to be executed or performed in the state of Maryland; and that if these proceedings left the fact doubtful as to the place where the contract was to be performed, the injunction should have been continued for further proof. 4. That the court of chancery ought to have referred it to a commissioner to inquire and report, whether the complainant had or had not sustained injury by the attachments in New Orleans. [*639

It was argued, for the appellant, that the creditors of Boyle had submitted to the insolvent laws of Maryland by instituting the suit in that state, and by the terms in which the judgment was entered. *Clay* v. *Smith*, 3 Pet. 411. Maryland was the place of the contract, or where, at least, it was to be performed. It was immaterial where the contract was made if it was to be performed in Maryland. As to the rule in fixing the place of the contract, *Lanusse* v. *Barker*, 3 Wheat. 110; *De Wolf* v. *Johnson*, 10 Ibid. 367; 7 Har. & Johns. 399, were cited.

The contract in this case was not consummated, until it was ratified by Boyle, in Maryland. The consignees had become security for the consignor, an act not within the scope of their authority, and not binding on the consignor, until he ratified it. As, therefore, the contract was not complete, until confirmed, and as this was done in Maryland, it was a Maryland contract. If the appellees had not given the security to enable the brig to proceed, they would not have been liable for neglecting it; this is the general rule as to all contracts growing out of correspondence. The place of payment contemplated was Baltimore. It was there that the same was to be carried into execution. Huberus de Conflictû Legum, 3 Dall. 374 note; 3 Mass. 77; 5 Ibid. 509; 6 Ibid. 157; 12 Ibid. 4; 2 Ibid. 84; 13 Ibid. 153; 15 Ibid. 354.

If the contract has been made in New Orleans, and so considered by the appellees, it would have borne interest at the rate of ten per cent. But the declaration states it to have been made in Maryland, and the rate of interest is that of *Maryland. This is an admission, that it was a Maryland contract; and therefore, to be regulated by her laws. This is equivalent to suing in a state court; and the question in the case will turn on the construction of the agreement by which the judgment was entered. It is considered, that the taking of the judgment in the form in which it was entered, was an agreement that the parties should be bound by the law of Maryland; and would take only what that law gives, and according to the operation of the law. It is a common practice in Maryland, to take a judgment in a suit against one who has been discharged as an insolvent debtor, subject to the discharge. This is equivalent to that practice.

*640]

Scott, for the appellees, assumed, that this case having been set down for final hearing by the complainant, upon the bill and answers, the facts set forth in the answers must be taken as true; and he relied on the case of *Leeds* v. *Marine Insurance Company of Alexandria*, 2 Wheat. 380, 383.

He also contended, that the discharge of Boyle, under the insolvent laws of Maryland, did not affect the right of the plaintiffs at law to a judgment, or to an execution upon that judgment; because the act of the general assembly of Maryland, passed at December session 1816, ch. 221, § 5, which grants a final discharge to insolvent debtors, was a law impairing the obligation of contracts, and in violation of the first article, tenth section or the constitution of the United States. He relied upon the following authorities, *Lanusse* v. *Barker*, 3 Wheat. 102, 146; *Consequa* v. *Fanning*, 3 Johns. Ch. 610; *Thompson* v. *Ketcham*, 8 Johns. 189, 193; *Blanchard* v. *Russell*, 13 Mass. 18; *Coolidge* v. *Poor*, 15 Ibid. 427, for the purpose of showing *lex loci contractûs:* and also upon *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197, 193; *McMillan* v. *McNeil*, 4 Ibid. 209; *Farmers' & Mechanics' Bank of Pennsylvania* v. *Smith*, 6 Ibid. 131; *Ogden* v. *Saunders*, 12 Ibid. 213, as to the validity of the discharge. And he contended, that the memorandum made upon the judgment, "subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland," gave to Boyle no other benefit from his discharge, than if it had been pleaded at length; and that the discharge was no release to Boyle from the claim of the defendants.

*641]

He also contended, that the attachments, mentioned in the proceedings in the cause, formed no bar to the right of the plaintiffs at law to an execution upon their judgment; and he relied on *Renner* v. *Marshall*, 1 Wheat. 215; *Bowne* v. *Joy*, 9 Johns. 221; *Walsh* v. *Durkin*, 12 Ibid. 99. And in reply to the fourth point of the appellant's counsel, "that the court of chancery ought to have referred it to a commissioner to inquire and report whether the complainant had sustained injury by the attachments at New Orleans," he showed by the answer of the defendants, that the proceedings in the attachment, laid in the hands of Breedlove, Bradford & Robinson, had been instituted at the instance and request of Boyle himself; and that in that case, and also in the proceedings in the attachment against Ambrose Nelson, there were no funds in the hands of the garnishees, liable to be affected by those proceedings. He also contended, that Boyle had sustained no injury by those proceedings, and that there was no evidence upon which the appellant could rely, to show that he had been injured by them; and that even if he had been injured, his remedy was before another tribunal, and not in a court of equity; and that he must establish the *quantum* of injury in a court of law, before he could claim a set-off on that account in a court of equity; that the appellant was without any defence; and that the injunction was properly dissolved, and the bill dismissed.

Story, Justice, delivered the opinion of the court.—This is an appeal from a decree in equity to the circuit court for the district of Maryland, dismissing the bill of the plaintiff, now appellant. The material circumstances are as follows:

Zacharie & Turner are, and at the time of the transactions hereafter to be stated were, resident merchants at New Orleans, and Boyle a resident merchant at Baltimore. In the year 1818, Boyle being the owner of the brig Fabius, sent her on a voyage to New Orleans, consigned to Zacharie & Turner, where she arrived and landed her cargo, and Zacharie & Turner procured a freight for her to Liverpool. After the cargo was put *on board, and the brig was ready to sail, she was attached by process of [*642
law, at the suit of Messrs. Vincent, Nolte & Co., of New Orleans, as the property of Boyle, for a debt due by him to them. Zacharie & Turner, with one Richard Relff, with a view to benefit Boyle, and enable the brig to perform her voyage, became security for Boyle upon the attachment, and thus procured the release of the brig. Upon information of the facts, Boyle approved of their conduct, and promised to indemnify them for any loss they might sustain on that account. Messrs. Vincent, Nolte & Co., recovered judgment in their suit, and Zacharie & Turner were compelled to pay the debt and expenses, amounting to $3113.80; and afterwards, on the 23d of December 1819, they instituted a suit against Boyle, for the recovery of the same, in the circuit court of Maryland. On the 31st of the same month of December 1819, Boyle made application for the benefit of the insolvent act of Maryland, of 1816, ch. 228, and eventually received a discharge under the same. On the first of May 1821, judgment by confession was rendered in the suit, in favor of Zacharie & Turner, for the sum $3113.80, with interest from the 15th of November 1819, and costs of suit; and a memorandum was entered of record, by consent of the parties, as follows, "this

judgment subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland." The judgment having remained unexecuted for more than a year, it was revived by a *scire facias*; and writs of *fieri facias* were issued, and renewed from time to time, until the 12th of December 1827, when a *fieri facias* was delivered to the marshal, who levied it on the ship General Smith, belonging to Boyle, on the 31st of March 1828; and returned it to the May term of the circuit court of the same year.

The bill of the plaintiff was filed, on the 7th of April 1828, and stated most of the preceding facts; and prayed for an injunction to the further proceedings to enforce the execution of the judgment, and for general relief. The grounds relied on by the plaintiff, for this purpose, were, first, that his property is exempted from the levy, by his discharge under the insolvent act; secondly, that he is entitled to credit for certain *com-
*643] missions accruing to him for certain business done for Zacharie, since the judgment, and agreed to be deducted therefrom; and thirdly, for the amount of losses sustained by the plaintiff in consequence of Zacharie & Turner having caused certain attachments for the same debt to be issued in Louisiana, against the property of the plaintiff, in the hands of certain debtors of the plaintiff in that state. An injunction issued on the bill, on the 8th of the same April.

The answer of the defendants (now appellees) having come in, the cause was set down for a hearing on the bill and answer (by which the facts stated in the answer must be taken to be true); and it was decreed by the court, that the injunction be dissolved, and the bill dismissed, without costs. From that decree, the present appeal has been taken to this court.

The first point presented for argument, and indeed, that which was the principal ground of the appeal, is, as to the effect of the discharge under the insolvent act. This question is, of course, at rest, so far as it is covered by the antecedent decisions made by this court. The ultimate opinion delivered by Mr. Justice JOHNSON in the case of *Ogden* v. *Saunders*, 12 Wheat. 213, 258, was concurred in and adopted by the three judges, who were in the minority upon the general question of the constitutionality of state insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the three other judges who concurred in the judgment. So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive.

It has been suggested, that the memorandum of agreement accompanying the judgment, that it should be "subject to the legal operation of the insolvent laws of Maryland," ought to be deemed an acquiescence on the part of Zacharie & Turner, in the validity of that discharge, or, at least, a waiver of any claim in repugnance to it. We do not think so. The sole effect of that agreement is, to save to the party whatever rights he may claim from the legal operation of those laws. It neither admits their validity, nor waives any rights of Zacharie & Turner, if they are unconstitutional.

*644] It has, in the next place, been argued, that the contract upon *which the judgment is founded, is, in contemplation of law, a Maryland

contract, and not a Louisiana contract; that Boyle undertook to pay the money in the place where he resided, and not in the place where Zacharie & Turner resided. Our opinion is, that this argument cannot be maintained. We do not admit, that the original undertaking of Zacharie & Turner, in giving security in behalf of Boyle, was an unauthorized act, and beyond the scope of their just authority, as consignees of the Fabius. It was an act obviously done for the benefit of Boyle, and indispensable to enable the vessel to perform her voyage, and naturally implied from the relation of the parties, as owner and consignees. It must have been intended by the owner, that the consignees were to be at liberty to do any act for his benefit, which was or might be required, in order to dispatch the vessel on the voyage. And Boyle himself seems to have admitted this to be true; for in the answer of Zacharie & Turner (which is evidence in the cause), it is expressly stated, that Boyle, "so far from disapproving of the acts of these defendants, as above stated, thanked them for their prompt and correct management of his business, and undertook and promised to indemnify them from any loss which they might sustain on his account." Now, that could scarcely be deemed a prompt and correct management of the business of the principal, which was wholly beyond the scope of the authority delegated to the agents. In this view of the matter, the contract of indemnity would clearly refer for its execution to Louisiana; as much so, as if Boyle had authorized Zacharie & Turner to advance money there, on his account, for which he would repay them. Such a contract would be understood by all parties, to be a contract made in the place where the advance was to be made; and the payment, unless otherwise stipulated, would also be understood to be made there. The case would, in this aspect, fall directly within the authority of *Lanusse* v. *Barker*, 3 Wheat. 101, 146. (See also *Coolidge* v. *Poor*, 15 Mass. 427; *Consequa* v. *Fanning*, 3 Johns. Ch. 587.)

But if the contract had been unauthorized, and beyond the agency, still the subsequent ratification of the transaction by Boyle would have the same operation, according to the well-known maxim, that a subsequent ratification is equivalent to a *prior order; and when made, it has relation back to the time of the original transaction, and gives it as full a sanction as if it had been done under an original authority. The ratification of this contract by Boyle was complete and perfect; and he treated it as a Louisiana contract of indemnity, for his benefit, by which he was bound, and which he ought to discharge in that state. [*645

As to the credit for commissions, that is no longer relied on; for the defendant's answer asserts distinctly that the amount has been already credited.

As to the attachments, it is not very easy to ascertain the grounds upon which Boyle attempts, in his bill, to assert an equity. Assuming that a bill would lie, to have an equitable set-off for unliquidated damages, occasioned by the misconduct of the creditors, in not prosecuting such attachments, with due diligence, where the debt has been lost by the insolvency of the garnishee, in the intermediate period (on which we desire to be understood as expressing no opinion); still, there must be sufficient facts alleged in the bill, to justify a presumption of loss. Now, in the present bill, there is no allegation whatsoever of any insolvency of the garnishees. The allegation as to one attachment is, "whereby your orator has been deprived of the bene-

fit of any part of the debt, now due by the said Nelson (the garnishee), being somewhere about the sum of $1500, besides interest thereon, from the said year, when the attachment aforesaid was laid, and which sum is as completely lost to your orator, as if it had been paid over to the said Zacharie & Turner; who, for aught your orator knows, may have actually recovered the whole of it, in virtue of said attachment, and may have refused to give credit for the same." And as to the other attachment, the allegation is, "that they also attached property belonging to your orator, which was in the hands of Messrs. Breedlove & Bradford (the garnishees), for which your orator has never received any credit, although it has been thus far completely lost to him, amounting, as he verily believes, to the sum of, &c." So that the whole *gravamen* is, that the attachments have hitherto prevented him from receiving the debts and interest due from the garnishees. Under such circumstances, where Boyle might at any time have relieved himself *646] from the *effects of the attachment, by the payment of the debt due to Zacharie & Turner, and where he has himself acquiesced in the delay, without in any manner attempting to speed the suits, and where no connivance or indulgence is pretended to have existed, in concert with the garnishees, and where there is no allegation in the bill itself, of any undue delay in prosecuting the attachments by the creditor, it is difficult to perceive any foundation on which to rest a claim for equitable relief. But the answer of the defendants shows still more forcible objections against the bill. This answer explicitly avers, that in both of the attachments, the garnishees denied having any funds of Boyle in their possession, Nelson generally, and Breedlove, Bradford & Co., with the qualification, any funds liable to the attachment; and the suits were dismissed accordingly. Copies of the proceedings are annexed to the answer, which demonstrate (if it had been necessary) the result of the averment; but it must be taken to be true, as the hearing was upon bill and answer.

It is added in the answer, that the suit against Breedlove, Bradford & Co., was commenced, upon the information, and at the request, of Boyle; so that it was not *in invitum*, but was an arrest of his funds, upon his own suggestion, and with his own consent. Surely, a suit in chancery cannot be maintained, in a case so naked of all real equity. But it is said, that the answer of the garnishees, Breedlove, Bradford & Co., admits, that they are indebted to the plaintiff. But we must take that answer, according to its terms and import; and if so, then the admission is qualified. It is as follows, "we do not consider ourselves in debt to Hugh Boyle, or to Hugh Boyle & Co.; we received of Hugh Boyle & Co., some property, which has been sold, and the proceeds, say twelve or thirteen hundred dollars, placed to their credit on our books; but one of the house holds a claim against Hugh Boyle & Co., for upwards of twenty-five hundred dollars, which amount he refused to admit as a credit to our partner, but was willing to close Hugh Boyle & Co.'s account, by charging him and crediting the partner with the balance due said Boyle, and in this way said balance was held to pay the claim." They add, in an answer to another interrogatory, "we *647] have no property of the defendants in this case, nor do *we know of any." Now, it has been shown at the argument, that in a process of this sort, under the local laws of Louisiana, the debt due to one partner might not be a good defence for the garnishees; and certainly, the court

cannot presume it. And, upon general principles, there can be little doubt, that in a court of equity, in a suit by Boyle, seeking relief, such a counter-claim would or might, under circumstances, furnish a good defence, if not to the firm, at least, to the creditor partner, to rebut the claim of Boyle against him. Where there is an express denial, by the garnishees, setting up an equity, of any property in their hands liable to the attachment, that allegation ought to be presumed to be supported by the local law, applicable to the facts, until the contrary is explicitly established. But the decisive answer is, that as this suit was commenced at the request of Boyle, and as the garnishees did not admit, that they had property liable to the attachment, the *onus* is on Boyle to show, that, nevertheless, by the local law, the attachment might have been enforced. He has failed to establish any such proposition.

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

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, 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, with costs.

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*Hugh Boyle, Plaintiff in error, *v.* James W. Zacharie and Samuel H. Turner. [*648

Error.—Chancery jurisdiction.—State practice.

A writ of error will not lie to a circuit court of the United States, to revise its decision in refusing to grant a writ of *venditioni exponas*, issued on a judgment obtained in that court; a writ of error does not lie in such a case.

All motions to quash executions are addressed to the sound discretion of the court, and as a summary relief which the court is not compellable to allow; the party is deprived of no right by the refusal; and is at full liberty to redress his grievance by writ of error, or *audita querela*, or other remedy known to the common law; the refusal to quash, is not, in the sense of the common law, a judgment, much less a final judgment; it is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act of 1789, a writ of error lies to this court, only in cases of final judgments.

The acts of Maryland regulating the proceedings on injunctions and other chancery proceedings and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the constitution and laws of the United States, is the same in all the states of the Union, and the rule of decision is the same in all; in the exercise of that jurisdiction, the courts of the United States are not governed by the state practice, but the act of congress of 1792, ch. 36, has provided, that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law; and the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe.

In respect to suits at common law, it is true, that the laws of the United States have adopted the forms of writs and executions, and other process, and the modes of proceeding authorized and used under the state laws, subject, however, to such alterations and additions as may, from time to time, be made by the courts of the United States. But writs of execution issuing from the courts of the United States, in virtue of those provisions, are not controlled or controllable, in

their general operation or effect, by any collateral regulations and restrictions which the state laws have imposed upon the state courts, to govern them in the actual use, suspension or superseding of them; such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States, unless adopted by them. Palmer *v.* Allen, 7 Cranch 550, 564; Wayman *v.* Southard, 10 Wheat. 1, and Bank of the United States *v.* Halstead, Ibid. 51, cited.

*649] ERROR to the Circuit Court of Maryland. *The facts of this case are stated, in part, in the preceding equity case; and in the opinion of the court, delivered by Mr. Justice STORY.

The defendants in error, citizens of Louisiana, and merchants of New Orleans, instituted a suit in the circuit court, against Hugh Boyle, of Baltimore, for the amount which they had been obliged to pay as his sureties, in an attachment against his property at New Orleans. The action was brought on the 23d December 1819.

Mr. Boyle appeared to the suit, at May term 1820, and filed a plea of *non assumpsit*, and issue was joined: the cause was then continued to November term 1820, and then to May term 1821, when the defendant withdrew his plea, and confessed judgment for the damages in the declaration and costs; these damages to be released upon the payment of $3113.80, with interest from 15th November 1819, and $17.25 costs, "subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland." On the 8th October 1822, a *scire facias* was issued to revive the judgment, and a *fiat* was entered, on the 7th November 1823, and for $16.75 costs on *fiat*.

A *fieri facias*, to lie, was issued to December term 1824, and renewed, from time to time, until 12th December 1827, when it was taken out of the office and delivered to the marshal; and was by him, on the 31st day of March 1828, levied on the ship called the General Smith, and so by him returned to May term 1828, in these words: "Levied as *per* schedule, on 31st day of March 1828; injunction issued on the 8th April 1828." On 7th April 1828, the plaintiff in error filed his bill of complaint on the equity side of the circuit court against Zacharie & Turner, to stay proceedings at law upon the judgment; and a writ of injunction was granted by the circuit judge, and issued on the 8th day of the same month.

The bill which had been filed by the plaintiff in error on the equity side of the court having been dismissed, the attorney for the plaintiffs, on the 10th June 1829, gave an order to the clerk to issue a writ of *venditioni exponas*, which was issued on the 29th August 1829, and delivered to the

*650] marshal, who *made a return thereof to the December term 1829, that he had received the amount of the execution from the defendant, and had it ready to bring into court.

The defendant, at the same term, made a motion to quash the writ of *venditioni exponas*, and filed the following reasons in support of his motion: 1. That the judge who granted the said writ of injunction required the defendant, Hugh Boyle, to execute an injunction bond or obligation before the said writ was issued. The bond was in the common form. 2. And also the 100th rule of the court, adopted, with others, by the circuit court of the United States for the fourth circuit, in and for the district of Maryland; passed and adopted by the court, as the rules for the orderly conducting of

business in the court, in cases at common law, and to regulate the practice in the court, at November term 1802.

Rule 100. "Writs of *capias ad satisfaciendum*, *fieri facias* (or attachment by way of execution), as authorized by the act of assembly of this state, may issue, at the option of the party in whose favor any judgment shall be rendered for the recovery of any debt or damages, but only one execution shall be served, returnable to the same court, unless sufficient money shall not be levied to satisfy the judgment, in which case the *capias ad satisfaciendum* may be afterwards served for the residue, which shall be indorsed thereon, and the costs of the writ not served shall be paid by the party issuing it."

And also the act of the general assembly of Maryland, passed at November session 1799, ch. 79, entitled, "an act to prevent unnecessary delay and expense, and for the further advancement of justice in the court of chancery;" and also the act of the general assembly of Maryland, entitled, "an act for the ease of the inhabitants in examining evidences relating to the bounds of lands, and in the manner of obtaining injunctions," passed at October session 1723, ch. 8. And also appealed to the knowledge of the court, that according to the uniform and immemorial practice in the state of Maryland, with regard to the state courts, whenever a writ of *fieri facias* had been levied, and the proceedings were stayed by injunction, before the day of sale, the officer who had levied the writ of *fieri facias* delivered up the property seized by *him, to the defendant at law, upon the service upon the said officer of notice of the writ of injunction. [*651

The court overruled the motion, and ordered and directed the marshal to bring into court the money mentioned in his return; and the cause was removed to this court by writ of error.

The case was argued by *Wirt*, for the plaintiff in error; and by *Scott*, for the defendants.

Wirt contended: 1. That there was error in not quashing the writ of *venditioni exponas;* because the equity cause, lately depending in the same court, between the same parties, on account of the same cause of action, having been set down for a final hearing, and a final decree having been passed, dissolving the injunction issued in said equity cause, and that decree being appealed from, and an appeal bond having been filed and approved by the court, and the proceedings transmitted to the appellate court, where they are still pending; the execution of the judgment enjoined against should have been stayed by the appeal, until affirmance of the decree. 2. That the property seized under the writ of *fieri facias* should have been delivered up by the marshal to the defendant at law (plaintiff in error), on service of the writ of injunction, according to the law and practice of the courts of the state of Maryland; and is to be considered as having been so delivered up; and therefore, a writ of *venditioni exponas* could not properly issue, even if other process might. 3. That whether the law and practice of the courts of Maryland justified the marshal in the delivery up of the property taken in execution or not, a writ of *venditioni exponas* was not the proper process which ought to have issued. 4. That if such a writ was the proper process, it was fatally defective in form, as well as in substance, and ought, therefore, to have been quashed. 5. That on the return of the

marshal made to the *venditioni exponas*, the court below erred in requiring the money to be brought into court.

Mr. Wirt contended, that the appeal in the equity case, was a *supersedeas* in this case; and the *vendentioni* was, therefore, improperly issued. Originally, all cases were brought up to this court by writ *of error, which *652] was always a *supersedeas*, if prosecuted in time. This practice was changed by the act of congress of 1803; and now the appeal operates precisely as did a writ of error; and the taking out the execution was irregular. 2 Wheat. 132; Coxe's Dig. 50, 51. As to the practice in the state of Maryland: 6 Har. & Johns. 332.

After the cause is in this court, it ought to have the power to see that no further proceedings be had in the court below. In all cases of proceeding, *in rem*, and bond and security given, the bond is a substitute for the *res ipsa;* which is, thereupon, restored to the party. Act of Maryland, 1723, ch. 28; Act 1799, ch. 79. It is admitted, that these laws have no force in the courts of the United States, except under the power of the court to adopt the state practice. As to adopting the state practice: 10 Wheat. 51; Ibid. 1. As to the right of the party to take out a writ of error in such a case: 7 Cranch 278.

The motion to grant the *venditioni* is a substitute for the writ of *audita querela*. This is now obsolete; and relief is granted on motion where *audita querela* was formerly brought. 3 Bl. Com. 406.

Scott, for the defendants in error, contended, that this case was not properly before the court. The supreme court, although a court exercising common-law jurisdiction, was a court of statutory jurisdiction; and we must look to the constitution of the United States and the acts of congress for the subjects proper to be brought before the court. A writ of error will not lie, to bring up an execution from a circuit court, and more than five years had elapsed from the rendition of the judgment, before the issuing of the writ of error; and the court could, therefore, take no cognisance of the judgment of the circuit court, or of the proceedings upon that judgment, because a writ of error would not lie upon the judgment, after five years; and there was no provision in any act of congress for bringing up an execution.

He also contended, that the proceedings on a judgment come properly within the discretion of the court by which the judgment was rendered; and in England, a writ of error would not lie, merely to bring up an execution; and where the king's *bench, in England, had quashed an execution, *653] which had been issued by another court, and which had been brought before that court, the judgment, upon which the execution had been issued, as well as the execution itself, had been brought before the court, and that the court had proceeded to quash, for error in the judgment. In this case, there was no error in the judgment, and none was alleged; if there were error, this court could not correct it, after five years: and, independent of the first objection, this court could not look at the execution, the judgment not being properly before it.

He also contended, that even if this case were properly before this court, the writ of *venditioni exponas* was properly issued, and the motion to quash it was rightly overruled; and the circuit court was right in directing

the marshal to bring the money into court. 1. Because the supreme court considers the practice of the king's bench and chancery court as affording the outlines for its practice. 2 Dall. 411. 2. Because the remedies in the courts of the United States, in equity, are not according to the practice of state courts, but according to the principles of equity, as distinguished and defined in those courts, from which we derive our knowledge of those principles. 7th Rule of Court, 8th August 1791; *Robinson* v. *Campbell*, 3 Wheat. 212, 221. 3. And because the circuit courts of the Union have chancery jurisdiction in every state, and have the same chancery powers, and the same rules of decision, in all the states. *United States* v. *Howland*, 4 Wheat. 108, 115.

He then assumed the proposition, that the writ of *fieri facias* was properly issued; and showed from the record, that it was levied upon "the ship General Smith," as the property of Boyle, eight days before the issuing of the writ of injunction, viz., upon the 31st day of March 1828; and that the writ of injunction was not issued until the 8th April 1828; and he contended, that the writ of *venditioni exponas* was issued in conformity to the practice in England: and referred to Eden on Inj. 34; 1 Madd. Chan. Pract. 130, for the purpose of showing, that the *fieri facias* having been levied before the issuing of the writ of injunction, the defendant and plaintiff in error was not entitled to have the ship *delivered up to him, upon the service of the writ or injunction; and the *venditioni exponas* having issued according to the practice in England, it would not be affected by the 100th rule of the circuit court; and that the application of that rule to the case before the court would destroy the uniformity of the practice in the courts of equity of the United States. He also contended, that the application of the acts of Assembly of Maryland, viz., September 1723, ch. 8, § 5, and 1799, ch. 79, § 10, which had been relied on by the plaintiff in error, and of the Maryland practice under those acts of assembly, would be a legislative, not a judicial act, unwarranted by the constitution and laws of the United States, contrary to the English practice, and contrary to the practice of the courts of the United States. [*654

He also insisted, there was no error in issuing the *venditioni exponas*, pending the appeal; and it was no breach of the injunction so to do; because the *fieri facias* and the *venditioni exponas* were but one execution; and that the execution having been begun, before the issuing of the writ of injunction, it was the right of the plaintiff at law to have it completed; but he admitted, that pending the appeal and writ of error, he could not have taken out a new execution; and he relied on *Milton* v. *Eldrington*, 1 Dyer 98 *b*, where a *venditioni exponas* was issued after a *scire facias*, although a *supersedeas*. Also *Charter* v. *Peeter*, Cro. Eliz. 597; and that the court was right in directing the marshal to bring into court the money which he had received on the execution.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Maryland, between the same parties, and upon the same judgment on which the bill in equity, which has just been disposed of, was founded. The facts relative to the judgments need not be again repeated, as they are fully disclosed in the preceding cause.

The object of the present writ of error is, to revise the decision of the circuit court, in refusing to quash a writ of *venditioni exponas* issued for the sale of the ship General Smith, which was seized upon the *fieri facias* on the judgment, upon a motion made by the counsel for Boyle for that purpose.
*655] *The *fieri facias* was levied on the ship, on the 31st of March 1828; the bill in equity was filed, and an injunction awarded, on the 8th of the succeeding April. On the 8th of May following, the writ of *fieri facias* was returned to the circuit court, with the marshal's return thereon, "levied as per schedule, on the 31st of March 1828; injunction issued on the 8th of April 1828." On the 29th of August 1829, a writ of *venditioni exponas* issued from the circuit court, returnable to the next December term of the court. At the return-term, a motion was made in behalf of Boyle, to quash the *venditioni exponas*, grounded, among other things, upon the injunction, and bond given in pursuance thereof, and the provisions of the act of Maryland of 1799, ch. 79, and the act of Maryland of 1723, ch. 8. A rule was then made, at the same term, upon the marshal, to return the writ of *venditioni exponas*, upon which he made a return, in substance, that the amount of the money had been paid into his hands, and was now in bank to his credit, to be returned as made under the writ of *venditioni exponas*, if the court should be of opinion, that it rightfully issued, and empowered and obliged the marshal to sell the ship seized under the *fieri facias* issued in 1828, stayed by injunction as aforesaid. The court overruled the motion to quash the *venditioni exponas*, and ordered the money returned on the writ to be brought into court. The present writ of error is brought upon this refusal to quash the *venditioni exponas*.

The first question naturally presenting itself upon this posture of the facts is, whether a writ of error lies in such a case. It is material to state, that no error is assigned on the original judgment, nor on the award of the *fieri facias*, which indeed, are conceded to have been rightfully issued, and to be above exception. But the error assigned is the supposed irregularity and incorrectness of the award of the *venditioni exponas*, after the writ of injunction from the chancery side of the court had been granted.

The argument to maintain the writ of error has proceeded, in a great measure, upon grounds which are not in the slightest degree controverted by this court. It is admitted, that the language in Co. Litt. 288 *b*, is entirely correct, in stating that "a writ of error lieth when a man is grieved by an
*656] error in *the foundation, proceeding, judgment or execution" in a suit. But it is added, in the same authority, that "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." If, therefore, there is an erroneous award of execution, not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance. The question here is not, whether a writ of error lies to an erroneous award of execution, for there was no error in the award of the *fieri facias*. But the question is, whether a writ of error lies, on the refusal to quash the auxiliary process of *venditioni exponas*, upon mere motion. In modern times, courts of law will often interfere by summary proceedings, on motion, and quash an execution erroneously awarded, where a writ of error or other remedy, such as a writ of *audita querela*, would clearly lie. But, because a court may, it does not follow, that it is bound thus to act in a summary manner; for in such cases, the motion is not granted *ex*

debito justitiæ, but in the exercise of a sound discretion by the court. The relief is allowed or refused, according to circumstances; and it is by no means uncommon, for the court to refuse to interfere upon motion, in cases where the proceedings are clearly erroneous, and to put the party to his writ of error or other remedy; for the refusal of the motion leaves every remedy, which is of right, open to him.

In *Brooks* v. *Hunt*, 17 Johns. 484, Mr. Chancellor KENT, in delivering the opinion of the court of errors, alluding to this practice, said, "it is not an uncommon thing for a court of law, if the case be difficult or dubious, to refuse to relieve a party, after judgment and execution, in a summary way, by motion, and to put him to his *audita querela*." That was a case very similar to the present. A motion was made to the supreme court of New York to set aside a *fieri facias*, on the ground, that the party was discharged under the insolvent laws of the state. The court refused the motion; and on error brought, the court of errors of New York quashed the writ of error. Mr. Chancellor KENT, on behalf of the court, assigned as one of the grounds of quashing the writ of error, that the rule or order denying the motion was not a judgment, within the meaning of the constitution or laws of New York. It was only a decision upon a collateral or interlocutory point, *and [*657
could not well be distinguished from a variety of other special motions and orders, which are made in the progress of a suit, and which have never been deemed the foundation of a writ of error. A writ of error would only lie upon a final judgment or determination of a cause; and it was never known to lie upon a motion to set aside process. And in the close of his opinion, he emphatically observed, if the case "is to be carried from this court to the supreme court of the United States, I should hope, for the credit of our practice, it might be on the *audita querela*, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit." There are other cases leading to the same conclusion. See *Wardell* v. *Eden*, 1 Johns. 531, note; *Wicket* v. *Creamer*, 1 Salk. 264; *Johnson* v. *Harvey*, 4 Mass. 483; *Bleasdale* v. *Darby*, 9 Price 600; *Clason* v. *Shotwell*, Chancellor Kent's Opinion, 12 Johns. 31, 50; 1 Tidd's Pract. 470–1; Com. Dig. Pleader, 3 B, 12. A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a court to grant a peremptory *mandamus*, upon a return made to a prior *mandamus*, which the court allowed as sufficient. This was held by the House of Lords, in *Pender* v. *Herle*, 3 Bro. P. C. 505.

We consider all motions of this sort, to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error, or *audita querela*, or other remedy known to the common law. The refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at the common law, error only lies from a final judgment; and by the express provisions of the judiciary act of 1786, ch. 20, § 22, a writ of error lies to this court only in cases of final judgments.

But if this objection were not, as we think it is, insuperable, there would be other decisive objections against the party. In the first place, the very ground of argument to maintain the motion to quash is, that the injunction

operated as a *supersedeas* of the execution, according to the acts of Mary-
*658] land of 1723, ch, 8, and of 1799, ch. 79, regulating proceedings *in chancery and injunctions, which give to an injunction the effect of a *supersedeas* at law. But the acts of Maryland, regulating the proceedings on injunctions and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe *Robinson* v. *Campbell*, 3 Wheat. 212; *United States* v. *Howland*, 4 Ibid. 108. So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland.

Strictly speaking, at the common law, an injunction in equity does not operate as a *supersedeas;* although it may furnish a proper ground for the court of law, in which the judgment is rendered, to interfere by summary order to quash or stay the proceedings on the execution. If the injunction is disobeyed, a court of equity has its own mode of administering suitable redress. But a court of law is under no obligations to enforce it as a matter of right or duty. In respect to suits at common law, it is true, that the laws of the United States have adopted the forms of writs, executions and other process, and the modes of proceeding authorized and used under the state laws, subject, however, to such alterations and additions as may, from time to time be made, by the courts of the United States. But
*659] writs and *executions, issuing from the courts of the United States in virtue of these provisions, are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the state laws have imposed upon the state courts to govern them in the actual use, suspension or superseding of them. Such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States, unless adopted by them. The case of *Palmer* v. *Allen*, 7 Cranch 550, 564, furnishes a commentary on this point; and is freely expounded and illustrated in the subsequent cases of *Wayman* v. *Southard*, 10 Wheat. 1, and *United States Bank* v. *Halstead*, 10 Ibid. 51. No rule of the circuit court of Maryland has been produced, which adopts these state regulations; and the existence of one is not to be assumed.

But if the injunction could be admitted to operate as a *supersedeas* at law, under any circumstances, in the courts of the United States, there

would yet remain a decisive objection against its application in the present case. Nothing is better settled at the common law, than the doctrine that a *supersedeas*, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it comes afterwards, the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. There are many cases in the books to this effect; but they are admirably summed up by Lord Chief Justice WILLES, in delivering the opinion of the court in *Meriton* v. *Stevens*, Willes 271, 280; to which alone, therefore, it seems necessary to refer. See *Charter* v. *Peeter*, Cro. Eliz. 597; Moore 542; *Clerk* v. *Withers*, 6 Mod. 290, 293, 298; s. c. 1 Salk. 321; *Blanchard* v. *Myers*, 9 Johns. 66; 2 Tidd's Pr. 1072; Com. Dig. Execution, C. 5, C. 8; Bac. Abr. Supersedeas, G. See also *McCullough* v. *Guetner*, 1 Binn. 214. In the present case, the levy on the *fieri facias* was made more than a week before the injunction was granted; so that, according to the course of the common law, it ought not to operate as a *supersedeas* to the *venditioni exponas*.

In every view of this case, it is clear, that there is no error in the proceedings, which is revisable by this court. Whatever might have been properly done by the circuit court, upon *the motion to quash, in order to give full effect to its own injunction, was matter exclusively [*660 for the consideration of that court, in the exercise of its discretion, and is not re-examinable here. And there is no pretence of any error in the judgment or award of the execution under which the levy was made. The judgment of the circuit court is, therefore, affirmed, with damages at the rate of six per cent., and costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is 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.

Ex parte JOHN A. DAVENPORT. [*661

Mandamus.—Practice.

Motion for a *mandamus* to the district judge of the southern district of New York, directing him to restore to the record a plea of "tender," which had been filed by the defendant, in a suit on a bond for the payment of duties, and which had been ordered by the court to be stricken off as a nullity. As the allowance of double pleas and defences is a matter not of absolute right, but of discretion in the court; and as the court constantly exercises a control over the privilege, and will disallow incompatible and shame pleas, no *mandamus* will lie to the court for the exercise of its authority in such cases; it being a matter of sound discretion, exclusively appertaining to its own practice. The court cannot say, judicially, that the district court did not order the present plea to be stricken from the record on this ground, as the record itself furnishes no positive means of information.

Upon the true interpretation of the provision in the 65th section of the duty collection act of 1799, ch. 128, relative to granting judgment, on motion, in suits on bonds to the United States for duties, the legislature intended no more than to interdict the party from an imparlance, or any other means or contrivances for mere delay; he should not, by sham pleadings, or other pretended defences, be allowed to avail himself of a postponement of the judgment, to the injury of the government, or in fraud of his obligation to make a punctual payment of the

duties, when they had become due. There is no reason to suppose, that the legislature meant to bar the party from any good defence against the suit, founded upon real and substantial merits; and such an intention ought not, in common justice, to be presumed, without the most express declarations.

The language of the 65th section neither requires nor justifies any such interpretation; it merely requires that judgment should be rendered at the return-term, unless delay shall be indispensable for the attainment of justice.[1]

There is no impossibility or impracticability in courts making such rules in relation to the filing of the pleadings, and the joining of issues, in this particular class of cases, as will enable the causes to be heard and tried upon the merits, and a verdict found at the return-term of the court.

THIS was a motion, by *Hall*, of counsel for the relator, for a *mandamus* to the judge of the District Court of the United States for the southern district of New York, "commanding him to restore to the record of the cause, the plea of tender, filed in the cause by the defendant, and to proceed to the trial, and judge thereupon according to law; and to vacate all rules and orders entered in the said court, setting aside such plea as a nullity."

The affidavit of John A. Davenport was filed, stating the institution of a suit by the United States in the district court of the United States for the southern district of New York, in *February term 1831, against *632] himself and a certain John A. Lacon, and that a declaration was filed therein against the defendants, to which the said John A. Davenport, he being the only defendant who appeared, after *oyer*, interposed two pleas. The declaration was in debt on a bond to the United States for duties on merchandise imported into the port of New York by Thomas H. Lacon, one of the obligors, on the 1st day of May 1831, in the penal sum of $500. The amount stated to be due to the United States, in the condition of the bond, was $50.25. In the margin of the bond was written, in figures, the sum of $228.34.

The first plea of the defendant was "*non est factum*." The second plea stated, that when the bond became due, to wit, on the 21st day of January 1832, before the commencement of the suit, the defendant, Thomas H. Lacon, was ready and willing, at the city of New York, to pay the amount due thereon, being the sum of $50.25, and that on the same day, he tendered to the plaintiffs the said sum of money, which the plaintiffs refused to receive; and that he was still willing and ready to pay the same: and that the said sum of $50.25 was brought into court, to be paid to the plaintiffs.

The affidavit proceeded to state, that the bond was given on the importation of certain manufactured iron into the port of New York; for which, as manufactured iron, and according to the tariff, the amount of duties as set forth in the condition of the bond was correct. That the collector of the port of New York, however, upon an allegation that such iron was not manufactured iron, but was subject to a specific duty, increased the amount of duties to the sum set forth in the margin of the bond, and filled in, or caused to be filled in, the penalty of $500; being after the execution of the bond and tender of payment, and without the assent of the deponent, to enable a recovery to be had to the extent of the increased duty; and that a tender of the amount in the condition mentioned was made, in order to test

[1] See United States *v.* Phelps, 8 Pet. 700.

the questions arising out of the acts of the collector, and the pleas interposed accordingly.

The affidavit further stated, that the district-attorney of the United States moved to strike off from the record the plea of tender, as a nullity; and that upon argument, the district judge *did decide, that, under the act of congress, no other plea could be interposed to the bond, [*663 except the plea of *non est factum*; and did thereupon order the said plea to be stricken from the record as a nullity.

Taney, Attorney-General, presented to the court the affidavit of the district-attorney of the United States for the southern district of New York, stating the circumstances of the case; and also a certified copy of the proceedings in the district court. The case was submitted, without argument.

STORY, Justice, delivered the opinion of the court.—This is a motion for a *mandamus* to the district judge for the southern district of New York, directing him to restore to the record a plea of tender, which had been filed, together with a plea of *non est factum*, by Davenport, in a suit on a custom-house bond for the payment of duties, brought against him in that court, and which had been ordered by the court to be stricken from the docket as a nullity. As the allowance of double pleas and defences is a matter not of absolute right, but of discretion in the court, and as the courts constantly exercise a control over this privilege, and will disallow incompatible and sham pleas, no *mandamus* will lie to the court for the exercise of its authority in such case, it being a matter of sound discretion, exclusively appertaining to its own practice. We cannot say judicially, that the court did not order the present plea to be stricken from the record, on this ground, as the record itself furnishes no positive means of information.

But it appears from the affidavit of the party, and the opinion of the district court, with a copy of which we have been furnished, that the plea was in fact stricken from the record, upon the ground, that under the 65th section of the duty collection act of 1799, ch. 128, the defendant has not a right to make every defence, which he would be entitled to make in a suit at common law upon such a bond; but that the statute contemplates a summary proceeding and judgment against him, without preserving to him the same right of a trial by jury, upon litigated questions of fact, at least, not upon such questions of fact as are not within the issue of *non est factum*. *The words of the 65th section of the act are, "And where suit shall be instituted on any bond for the recovery of duties due to the Uni- [*664 ted States, it shall be the duty of the court, where the same may be pending, to grant judgment at the return-term, upon motion; unless the defendant shall, in open court, &c., make oath or affirmation, that an error hath been committed in the liquidation of the duties demanded upon such bond, specifying the errors, &c.; whereupon, if the court be satisfied, that a continuance until the next succeeding term is necessary for the attainment of justice, and not otherwise, a continuance may be granted, until the next succeeding term, and no longer." In our opinion, upon the true interpretation of this provision, the legislature intended no more than to interdict the party from an imparlance, or any other means or contrivances for mere delay. He should not, by sham pleadings, or by other pretended defences, be allowed to avail himself of a postponement of judgment, to the injury of the gov-

ernment, and in fraud of his obligation to make a punctual payment of the duties when they had become due.

But we perceive no reason to suppose, that the legislature meant to bar the party from any good defence against the suit, founded upon real and substantial merits. And certainly, we ought not, in common justice, to presume such an intention, without the most express declarations. To deprive a citizen of a right of trial by jury, in any case, is a sufficiently harsh exercise of prerogative, not to be raised by implication, from any general language in a statute. But to presume, that the government meant to shut out the party from all defences against its claims, however well founded in law and justice, without a hearing, would be pressing the doctrine to a still more oppressive extent. We think the language of the 65th section neither requires nor justifies any such interpretation. It merely requires, that judgment should be rendered at the return-term, unless delay should be indispensable for the attainment of justice: and there is no impossibility or impracticability in the court's making such rules in relation to the filing of the pleadings, and the joining of issues, in this peculiar class of cases, as will enable the causes to be heard and tried upon the merits, and a verdict found at the return-term of the court. It is a matter of common practice, in all classes of cases, *at least, in one of the circuits, and no inconve- *665] nience or hardship has hitherto grown out of it. Special exceptions, founded upon extraordinary circumstances, are and may be disposed of, upon special application for delay.

We have thought it right to express this opinion on the present occasion, because it appears that there has been a diversity of judgment among the district judges upon the subject. It is probable, that the district judge of the southern district of New York, will, upon this intimation, grant the proper relief. If he should not, we cannot interfere by way of *mandamus*, unless the objection is put upon the record in a proper form, which it does not appear to be, in the present case.

On consideration of the motion made in this case, on a prior day of the present term of this court, for a *mandamus* to be directed to the judge of the district court of the United States for the southern district of New York, "commanding him to restore to the record of the cause in said named case, the plea of tender filed in the said cause by the defendant, and to proceed to trial and judge thereupon according to law, and to vacate all rules or orders entered in the said court, setting aside such plea as a nullity," and of the exhibits filed in the case, as well by the said counsel of the defendant as by Mr. Attorney-General, in behalf of the United States; it is now here ordered and adjudged by this court, that the *mandamus* prayed for be and the same is hereby refused, and that the said motion be and the same is hereby overruled.

*Stephen Lindsey and others, Plaintiffs in error, *v.* The Lessee of Thomas B. Miller, Defendant in error.

Land-law of Ohio.

The plaintiff claimed the land in controversy, which was situated in the Virginia military district, in the state of Ohio, under a patent from the United States, dated 1st December 1824, founded on an entry and survey executed in the same year; the defendants offered in evidence a patent, issued by the state of Virginia, in March 1789, to Richard C. Anderson, for the same land, which was rejected by the court; and they gave in evidence an entry and survey of the land, made in January 1783, recorded on the 7th of April in the same year, and proved possession for upwards of thirty years. The warrant under which the defendants' survey was made, stated, that the services for which it issued were performed in the Virginia state line; and not on the continental establishment. On the 1st of March 1786, Virginia conveyed to the United States the territory north-west of the river Ohio, with the reservation of such a portion of the territory ceded, between the rivers Scioto and Little Miami, as might be required to make up deficiencies of land on the south side of the Ohio, called the Green River lands, reserved for the Virginia troops on continental establishment. The holders of Virginia warrants had no right to locate them in the reservation, until the good land on the south side of the Ohio was exhausted, and it was deemed necessary that Virginia should give notice to the general government, when the Green River lands were exhausted; which would give a right to the holders of warrants to locate them in the district north of the Ohio. Lands could be entered in this district, only by virtue of warrants issued by Virginia to persons who had served three years in the Virginia line on the continental establishment.

In May 1800, congress authorized patents to issue on surveys made under Virginia warrants, issued for services on the continental establishment. Warrants issued by Virginia for services in her state line, gave no right to the holder to make an entry in the reserved district.

The land in the possession of the defendant was surveyed under a warrant which did not authorize the entry of lands in the reserved district. The possession of the same did not bar the plaintiff's action.

It is a well-settled principle, that the statute of limitations does not run against a state; if a contrary rule were recognised, it would only be necessary for intruders on the public lands to maintain their possession, until the statute of limitations should run, and they then would become invested with the title, against the government, and all persons claiming under it.

The entry and survey of the defendant were made before the deed of cession. At the time the location was made, the land in the reserved district was not liable to be appropriated in satisfaction of warrants granted by the state of Virginia, for military services in the state line.

No act of congress was passed, subsequent to the deed of cession, which enlarged the rights of Virginia to the lands in the military disirict, beyond the terms of the cession; longer time has repeatedly been given for locations, but no new rights have been created. It would seem, therefore, to follow, that when the *act of 1807 was passed, for the protection of surveys, congress could have designed to protect such surveys only as had been made in [*667 good faith; they could not have intended to sanction surveys made without the shadow of authority, or, what is the same thing, under a void authority.

It is essential to the validity of an entry, that it shall call for an object, notorious at the time, and that the other calls shall have precision. A survey, unless carried into grant, cannot aid a defective entry, against one made subsequently; the survey, to be good, must have been made in pursuance of the entry.

To cure defects in entries and surveys, was the design of the act of 1807; it was intended to sanction irregularities which had occurred without fraud, in the pursuit of a valid title. In the passage of this act, congress could have had no reference but to such titles as were embraced in the deed of cession.

Miller *v.* Lindsey, 1 McLean 32, affirmed.

Error to the Circuit Court of Ohio. This was an ejectment in the circuit court of Ohio, instituted by the defendants in error, for the recovery of a tract of land situated in the Virginia military district, in the state of Ohio. The title of the plaintiff's lessor was derived from a patent issued by the

United States, dated the 1st day of December 1824, for the premises in controversy; of which the defendants were in possession.

On the trial, the defendants offered in evidence, the copy of a survey, bearing date the 5th of January 1788, recorded on the 7th of April, in the same year. The entry and survey, which comprehended the land in dispute, were in the name of Richard C. Anderson, and the latter purported to be made for 454 acres of land, part of a military warrant, No. 2481, on the Ohio river, on the north-west side, &c.

The defendants then read in evidence the act of congress of the 3d of March 1807, authorizing patents for land, located and surveyed by certain Virginia revolution warrants, and the act amending the same, passed in March 1823. They also offered in evidence, the deposition of James Taylor, to prove that the defendants had been in possession of the premises, for upwards of thirty years; which deposition was admitted by the court.

Then plaintiff then offered evidence, to prove that the warrant on which the defendants' survey was predicated, was issued by the state of Virginia, on the 12th of February, in the year 1784, for services performed in the Virginia state line, *and not on the continental establishment. The *668] defendants objected to this evidence, but the court overruled the objection, and permitted the same to go to the jury.

The defendants, by their counsel, then moved the court to instruct the jury, that if they believed, that the survey under which the defendants claimed, was founded on the warrant so admitted in evidence by the court, it did not render the survey void; but that the survey and possession, under the acts of congress referred to, constituted a sufficient title, to protect the defendants in their possession. The court refused to give the instruction, and directed the jury, that if they believed the survey of the defendants was founded on the warrant offered in evidence by the plaintiff, then, that the survey was void; and that the survey and entry, together with the possession of the defendants, were no legal bar, under the acts of congress aforesaid, to the plaintiff's right of recovery. They further requested the court to instruct the jury, that if they believed the defendants had the uninterrupted possession of the premises for more than twenty-one years since the commencement of the act of limitations of the state of Ohio, and before the commencement of this suit, that then the defendants had a title by possession; unless the plaintiffs came within some one of the exceptions of the statute. The court refused to give such instructions. They further requested the court to instruct the jury, that if they believed the defendants were innocent purchasers, without notice of the warrant offered in evidence by the plaintiff, that the defendants were entitled to a verdict. The court refused to give such instructions.

To these proceedings of the court, the defendants excepted; and a verdict and judgment having been rendered for the plaintiff, they prosecuted this writ of error.

The case was argued by *Ewing* and *Corwin*, for the plaintiffs in error; and by *Leonard* and *Doddridge*, for the defendant.

The only question argued before the court was that which had reference to the validity of the title derived by the plaintiffs in error, the defendants below, under the entry and survey in the name of Richard C. Anderson.

The counsel for the plaintiffs in error abandoned the point made in the circuit *court, that they were entitled to the benefit of the statute of limitations. [*669

For the *plaintiffs* in error, it was argued, that the plaintiffs' title was protected by the act of congress of March 3d, 1807. That act was made to protect possessions against entries under certain descriptions of warrants; to prevent an entry or location on tracts for which patents had issued, or surveys had been made. It was admitted, that there must have been a survey by some person, acting in an official capacity. The party claiming must show a color of title; and that has been shown by the entry and survey in this case. There is no distinction, under the law, between surveys which were void and voidable. These terms are of very indefinite import, and the application of the act cannot turn upon them. The cases of *Anderson* v. *Clarke*, 1 Pet. 636, and of *Hoofnagle* v. *Anderson*, 7 Wheat. 212, sustain the principles claimed by the plaintiffs in error. When, in 1807, congress passed the law, they must be presumed to have legislated on the then existing state of things. It was then well known, that there were lands held under claims drawn under surveys made for services in the Virginia state line. It must be presumed, the act was intended to apply to those cases. The equities of both classes of claimants were the same; both were meritorious; and the powers of congress extended to both. In 1823, congress passed a law in precise accordance with the act of 1807, after the decision of the court in *Hoofnagle* v. *Anderson*, in 1822, relating to Virginia state warrants. There is nothing appearing on the face of the survey, under which the plaintiffs in error held the land, showing that their title below was derived under a warrant for services in the state line; nor is it open to inquiry, whether the surveyor was legally authorized to make the survey. The plaintiffs in error held as *bonâ fide* purchasers under Anderson's title; they were purchasers without notice.

The case of *Miller* v. *Kerr*, 7 Wheat. 1, and the cases cited for the defendant in error, have no application to this case. The law of 1807 was not in the view of the court in the decision of these cases. The limitation upon claims intended to be brought within *the act of 1807, extends in terms to such a warrant as the plaintiffs'. The meaning of the [*670 terms "patent" and "survey," is decided in the case of *Hoofnagle* v. *Anderson*; and in that case, the survey was under a state-line warrant.

Leonard and *Doddridge*, for the defendant in error, contended, that the act of congress upon which the plaintiffs relied, was intended to protect informal or imperfect entries, or surveys under continental warrants, and not such as were absolutely void; such as surveys made under state-line warrants. The surveys made on the ground were to be protected when made under proper warrants. This construction is established in the cases reported in Hardin 348, 358, 359.

In *Miller* v. *Kerr*, 7 Wheat. 1, this court decided, that as there was no reservation whatever of these lands, in favor of the bounties due to the state line, no title could be acquired in virtue of such service. They add, the same principle was asserted by the court in the case of *Polk* v. *Wendall*; and we think it too clear to be controverted. The question upon which the court felt difficulty in *Miller's Case*, was the admission of evidence question-

ing the validity of the warrant, which expressly recited, that the land was "due in consideration of services for three years as a lieutenant of the Virginia continental line." They determined in favor of admitting this evidence, because they say, "until the consummation of the title by grant, the persons who acquire an equity hold a right subject to examination. The validity of every document is then open to examination, whatever the law may be, after the emanation of a patent." The force of this decision, as applicable to this case, is in no respect impugned by the case of *Hoofnagle* v. *Anderson*, subsequently decided, and reported in 7 Wheat. 212. In this latter case, the party was protected by his patent, which was issued before the making of his adversary's entry. In *Miller's Case*, the party claiming under a warrant, in the state line, did not hold an operative patent. He held the elder entry and survey. The other party, having the senior patent, held the legal title. Consequently, the party stood upon his entry and survey, which was open to examination. In this *case, the plaintiffs in error, having no legal grant, stand also upon their entry and survey; and, upon the doctrine of *Miller's Case*, these confer no title whatever.

*671]

In *Anderson* v. *Clarke*, 1 Pet. 628, it was considered, what description of survey protected land from entry under the law of March 2d, 1807. The question presented in that case was, whether an entry and survey, upon a warrant previously satisfied, was protected. The general principle was not decided, the court being of opinion, that the particular circumstances and relations of the parties connected with the entries, operated to protect them.

No doctrine is better settled, than that a survey, without an entry, is void; none, than that an entry, without a warrant to authorize it, is void. If the act of March 2d, 1807, can be made to protect this survey, it protects that which before the passage of the law was absolutely void—as much so as an entry made without reference to any warrant. The object of the law was to protect *bonâ fide* entries and surveys, made upon warrants capable of appropriating the land, but defective in some of the requisites specified in the law. This was a prudent and parental object. But it ought never to be construed as protecting that which originated in positive wrong, and unauthorized encroachment upon the rights of others.

Whatever might have been the original rights and equities of the two classes of claimants, and however true it may be, as suggested by the chief justice, in *Hoofnagle* v. *Anderson*, "that the rights of the state officers were not sufficiently respected, when the legislature omitted to insert them, as well as their brethren of the continental line, in the reservation for military warrants," it is certain, that that omission limited and concluded their rights. An entry, specifying that it was made upon a warrant in the state line, and a survey and patent, containing the same specification, would be mere nullities; because all were contrary to law, and unauthorized upon their face. It is only where *primâ facie* everything is legal, that the grant appropriates the land; until the grant issues to shut up all inquiry into intermediate proceedings, the validity of both entry and survey depends upon the warrant. If that confer no authority, the entry and survey originate no right. Surely, the act of March 2d, 1807, was intended to protect *existing rights, and not to be made the foundation

*672]

of new ones. Yet such must be its operation, if it protect the survey in question. They cited also, Swann's Collection of Ohio Land Laws 121 ; 5 Cranch 234 ; 7 Wheat. 212 ; 9 Ibid. 480.

McLean, Justice, delivered the opinion of the court.—This is a writ of error brought to reverse a judgment of the circuit court for the district of Ohio. The plaintiff in the court below prosecuted an action of ejectment, to recover possession of 450½ acres of land, lying in what is called the Virginia military district, and known by entry No. 12,495. Stephen Lindsey and others were made defendants ; and were proved to be in possession of the land in controversy.

On the trial, the plaintiff exhibited a patent for the land, bearing date the 1st December 1824, which was founded on an entry and survey executed in the same year. The defendants offered in evidence a patent issued by the commonwealth of Virginia, in March 1789, to Richard C. Anderson, for the same land, which was rejected by the court. They then gave in evidence an entry and survey of the land, made in January 1783, which were duly recorded on the 7th of April, in the same year ; and proved possession for upwards of thirty years. The plaintiff then offered in evidence the warrant on which the entry and survey of the defendants were made ; accompanied by proof, that the military services for which said warrant issued, were performed in the Virginia state line, and not on the continental establishment. This fact was apparent on the face of the warrant. To the admission of this evidence, the defendants objected. The defendants then requested the court to instruct the jury, that the uninterrupted possession for more than twenty-one years was a bar to the plaintiff's recovery. That this possession, under the entry and survey before stated, ought to protect them against the title of the plaintiff. The court refused to give the instructions ; on which ground, and because the court admitted the evidence offered by the plaintiff, which *was objected to by the defendants, a bill of exceptions was taken ; which presents to this court the above questions. [*673

That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well-settled principle, that the statute of limitations does not run against a state. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run ; and then they would become invested with the title, against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government. The title under which the plaintiff in the ejectment claimed, emanated from the government in 1824. Until this time, there was no title adverse to the claim of the defendants ; there can, therefore, be no bar to the plaintiff's action.

To understand the objection to the validity of the defendants' title, under their entry, survey and patent, it will be necessary to advert to the conditions on which the district of country, within which the location was

made, was ceded by Virginia to the United States. By her deed of cession, which was executed in behalf of the commonwealth by her delegates in congress, in 1784, Virginia conveyed to the United States the territory north-west of the river Ohio, with certain reservations and conditions, among which was the following: "that in case the quantity of good land on the south-east side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee river, which have been reserved by law for the Virginia troops on continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops, in good lands, to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio; in *674] such *proportions as have been engaged to them by the laws of Virginia."

From this condition, it is clear, that until the good land was exhausted in the district of country named, the holders of Virginia warrants had no right to locate them in the above reservation. This is the construction given by congress to the deed of cession, as appears from a resolution adopted by them on the subject. It was also deemed necessary, that Virginia should give notice to the general government when the Green river lands were exhausted, which would give a right to the holders of warrants to locate them in the district north of the Ohio.

Lands could be entered in this district only by virtue of warrants issued by Virginia, to persons who had served three years in the Virginia line, on the continental establishment. In May 1800, by an act of congress, the proper officer was authorized to "issue patents on surveys which have been, or may be made, within the territory reserved by the state of Virginia, north-west of the river Ohio, and being part of her cession to congress, on warrants for military services issued in pursuance of any resolution of the legislature of that state, previous to the passing of that act, in favor of persons who had served in the Virginia line on the continental establishment." Several laws were subsequently passed in relation to this reservation, and to the rights of warrant-holders; in all of which, a reference is made to warrants issued for services performed on the continental establishment. This was in conformity to the deed of cession; and, although not necessary, was deemed proper, in giving time, to locate warrants in this district, in order to prevent the semblance of right from being acquired by virtue of locations made on other warrants.

It was known, that Virginia had issued other military warrants, for services in her state line, which gave no right to the holder to make an entry in the above district. In the act of the 2d of March 1807, to extend the time for locating military warrants, in the reserved district, and for other purposes, it is provided, "that no locations within the above-mentioned tract, shall, after the passing of that act, be made on tracts of land for which *675] patents had been previously *issued, or which had been previously surveyed;" and any patent obtained contrary to the provisions of that act was declared to be null and void. As, by the deed of cession, the fee to this district passed to the United States, the patents for lands entered and surveyed within it necessarily emanated from the general government. It is, therefore, clear, that the circuit court did not err in rejecting, as evi-

dence, the patent which was issued by Virginia for this land, several years subsequent to the deed of cession. But the defendants below rely upon their survey, as being protected by the act of 1807. This is the main point in the case, and it becomes necessary fully to consider it.

The entry and survey of the defendants were made before the deed of cession, but it was not contended, that, at the time this location was made, the land within this district, under the laws of Virginia, was liable to be appropriated in satisfaction of warrants granted by the state for military services in the state line. The fact, therefore, of this location having been made, while the fee of this district remained in Virginia, cannot give it validity, as the entry was not made in pursuance of the laws of Virginia. By the act of 1807, any patent is declared to be void, that shall be issued on an entry of land which had been previously patented or surveyed. This language is general, and literally applies to all surveys which had been previously made, whether made with or without authority. Could congress have designed, by this act, to protect surveys which had been made without the semblance of authority? If an intruder, without a warrant, had marked boundaries in a survey, either large or small, would it be protected under the act? When the object and scope of the act are considered, and other laws which have been enacted on the same subject, and the deed of cession are referred to, it would seem, that much difficulty cannot be felt in giving a correct construction to this provision.

In making the cession, Virginia only reserved the right of satisfying warrants issued for military services in the state line on the continental establishment. Warrants of no other description, therefore, could give any right to the holder, to any land in this district. In all the acts subsequently passed, giving further time for the location of warrants in this reservation, *there is a reference to the kind of warrants which may be located. And in the act of 1807, the "officers and soldiers of the Virginia [*676 line on continental establishment, are named as entitled to land in the district." No act of congress passed, subsequent to the deed of cession, which enlarged the rights of Virginia to this district, beyond the terms of the cession. Longer time has repeatedly been given for locations, but no new rights have been created. It would seem, therefore, to follow, that when the act of 1807 was passed for the protection of surveys, congress could have designed to protect such surveys only as had been made in good faith. They could not have intended to sanction surveys made without the shadow of authority, or, which is the same thing, under a void authority. It is known to all who are conversant with land titles in this district, that the mode pursued in making entries and surveys under the Virginia land law, gave rise to the most ruinous litigations. The docket of this court contains abundant evidence of this fact. By the law of 1807, congress intended to lessen litigation.

It is essential to the validity of an entry, that it shall call for an object, notorious at the time, and that the other calls shall have precision. A survey, unless carried into grant, cannot aid a defective entry, against one made subsequently. The survey, to be good, must be made in pursuance to the entry. To cure defects in entries and surveys was the design of the act of 1807. It was intended to sanction irregularities, which had occurred without fraud, in the pursuit of a valid title. In the passage of this act,

congress could have had no reference, but to such titles as were embraced by the deed of cession.

The case of *Miller v. Kerr*, reported in 7 Wheat. 1, is cited by the defendant's counsel. In this case, the register of the land-office of Virginia, had, by mistake, given a warrant for military services in the continental line, on a certificate authorizing a warrant for services in the state line. An equity acquired under this warrant was set up against a legal title subsequently obtained: but the court sustained the legal title. They considered the register a ministerial officer, and that his official acts, as such, might be
*677] *inquired into. This entry was made subsequent to the deed of cession, and the court seemed to think, if this territory had not been ceded, there would have been great force in the argument, that as the holder was entitled to the land for services rendered, and as, by the mistake of the officer, he had been prevented from locating the warrant in Kentucky, and as no provision existed by which his claim could be satisfied; if the entry made should not be sustained, that under such circumstance it should be held valid. The case was a hard one, but the court were clear, that by virtue of the warrant thus issued, no right could be acquired in the Virginia reservation.

The case of *Hoofnagle* v. *Anderson*, 7 Wheat. 212, is strongly relied on as a case, if not directly in point, that has, at least, a strong bearing on the question under consideration. In that case, the court decided, that a patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. The entry on which this patent was founded was made in the Virginia reservation, by virtue of a warrant which was, in fact, issued for services in the state line; but it was stated on its face to have been issued for services on the continental establishment. This case would have been similar to the one under consideration, if the patent had not been issued; but the decision turned against the subsequent locator, on the ground, that the patent appropriated the land. The court say, that the "principle is well settled, that a patent is unassailable by any title commenced after its emanation."

The case of *Jackson* v. *Clark*, 1 Pet. 628, it is contended, bears a close analogy to the one under examination. That was a case, where the act of 1807 was decided to protect a survey, although made on a warrant which had been previously located and not withdrawn. But the court sustained the survey, on the ground, that is was not a void act, though it might be irregular. That to the purchaser of the survey, there was no notice of irregularity, much less of fraud. The warrant was valid, and upon its face, authorized the entry. The entry had been regularly made on the books of the surveyor, and the survey had been executed by a regular officer; and the only objection to the validity of the proceedings was, that the warrant
*678] had been previously located. This *location, the court said, might be withdrawn, and that would remove all objections to the subsequent proceedings. And they intimate, that the powers of a court of chancery were sufficient to have compelled the original locator to withdraw the first entry, or enjoin him from the use of it, so as to remove the objections to the second entry. Under all the circumstances of the case, they consider, that the second survey was protected from subsequent entries, by the act of 1807. They say, "if it be conceded, that this provision in the above

act was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularity."

There can be no doubt, that congress did intend to protect surveys which had been irregularly made, and it is equally clear, that they did not design to sanction void surveys. A survey is void, unless made under the authority of a warrant; and it need not be stated again, that the warrant under which the survey of the defendants in the circuit court was made, gave no right to the holder to appropriate land north of the Ohio. Neither the entry nor the survey is a legal appropriation of the land. The claimant is only vested with the equitable estate, until his entry and survey have been carried into grant.

This court decided, in the case of *Taylor's Lessee* v. *Myers*, 7 Wheat. 23, that the act of 1807 did not protect a survey from which the entry had been withdrawn.

In the argument, it was insisted, that the entry and survey having been made in the name of Richard C. Anderson, the principal surveyor, were void under the laws of Virginia; that by those laws he was prohibited from making an entry in his own name. As there are other points in the cause on which the decision may rest, it is unnecessary to investigate this one, further than to observe, that, under other circumstances, it might be entitled to serious consideration.

This is a case of great hardship on the part of the defendants below; and regret is felt that the principles of law which are involved in the cause do not authorize a reversal of the judgment given by the circuit court. *The judgment must be affirmed, with costs, and the cause remanded for further proceedings. [*679

BALDWIN, Justice, dissented, and gave an opinion in writing; which was not delivered to the reporter.

Judgment affirmed.

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*CADWALLADER WALLACE, Plaintiff in error, *v.* JOSIAH C. PARKER, Defendant in error. [*680

Error to state courts.—Military reservation.

This court has jurisdiction in an appeal from the supreme court of the state of Ohio, in a case where was drawn in question at the trial the construction of the act by which Virginia ceded the territory she claimed north-west of the river Ohio to the United States, and of the resolution of congress accepting the deed of cession, and the acts of congress prolonging the time for completing titles to lands within the Virginia military reservation—the decision of the supreme court of Ohio, having been against the title set up under the acts of congress.

Construction of the acts of congress relative to the Virginia reservation of military lands in Ohio. Parker *v.* Wallace, 3 Ohio 490, affirmed.

ERROR to the Supreme Court of Ohio. Josiah C. Parker, the defendant in error, filed a bill in the court of common pleas of Brown county, in the state of Ohio, praying for an injunction; and that Cadwallader Wallace, the defendant in error, should be compelled to release his legal title to one thousand acres of land in the Virginia military district, in the state of Ohio, which Josiah Parker, the grandfather of the complainant, had entered, on

or about the 12th of January 1788, on part of a Virginia military warrant, No. 1920; under which entry, a survey was made, but which survey, by the omission of the surveyor, was not returned to the proper officer for record. The bill stated, that the defendant, Cadwallader Wallace, had caused part of the tract to be located, and had obtained a grant for the same; and upon the said grant, had prosecuted a writ of ejectment against persons in possession of the land under the complainant.

The defendant held under a patent, dated April 13th, 1824, issued to him in consideration of military services performed by Thomas Parremore to the United States, a captain, for the war, in the Virginia line on continental establishment, and in pursuance of an act of the congress of the United States of the 10th day of August 1790, entitled, "an act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying north-west of the river Ohio, between the Little Miami and Scioto." The survey on which *the patent was founded, *681] was dated the 17th day of December 1823. In an answer afterwards filed to an amended bill, he said, that the complainant had no equitable claim to the land, because the entry made by him was based upon a resolution warrant, which was not protected by the act of congress, and could not, therefore, be a foundation on which to base a valid entry.

The pleadings also exhibited other questions as to the nature and validity of the surveys of the land. But as no decision of the court was given upon any of the questions presented by those parts of the proceedings, they are omitted.

The petition of Josiah Parker, the grandfather and devisor of the complainant, in 1783, to the legislature of Virginia for an allowance of land, and the proceedings thereon, were as follows:

To the Honorable the General Assembly:—The request of Josiah Parker humbly representeth, that he was, in October 1775, appointed by the assembly, major of the fifth regiment on continental establishment; that he was, in August 1776, promoted to the rank of lieutenant-colonel, and the April following, had the honor of receiving a full colonel's commission in the same regiment, which he retained until August 1778, when he resigned it to General Washington, on the banks of the North river, after the arrival of Compte D'Estaing, and the French alliance. That previous to all this, he raised the first company of minutemen on the south side of James river, and was on actual duty at the Great Bridge, with his company, until his promotion in the continental line. That since his resignation, he has, on every invasion, been employed against the enemy, and with active and disagreeable commands, with the rank still of colonel in the militia, which he satisfied himself with, though inferior to the rank he held in the army, as he felt the satisfaction of serving his country; and during all this his services in the militia, he never received a shilling of money of any sort from this state or the continent; notwithstanding, by the act of assembly allowing a bounty of lands to the officers and soldiers, he is precluded from any share, because he did not serve three years in the continental line; that, nevertheless he is emboldened to request the assembly will allow him a colonel's allowance of lands, because they have resolved that Generals Stephens and Lawson should receive *theirs; and although each of these are general *682] officers of the militia, yet they were only colonels at the same time

with your petitioner, who remained longer in the continental army than either of them.

In the House of Delegates, Tuesday, the 18th of November 1782: Mr. Mann Page reported from the committee of propositions and grievances, that the committee had, according to order, had under their consideration the petition of Josiah Parker, to them referred, and had agreed upon a report, and come to a resolution thereupon, which he read in his place, and afterwards delivered it at the clerk's table, where the same was again twice read and agreed to by the house, as followeth: It appears to your committee, that in October 1775, the said Josiah Parker was appointed a major of the fifth regiment on continental establishment, in which rank he acted until August 1776, when he was appointed lieutenant-colonel; and in April 1777, he received a full colonel's commission in the same regiment, and acted in that rank until August 1778, when he resigned. It also appears to your committee, that since that resignation of the said Josiah Parker, he hath, upon every invasion of this state by the enemy, been upon duty with the militia, in the rank of colonel, with the command of the whole militia on the south side of James river, after the invasion by General Philips, until the arrival of the Count de Grasse. Resolved, that the petition of the said Josiah Parker, praying that he may be allowed the bounty in lands by law given to a colonel in the continental line, is reasonable.

Land Office, Military Warrant, No. 1920. To the principal surveyor of the lands set apart for the officers and soldiers of the commonwealth of Virginia. This shall be your warrant to survey and lay off, in one or more surveys, for Colonel Josiah Parker, his heirs or assigns, the quantity of 6666⅔ acres of land, due unto the said Josiah Parker, in consideration of his services for three years as a colonel in the Virginia continental line, agreeable to a certificate from the governor and council, received into the land-office. Given under my hand, and seal of the said office, this 21st day of Nov., in the year 1783. JOHN HARVIE, R. L. Office.

*The complainant also exhibited in evidence a patent for 510 acres, issued to him by the United States, as the devisee of Josiah Parker; which patent, bearing date the 1st of February 1827, recited, that in consideration of military services performed by Josiah Parker, for three years, a colonel to the United States in the Virginia line on continental establishment, and in pursuance of an act of congress of the United States, passed on the 10th day of August, in the year 1790, entitled "an act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying north-west of the river Ohio, between the Little Miami and Scioto," and other acts of the said congress, amendatory to the said act, there is granted by the United States unto Josiah C. Parker, devisee of the said Josiah Parker, a certain tract of land, containing 510 acres, situate between the Little Miami and Scioto rivers, north-west of the river Ohio, on the waters of Red Oak and Eagle creeks, branches to the Ohio, being part of a military warrant, No. 1920. [*683

The court of common pleas of Brown county, on the 26th of September 1826, ordered and decreed that the complainant's injunction for the land aforesaid, and the costs of the suit at law, be rendered perpetual; and that said defendant do, by deed duly executed, within thirty days, release to the complainant the land herein before described by metes and bounds; and in

case of failure of said defendant to execute such release, that then and in that event, this decree shall operate as such release; and it is further ordered and decreed by the court, that the defendant pay the complainant his costs by him about his suit in this behalf expended, also his costs about his defence in the action at law expended, within thirty days; and in case of failure, that said complainant have execution for said costs, and the parties are hence dismissed. And thereupon, the defendant, by his counsel, gave notice that he would appeal from the decree aforesaid to the supreme court.

The supreme court of Ohio, at November term 1828, affirmed the decree of the court of common pleas; and the defendant prosecuted a writ of error to this court.

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

*684] *For the *plaintiff*, it was argued, that this case was within the cognisance of the court, under the provisions of the 25th section of the judiciary act of 1789. 7 Wheat. 1. The warrant issued to Josiah Parker, by mistake, and this is a matter to be inquired into by the court. It is shown by the record, that both parties claim under the various acts of congress, relative to the grants of lands to officers and soldiers of the Virginia line. The right of the defendant in the state court of Ohio, under that law, has been denied. Thus, the construction of the act of congress is involved in the case, and the court have full jurisdiction over it. By the facts disclosed in the pleadings and in the exhibits, it is most apparent, that the supreme court of Ohio, in deciding the case, were bound to review the statutes of the United States in reference to the subject, and to give a construction to them. The plaintiff in error contends, that the court gave an erroneous construction to the act. *Hickie* v. *Starke*, 1 Pet. 98; *Harris* v. *Dennie*, 3 Ibid. 292; *Fisher* v. *Cockerel*, 5 Ibid. 248.

As the warrant to Josiah Parker emanated from the state of Virginia, and was issued by an officer of the state, and the United States have assumed the execution of the laws of Virginia under which the same was granted, the courts of Ohio must have had those laws before them and must have construed them.

The law of the United States, of August 10th, 1790, gives land on the Scioto river to satisfy those who are entitled to land by the law of Virginia, under military warrants. The plaintiff in error contends, that the grant to the devisor of the defendant in error was not authorized by the Virginia law. Swann's Laws of Ohio 70, 127. It is denied, that the title of the defendant in error is protected under the act of congress. In September 1783, congress passed the act proposing the cession of the lands north and west of the Ohio river to the United States; and in October 1783, the legislature of Virginia acceded to the terms offered by that act. In May 1779, the state of Virginia passed the first law relative to the grants of lands for military services. No quantity was designated by that act. In October 1779, a law was passed regulating the quantity each officer should have.

*685] Swann's *Laws 11. These were the only laws on the subject in force at the time of the cession; and under these laws, no one was entitled to a warrant who had not served on the continental establishment three years, or until the end of the war; or who was the legal representative of

one who was killed in battle or had died in the service. Under the act of congress of 1800, state-line officers were not entitled to land. And that act expired in three years. If the defendant could avail himself of the provisions of that act, he was bound to show a compliance with its provisions within the three years. The act of 1807 provides for another class of officers.

After the cession made by Virginia to the United States, she might provide as she thought proper for her meritorious officers; but that provision could not be made out of the land ceded, unless the officer had served three years. And the issuing of a patent under the act of 1800 is prohibited, under the act of 1807, unless the person applying for it was entitled to a warrant under the laws of Virginia, prior to the cession. The warrant to Josiah Parker was issued under a special resolution of the Virginia legislature, was for services of less than three years on the continental establishment, and was authorized, in November 1783, after the cession to the United States.

Corwin, contrà, argued: 1. That this court had no jurisdiction of the case on the pleadings and evidence. 2. That the warrant of Josiah Parker was good and valid, it having issued prior to the transfer of the soil by Virginia to the United States. 3. The warrant of Parker being in usual form, expressing upon its face legal consideration, and having been issued upon the order and judgment of the proper tribunal authorized to hear and determine such cases, and no appeal or writ of error being allowed from such decision; it cannot be questioned in a collateral way, but must be taken as conclusive evidence of the right of Parker to the warrant. Ohio Land Laws, 129, 132, 134, 135; Hughes 46; 2 Bibb 134; 1 A. K. Marsh. 149.

He denied, that the construction of an act of congress was *drawn into question in this case before the courts of Ohio, in deciding on the [*686 rights of the parties. The warrant of the 21st of November 1783, was before the courts of Ohio; and it was not necessary for those courts to look beyond the Virginia laws, to decide upon the rights of the complainant there. But if the warrant to Josiah Parker was a resolution warrant, it was good under the act of congress. The cession by Viginia was made in March 1784, and the warrant was issued on the 21st of November 1783. The act of congress of 1807 covers all land engaged by the state of Virginia prior to the cession, not prior to the preparatory legislation in reference to the cession. All existing rights to lands under the legislature of Virginia were to be satisfied out of the reserved lands. This is clearly one of the cases included under the act of 1807. That act relates in terms to resolution warrants, and does not relate to warrants under the Virginia law of 1779. A resolution is a law, within the meaning of this act. No officer entitled to a warrant under the Virginia law of 1779 took a resolution warrant; and the necessity for a warrant arose from the fact that the officer in this case was not entitled to the act of 1807. Act of Congress of 1803. (2 U. S. Stat. 225.)

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a decree pronounced by the supreme court of the state of Ohio, sitting in and for the county of Brown, in a case in which the defendant in error was plaintiff. The case must, therefore, be brought within the 25th

section of the judiciary act, or this court cannot take jurisdiction of it. The plaintiff in error alleges, that the construction of an act of congress was drawn in question on the trial, and that the decision was against the title set up under the act; and also, that the construction of a state law was drawn in question, as being contrary to an act of congress, and the decision was in favor of the party claiming under the state law.

Josiah Parker obtained a land-warrant from the land-office of Virginia, for his services in the Virginia line on continental *establishment. *687] The defendant in error having located the warrant on lands in the military reserve, and received a patent therefor, instituted a suit in chancery against the plaintiff in error, who held the same land under a prior grant, and obtained a decree for a conveyance. This court cannot examine the general merits of the decree. Our inquiries are in this case limited to the question, whether the record shows that an act of congress has been misconstrued, to the injury of the plaintiff in error, or the title of the defendant in error has been sustained by a law of a state which is repugnant to a law of the United States. Both questions depend on the construction of the act by which Virginia ceded the territory she claimed north-west of the river Ohio to the United States, of the resolution accepting the deed of cession, and of the acts of congress prolonging the time for completing titles to lands, within the Virginia military reservation.

The deed of cession was executed by the members of congress, then representing the state of Virginia, on the 1st of March 1784; in virtue of a power conferred on them by the act of cession, which act it recites. One of the conditions on which the cession is made, is (1 Laws U. S. p. 474), "that in case the quantity of good lands on the south-east side of the Ohio," "which have been reserved by law, for the Virginia troops on continental establishment, should" "prove insufficient for their legal bounties, the deficiency should be made up to the said troops, in good lands to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia." The deed was accepted by congress according to its terms. The act of cession to which the deed refers was passed on the 20th of December 1783.

In his answer to an amended bill, filed by the plaintiff in the state court, the defendant says, "that if the complainant's entry does contain that certainty and precision which the law requires, in order to constitute a valid entry, yet the complainant has no equitable claim to the land in question, because, first, said entry is based upon a resolution warrant, which is not protected by any act of congress; and cannot, therefore, be a foundation on which to base a valid entry." *The warrant to *688] which the answer refers is in the usual form, and does not purport to have been issued in virtue of a resolution. But the warrant did, in fact, issue on a resolution, which appears in the proceedings in the cause. It appears, that Colonel Josiah Parker presented a petition to the general assembly of Virginia, in which he stated himself to have served two years and ten months in the Virginia line on continental establishment, after which he resigned his commission as a colonel in the army. That since his resignation, he had been called into service as colonel, commanding a corps of militia, during every invasion of the state. He prays that the assembly will

grant him a colonel's allowance of lands. This petition was referred to a committee, whose report stated the facts, and concluded with the following resolution. "Resolved, that the petition of the said Josiah Parker, praying that he may be allowed the bounty in lands, by law given to a colonel in the continental line, is reasonable. This resolution was approved by the senate, and was passed the 20th of November 1783. In March 1807, congress passed an act, extending the time for locating Virginia military land-warrants, which enacts—"that the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands within the tract reserved by Virginia, between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed a further time," &c. This act was continued by subsequent acts, so as to be in force when the survey was made under which the complainant in the state court obtained his decree. Does the act cover his case? We think, it extends to every case which comes within the reservation made by Virginia in her act of cession. The deficiency of good lands on the south-east of the river Ohio, having been admitted by congress, the inquiry is, whether the warrant granted to Josiah Parker is among those for which the reserve on the north-western side of that river was made?

The resolution grants the land to Josiah Parker, as a colonel in the continental line. At the time it was passed, Virginia possessed the territory in which it was located, in *absolute sovereignty. The deed of cession had not been executed, nor had the act been passed by which [*689 that deed was authorized. Congress, by accepting the cession, admitted the right to make it, and that right has never since been drawn into question. The resolution then gave to Josiah Parker all the right it purported to give. What was that? "The bounty in lands by law given to a colonel in the continental line." By this resolution, Josiah Parker was placed by the state of Virginia on precisely the same footing with a colonel who claimed under the act which had previously been passed. Had the cession never been made, no distinction could have been taken between them. The officer by whom the warrant was issued perceived no distinction, and the warrant is expressed to be "for his services for three years as a colonel in the Virginia continental line." To discover what services the legislature received as an equivalent for two months of this time, services performed at the head of corps of militia, we must look at the petition and the report of the committee. But the legislature, at that time, possessed the same power to bestow their bounty on an officer who had performed the services stated in Colonel Parker's petition, and in the report of the committee, as on one who had completed his three years in the continental line. They possessed the same power to bestow that bounty on an individual, in the form of a resolution, as on their officers generally, in the form of an act. The one conferred the same rights as the other, and was equally obligatory on the state. Had the lands been retained by Virginia, no distinction could have been made between these claims, and it is impossible to perceive any reason, why she should have distinguished between them, in the reservation contained in her act of cession. Do the words of the act set up this distinction? They are, "that in case the quantity of good land on the south-east side of the Ohio, which have been allowed by law for the Vir-

ginia troops upon continental establishment, should," "prove insufficient for their legal bounties, the deficiency should be made up," &c.

It cannot be doubted, that Colonel Parker's warrant might have been located on the land "reserved by law on the *south-east side of the *690] Ohio, for the Virginia troops upon continental establishment." This reservation is made in general terms. It is not connected with the allotment of specific quantities for specific services. Provisions were afterwards made for this subject, and those provisions varied at different times. At one time, service was required during the war; by another act, three years' service entitled the officer to his bounty, and an increased bounty was allowed for those who had served six years and upwards. Officers who resigned after serving three years, were entitled to the bounty, by an act which was passed so late as the year 1782. Particular resolutions were passed afterwards, in favor of officers who were deemed by the legislature to have performed services as meritorious as if they had remained in the regular army for three years. All these warrants were equally entitled to be satisfied out of the land "reserved by law on the south-east side of the Ohio for the Virginia troops on continental establishment." They were equally "legal bounties," equally bounties "which had been engaged to them by the laws of Virginia," before her cession of the territory north-west of the Ohio; for a resolution receiving the assent of both houses is a law as operative as an act of assembly.

If, then, under the laws of Ohio, we may consider the petition of Colonel Parker and the report of the committee as part of the record in this cause, the court of Ohio does not appear to us to have misconstrued the act of cession of any act of congress. The decree of the supreme court of the state of Ohio, sitting in and for the county of Brown, is affirmed, with costs.

This cause came on to be heard, on the transcript of the record, from the supreme court of the state of Ohio, sitting in and for the county of Brown, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the judgment and decree of the said supreme court in this cause be and the same is hereby affirmed, with costs.

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*691] *United States, Appellants, *v.* Don Fernando de la Maza Arredondo and others, Appellees.

Florida land-law.

The grant of the king of Spain to F. M. Arredondo & Son, for land at Alachua, in Florida, gave a valid title to these claimants, under the grant, according to the stipulations of the treaty between the United States and Spain, of 1819, the laws of nations, of the United States, and of Spain.

Construction of the treaty with Spain of 1819, relative to grants of lands in the territory of Florida; and of the several acts of congress, passed for the adjustment of private claims to land within that territory.[1]

Appeal from the Superior Court of the Eastern District of Florida. On the 11th day of November 1828, Fernando de la Maza Arredondo & Son,

[1] See note to 3 U. S. Stat. 709, for a history of the Florida land-claims.

and others, their grantees, filed their petition in the superior court of the eastern district of Florida, against the United States, under the provision of the sixth section of an act of congress passed May 23d, 1828, entitled, "an act supplementary to the several acts providing for the settlement and confirmation of private land-claims in Florida."

The petition stated, that the petitioners claimed title to an undivided parcel of land, containing 289,645 acres, situated in the county of Alachua, in the eastern district of Florida, about 36 miles west of the river St. Johns, and about 52 miles west of the city of St. Augustine; which land extends four leagues to the east point of the compass, in a rectilinear figure, taking as the centre thereof, a place called Alachua, formerly inhabited by a tribe of Seminole Indians, but subsequently abandoned by them; that the said tract of land was granted by the Spanish government, with all the formalities and solemnities used by it in such cases, to the petitioners, on the 22d day of December 1817, the said grant having been executed at Havana, in the island of Cuba, by Don Alexander Ramirez, intendant of the army, superintendent-general, and sub-delegate of the royal exchequer of the island of Cuba, and the two Floridas, &c., by and with the advice and approbation of the surveyor-general of the two Floridas, and of the minister fiscal, the King of Spain's attorney-general. A *translation of the grant and other proceedings was annexed to the petition as follows: [*692

Don Alexander Ramirez, intendant of the army, and sub-delegate superintendent-general of the royal domain of the island of Cuba and the two Floridas, president of the tribunal of accounts and of the board of tithes, superintendent of the department of the crusades, judge particular of vessels putting in port by stress of weather, and protector of the royal lottery, superior chief and inspector of the royal factory of segars, &c.

Whereas, Don Fernando de la Maza Arredondo & Son, merchants of this city, have presented a memorial to this intendancy general and sub-delegate, of the 12th of November last, in which they pretend to obtain, as a gratuitous grant, a lot of land in East Florida, where they have been established, and where still remains the greater part of their family, and a great deal of their property, offering to form an establisment in the territory known under the name of Alachua, as it is adapted to the growing of cattle and the culture of provisions; said establishment to be composed of two hundred families, which they are to convey, at their own costs, proposing other advantages which will result, not only in favor of the other inhabitants already established, and residents of the city of St. Augustine, but also in favor of the Creek and Seminole Indians living on the borders of that country, provided they obtain in absolute property the said grant, limited to four leagues of land to every point of the compass, fixing as the central point thereof the indicated tract of Alachua. And the said memorial having passed by my decree of the 12th instant, to the captain of infantry, Don Vincente Sebastian Pintado, surveyor-general of the two Floridas, for his information, which he gave on the 15th of the same month, with all the necessary information and solid reasons which demonstrate and make known the convenience and utility of providing fer the increase of population in said province, without expense to the royal treasury, and of accepting the offers of the interested parties, on account of the importance of the undertaking, and

of the considerable disbursements which they will have to make to carry the same into effect. In consequence thereof, by a decree of the same day, the *693] subject was communicated to *the auditor fiscal of the royal domain, who, in his representations of the 17th, founded on the sovereign disposition concerning the increase of population in those possessions of his majesty, supported the pretensions of Maza Arredondo & Son, gave his consent, in order that the land which they solicit be granted to them in the terms they propose. Wherefore, on the day of yesterday, I provided the act which follows: Seen. In virtue of the royal order of the 3d of September, in this year, by which, in appointing me superintendent of the two Floridas, his majesty commands me, in express terms, to provide for the increase of population in those provinces, by every means which my prudence and zeal may dictate, with the concurrence of his lordship the fiscal, and with the report of the surveyor-general of the said province, the tract called Alachua, in East Florida, is declared to belong to the royal domain. In consequence whereof, and in attention of the notorious integrity and fidelity, to the known capital and other good qualities of Don Fernando de la Maza Arredondo & Son, I grant to them the part which they solicit of the said tract belonging to the royal domain, in conformity to the sovereign dispositions on this matter, and with the precise condition to which they obligate themselves to establish thereon two hundred families, which ought to be Spanish, with all the requisites which are provided for, and others which will be provided by this superintendency, in virtue of the said royal order; the said establishment to begin to be carried into effect in the term of three years, at farthest, without which this grant will be null and void; said grant is also understood to be made without prejudice to a third party, and especially to the Indians, natives of that land, who may have returned, or may intend to return, to make there their plantations. Let this *expediente* pass to the surveyor-general above mentioned, in order that he may make the corresponding plat, in conformity to his information, and the granted extent of four leagues to every wind, in a rectilineal figure, with possible perspicuity, to avoid future doubts and litigations; which being done, let the title in form be executed, with the same plat annexed thereto, a copy of which will remain in the *expediente*, with the provision that the said three years allowed to commence the establishment of families are to run and be counted from *694] *this date; and that, on the first families being prepared and disposed, the grantees will give notice of it, together with a list of the individuals, and mention made of the places of which they are natives, of their occupation, in order that the orders and instructions which the government and the superintendency of the royal domain in East Florida may see fit to give, be issued, and in order that an account of the whole be given in proper time to his majesty.

The figurative plan formed by the surveyor-general aforesaid being presented, with the explanation which, in continuation, he gave of the survey and demarcation, it results, that the tract of land is situated in East Florida, 52 miles, more or less, distant west from the city of St. Augustine, and about 36 miles west of the western margin of the river St. Johns; bounded on every side by vacant lands, the place known by the name of Alachua being towards the centre, which place was formerly inhabited by a tribe of the Seminole nation, which abandoned it; and according to the dimensions and

form which were given to the tract in said plat, and the report annexed to it, it is specified, that, as the leagues used in that province are equal to three English miles containing each 1760 yards or 80 chains of Gunter, the space granted contains 289,645 English acres, and five-sevenths of an acre, equal to 342,250 arpents, and one seventh of an arpent, a measure used in West Florida, and counting for an English acre 160 perches and 16½ feet, London measure, to a lineal perch, as used in the time of the British dominion, and tolerated since by our government. Wherefore, in the exercise of the faculties which have been conferred upon me by the king, our lord, whom may God preserve! and in his royal name, I do grant, gratuitously, to the said Don Fernando de la Maza Arredondo & Son, the number of acres of land as above stated, under the limits, courses and distances pointed out in the figurative plat, a copy of which will be annexed to this title, in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof, and in the terms exposed in my decree inserted in it.

*In testimony whereof, I have ordered the execution of this title, signed before me, and sealed with the royal seal used in my office, [*695 and countersigned by the commissary of war, Don Pedro Carambot, his majesty's secretary of this intendancy and of the sub-delegate superintendency general. Given in the Havana, on the 22d of December 1817.

[L. S.] ALEXANDRO RAMIREZ.

PETER CARAMBOT.

An account of the preceding title has been taken and registered in the book prepared for that purpose in the secretary's office under my charge. Havana, date as above. CARAMBOT.

This grant was alleged to have been authorized by a royal order of the King of Spain, and other proceedings, of which the following translation was annexed to the petition.

Don Juan Nepomuceno de Arrocha, honorary comptroller of the army, and secretary of the intendancy of the public finance of this island, and that of Puerto Rico.

I do hereby certify, that, in compliance with the decree of the 7th of this month, of the superintendant Don Francisco Javier Ambari, made at the petition of Don Fernando de la Maza Arredondo, of the 4th instant, and filed in the secretary's office under my charge, exists the royal order of the following tenor: His Majesty, understanding by the letters of your lordship of the 14th and 18th of August, and 21st of October, of the year last past, No. 18, 28 and 107, of the resolution concluded with the captain-general of that island, to regulate all that appertains to the branch of the royal finance, and to attend to the protection and advancement of the two Floridas; and having conformed himself, with the advice given by the supreme council of the Indies, in their deliberations held on the 11th of August last, his majesty has been pleased to approve, for the present, all which has been done with respect to the regulations of said branch, as also the supplies administered by the board of royal finance for the payment of the regiment of Louisiana, and other indispensable expenditures for the fortifications and defence of the cities of St. Augustine and Pensacola,

authorizing your lordship, in case of necessity, to aid or *supply them. His majesty, likewise, has determined, for the present, the superintendency of the two Floridas in favor of your lordship, as superintendent of the island of Cuba: and lastly, his majesty has been pleased to command to inform your lordship, as I now do, that you facilitate the increase of the population of those provinces, by all means which your prudence and zeal can dictate, informing, as soon as possible, the motives for the absence of Don Juan Miguel de Losadas and Don Manuel Gonzalez Almirez, from their offices. All which I communicate to your lordship by royal order, and for your intelligence and compliance thereof. God preserve your lordship many years! Madrid, 3d September 1817. GARAY.

To the Intendant of Havana.

Havana, 10th October 1823.

JUAN NEPOMUCENO DE ARROCHA.

From Senor Don Jose Fuertes, intendant *pro tem.*, advising his having delivered the command to Senor Don Alex'o Ramirez, chosen by his majesty.

Habano, 3d July 1816.

The king, our master, having been pleased to confer on Senor Don Alexander Ramirez, by a royal commission of the 5th of October of the year last past, the posts of intendant of the army, superintendent general sub-delegate of the royal domain, which I have provisionally exercised by royal order, he has this day taken possession of them, and I advise your excellency of it, for your information, and due effects to the service of his majesty. May God preserve your excellency many years!

JOSE DE FUERTES.

His Excellency, sub-delegate of the royal domain, St. Augustine, Florida.

The petition proceeded to state, that as an inducement to the Spanish government to make the said grant to F. M. Arredondo & Son, they had offered and stipulated to establish on the same two hundred families, in the event of the said land being granted to them in full dominion and absolute property; which offer was accepted by the Spanish government, it requiring
*697] that the families should be Spanish. The grant *was made in absolute property, subject only to the condition, that the grantees should begin their establishment in three years from the date of the grant. That though the settlement of the lands was begun in the months of September or November 1820, yet F. M. Arredondo, who was at Havana, ignorant of the fact, and knowing that previous to that time the settlement had been prevented by the disturbed state of East Florida, obtaining from Don Ramirez a prolongation of the time of settlement for one year, by a decree dated 2d December 1820. The petition averred a performance of the conditions of the grant, and that certain Spanish families and subjects were settled on the lands, before and after the prolongation of the time for the same, and of the time allowed by the eight article of the treaty between Spain and the United States, of the 22d February 1819, and that the settlements continued, there being on the lands a number of Spanish families and citizens of the United States, cultivating and improving the same.

The petition averred, that from the situation of that part of Florida in which the lands are situated, from the beginning of 1818, until July 1821,

they were entitled to that part of the provision of the eighth article of the treaty, which grants and secures to the owners of lands in the territories an extension of time for the performance of grants. During a considerable period of time after the grant, the war between the United States and the Indians prevented the full accomplishment of the purposes of the petitionors for the settlement of the land; and the danger from the Indians, which would attend any settlement of land at Alachua, continued, until the government of the United States took efficient means to protect the country, by posting troops in the same. The petitioners claimed, that by this state of things, and from these causes, they were exempt from the full performance of the condition of the grant, as to the settlement of the land. The petition proceeded to state, that the cession of East Florida to the United States had rendered it wholly impracticable for the grantees to introduce and settle two hundred Spanish families on the land, the emigration of the same being prohibited by the laws of Spain. And the petitioners insisted, that the original grantees had thus been prevented from performing the conditions of the grant; that the original grantees *and [*698
their assigns were thereby discharged of all obligation to settle families on the lands included in the grant; and that the United States had failed to ratify the grant, as they were bound to do under the treaty with Spain, in consequence of which the grantees could not proceed safely to settle and improve the land.

The petition alleged, that the claims of the petitioners had been submitted to the examination of the board of commissioners, under the act of congress of 3d March 1828, entitled, "an act amending and supplementary to the act for ascertaining claims and titles to lands in the territory of Florida, and to provide for the survey and disposal of the public lands in Florida;" and the proceedings of the board of commissioners on the same, were annexed to the petition; that the lands claimed by the petition were within the territory of Florida ceded to the United States by the treaty with Spain of 22d February 1819; that these claims had not been decided and finally settled, under the provisions of the act of congress of 23d May 1828, entitled "an act supplementary to the several acts providing for the settlement and confirmation of private land-claims in Florida;" that the respective claims of the petitioners contained a greater quantity of land than the commissioners were, by the acts of congress, authorized to confirm; and that the said claims of the petitioners for the said lands, had not been reported by the commissioners appointed under any of the aforesaid acts, or any other, or by the register and receiver, acting as such, under the several acts of the congress of the United States in that case made and provided, as ante-dated or forged. The petition prayed that the title of the petitioners to the land claimed by them might be inquired into by the court, according to the provisions of the act of congress, &c.

To this petition, an answer and supplemental answer were filed by the attorney of the United States for the district of East Florida, at May term 1829, and subsequently.

The answer required that the petitioners should make due proof that the tract of land claimed by the petitioners was granted by the Spanish government to Fernando de la Maza Arredondo & Son, with all the formalities

and solemnities used in such cases; and that the petitioners held by regular and legal conveyances under the said grant; and that the court *would require of the said petitioners due proof, according to law and the usages of courts of equity, of the making and execution of the said grant, deeds and conveyances, and of the matters and things therein contained, and in the said bill thereof alleged and set forth.

*699]

The answer averred, that if the grant was executed, as alleged in the petition, that then Don Alexander Ramirez, the intendant, &c., exceeded the powers conferred on him by the crown of Spain; and that no power had been conferred upon the intendant to make grants of land in Florida, of the magnitude and description of the one claimed and described in the petition; and if such grant was made by the intendant, it was made contrary to, and in violation of, the laws, ordinances and royal regulations of the government of Spain, providing for the granting of land in its provinces, and was never approved by the king of Spain; without whose approval, it was wholly null and void. And that if it was so made by the Spanish government to the said Fernando de la Maza Arredondo & Son, at the time and in manner and form as the petitioners had alleged, it was made upon the precise obligation, and express condition of their binding themselves to establish there, to wit, on the said tract of land, two hundred Spanish families, with all the requisites which were pointed out to them, and the others which were to be pointed out to them, by the superintendency, &c., to wit, on their beginning their establishment on the said tract of land, within three years, at most, from the date of said grant, without which the said grant was to be considered null and void; which condition the said Fernando de la Maza Arredondo & Son accepted, and engaged to perform. That the said Fernando de la Maza Arredondo & Son did not commence their said establishment on the said tract of land, within the said three years; and they had not established on the land two hundred Spanish families, according to their engagement, but had wholly failed so to do; and further, that the said condition and obligation had not been complied with and fulfilled, either by the said Fernando de la Maza Arredondo & Son, or by any other person or persons in their behalf, nor by the said petitioners; so far from it, that the said Fernando de la Maza Arredondo & Son, after the time when the said grant was supposed to have been *made as aforesaid, and without having in any manner complied with the condition thereof, removed their family from the province of East Florida to the island of Cuba, then and still one of the dependencies of the crown of Spain; to wit, after the cession and transfer of the said province to the said United States, and did then totally abandon the said tract of land. And that if the said grant was made as was alleged, and upon the condition mentioned, the performance of the said condition was a matter of special trust and confidence reposed by the said Spanish government in the said Fernando de la Maza Arredondo & Son, which could not have been delegated by them to any other person or persons; and that the sale and conveyance of said tract of land, or of parts thereof, to the said petitioners, by the said Fernando de la Maza Arredondo & Son, in manner and form as is in said bill alleged, without having first performed the said condition, was a violation of the special trust and confidence so reposed in them as aforesaid, and rendered the said grant (if

*700]

any such was ever made), by the laws then in force in East Florida, entirely null and void.

The answer denied, that Fernando de la Maza Arredondo & Son were prevented from a compliance with, and performance of, the condition of the supposed grant, by any such causes as are in the bill of complaint, by the said petitioners, alleged and set forth, or that such difficulties at any time existed in relation to the making of the settlement, was as charged in the petition; and averred, that it would have been perfectly practicable, with due and reasonable exertion, to have proceeded with the establishment and location of the two hundred families on the said tract of land, at any time after the period when the grant is alleged to have been made; and that no circumstances had at any time since that period existed, which could have entitled Fernando de la Maza Arredondo & Son, or the petitioners, to the benefit of the eighth article of the treaty in the bill of complaint mentioned; and that, if any of the parties ever were thus entitled, they each and all of them wholly failed to comply with said condition, during the extension of time given by said treaty: and further, that, if any such grant of further time was given by the intendant, &c., to the said Fernando de la Maza Arredondo & Son, for the performance *of the said obligation, as was [*701
mentioned in the said petition, such grant was rendered null and void, by the latter clause of the said eighth article of the afore-mentioned treaty; and that if it had not been thus rendered null and void, the said Fernando de la Maza Arredondo & Son, and all persons claiming any interest in the said lands through them, entirely failed to avail themselves of the benefit intended to have been conferred thereby. The answer denied, that the said petitioners were, by the circumstances by them thereunto alleged, stated and set forth, or by any other circumstances whatever, absolved from the performance and fulfilment of the said condition and obligation; or that they, or either of them, were entitled to hold the said tract of land, or any part thereof, discharged from the said condition or obligation; and further averred, that, if the said grant was made to Fernando de la Maza Arredondo & Son, in manner and form as was stated in the petition (which was not admitted), it was expressly made, and understood to be, without prejudice to a third person, and especially, without prejudice to the native Indians of that soil, who might then have returned, or who might wish to return, to establish themselves there again; and that after the time when the grant was alleged to have been made as aforesaid, such of the native Indians of that soil as were then absent, or some of them, did return, and, together with others of them, who were already there, wished to and did establish themselves upon the said tract of land.

And the answer averred, that the right and title to the said tract of land was, previous to, and at the time when the grant was alleged by the petitioners to have been made, vested in the Florida tribes of Indians, who previously had, and then did claim title thereto, and occupy the same in their customary manner, as their circumstances required; and that the native Indians formed a part of the Florida tribes; and further, that the claim, title and occupancy of the aforesaid Indians constituted the only real obstacle (if any existed) to the location and settlement of the two hundred Spanish families on the said tract of land; and that the claim, title and occupancy of the Indians was a matter of public notoriety, and could not

have been unknown to Fernando de la Maza Arredondo & Son, at the time
*702] when the grant was alleged to *have been made as aforesaid. And the answer further said, that the said claim and title of the said Indians to the said tract of land was not extinguished, until the 18th day of September, in the year of our Lord 1823. The answer submitted, that by the laws, ordinances and royal regulations of the government of Spain, which were in force in the province of East Florida, at the time when the said grant was alleged to have been made, it was provided, that the distribution of lands should be made with equity, and without any distinction or preference of persons, or injury to the Indians; and that it was therein and thereby especially provided and commanded, that the lands which might be granted to Spanish subjects should be without prejudice to the Indians, and that those granted to the injury of the Indians should be restored to their rightful owners. The answer further averred, that Fernando de la Maza Arredondo & Son were, at the time when the grant was alleged to have been made as aforesaid, and still were, Spaniards, and subjects of the government of Spain, and that the grant of the tract of land (if any such was ever made, as was in said petition stated) to Fernando de la Maza Arredondo & Son, was made to the prejudice and injury of the Florida tribes of Indians.

The answer proceeded to state, that the United States claimed title to the said tract of land, by virtue of the second article of the treaty "of amity, settlement and limits, between the United States and his Catholic Majesty, which was made, concluded and signed between their plenipotentiaries, at the city of Washington, on the 22d day of February, in the year of our Lord 1819, and which was accepted, ratified and confirmed by the President of the same United States, by and with the advice and consent of the senate thereof, on the 22d day of February, in the year of our Lord 1821, by which his Catholic Majesty ceded to the said United States, in full property and sovereignty, all the territories which then belonged to him, situated to the eastward of the Mississippi, known by the name of East and West Florida, in which East Florida the said tract of land was situate; and also, by virtue of the treaty first above mentioned, which was accepted, ratified and confirmed by the President aforesaid, by and with the
*703] *advice and consent of the senate aforesaid, on the 2d day of January, in the year of our Lord 1824.

The supplemental answer averred, that if any such grant of further time was given by Don Alexander Ramirez, intendant, &c., as aforesaid, to Fernando de la Maza Arredondo & Son, to perform the conditions of the said supposed grant, the grant of further time was equivalent to a new grant for the said lands, and that it was made contrary to, and in violation of, the laws, ordinances and royal regulations, and without any power or authority on the part of the said Don Alexander Ramirez, intendant, &c., as aforesaid, to make it; and that, if the said Don Alexander Ramirez, intendant, &c., as aforesaid, had been invested by the said Spanish government with competent power and authority to make grants of land in Florida, of the magnitude and description of the one claimed and described by the petitioners aforesaid, in their said petition or bill of complaint, the said grant of further time aforesaid was made since the 24th day of January 1818, as appears by the showing of the petitioners themselves, and was rendered

wholly null and void, by the provisions of the latter clause of the eighth article of the treaty. And that, if any such grant of the said lands was made as aforesaid, the said Fernando de la Maza Arredondo & Son wrongfully represented to the said Alexander Ramirez, intendant, &c., as aforesaid, in order to obtain it, that the said lands had been abandoned by the said Indians, and were vacant. And that it was in consequence of the said false, fraudulent and wrongful representations of the said Fernando de la Maza Arredondo & Son, that he, the said Don Alexander Ramirez, intendant, &c., as aforesaid, declared the said lands to be crown lands, and granted them to the said Fernando de la Maza Arredondo & Son; whereas, in truth and in fact, the said lands were not vacant, nor abandoned by the said Indians, but that, on the contrary, the said Indians had constantly been, and still were, possessed of the said lands, at the date of the said supposed grant, and that they had continually occupied the same, and had never left the said lands, unless they were driven off by a superior and lawless force, and then only temporarily: and therefore, if the said grant was made, as was alleged in the said *petition or bill of complaint, and the said Don Alexander Ramirez, intendant, &c., as aforesaid, had been and was invested, by [*704 the Spanish government aforesaid, with competent power and authority to make the same, it was fraudulently and surreptitiously obtained, by imposing on the said Don Alexander Ramirez, intendant, &c., as aforesaid, a false representation of facts; and as it might have been cancelled by the King of Spain, on that ground, so it might now be cancelled by the sovereign authority of the United States; and that a court of equity could not, consistently with the principles which govern that tribunal, lend its aid to give effect to a grant obtained by fraud and misrepresentation. And the answer prayed, that the petitioners might be required to show and prove, on the hearing of the cause, the specific power and authority which had been conferred (if any such power had been conferred) by the Spanish government upon the said Don Alexander Ramirez, intendant, &c., as aforesaid, at the time when the said supposed grant was alleged to have been made as aforesaid, to make grants of land in East Florida, and particularly, that they might be required to show and prove the specific power under which he claimed to act in making the said supposed grant of lands, and also the said grant of further time for the performance of the aforesaid conditions; if, indeed, any such grants were ever made by him, which was not admitted.

To the answer and the supplemental answer of the United States, the petitioners put in a general replication; and the case was regularly proceeded in to a hearing. On the 1st of November 1830, a decree was given in favor of the petitioners; from which decree, the United States appealed to this court.

The evidence adduced in the court below, on the part of the petitioners, consisted of the proceedings and the testimony given before the commissioners of the United States, upon the claim presented for their consideration, according to the provisions of the act of congress; and of additional documentary and oral evidence. Testimony was also given on the part of the United States, to sustain the allegations in the answer, and applicable to the several matters therein contained. The particulars of the matters so exhibited in evidence are not inserted in the report; as the opinion of

the court, and the *dissenting opinion of Mr. Justice THOMPSON, fully state the facts of the case, which were considered as established by this evidence.

The case was argued by *Call* and *Wirt*, with whom also was *Taney*, attorney-general, for the United States; and by *White* and *Berrien*, with whom also was *Webster*, for the appellees.

The counsel for the *United States* contended, that the decree of the superior court of the eastern district of Florida should be reversed, and the petition dismissed, on the following grounds: 1. The petitioner has not shown, what he was bound to show affirmatively, the authority of Alexander Ramirez to make the grant which the decree of the court has confirmed. 2. The intendant of the island of Cuba was not authorized to make the grant in question; and it was made in violation of the laws and ordinances and royal regulations of the government of Spain. 3. The land in controversy was, at the time of the grant, within the Indian boundary established by the government of Great Britain, during its occupancy of the Floridas, and subsequently acknowledged by the government of Spain; and was, therefore, not subject to be disposed of by the subordinate offices of the crown. 4. Conceding, for the sake of argument, that the intendant had the power to make the grant, the sovereign power alone could dispense with the conditions annexed to it; and no such power has been delegated to the judiciary. 5. The grantees failed to perform that condition of the grant which required them to commence the establishment of the two hundred Spanish families on the land, within three years from the date of the grant. 6. The grantees have not complied with the conditions of the grant, which required them to settle two hundred Spanish families on the land. 7. The prolongation of time for the performance of the conditions of the grant, was given by the said intendant, after the ratification of the treaty, by the king of Spain, which ceded Florida to the United States; and is, consequently, void, for the want of authority. *8. The treaty and laws
*706] referred to in the decree, as the grounds of confirmation of the grant, do not justify it.

For the *appellees*, the following points were insisted upon: 1. By the terms of the treaty, all grants made by his Catholic Majesty, or his lawful authorities, are to remain valid. The only questions for the consideration of this court, are: 1st. The genuineness of the grant. 2d. The lawfulness of the authority by which it was issued. 2. The decree, on which this grant is founded, is a judicial act, which cannot be drawn into question in the tribunals of the United States. 3. A genuine grant, issued by a lawful authority of his Catholic Majesty, can only be impeached, on the ground of fraud in obtaining it. 4. This grant was within the scope of the powers expressly given to the Spanish officer making it, by the laws of the Indies. 5. It was specifically authorized by the royal order of the 3d Sept. 1817. 6. There was no existing Indian title to these lands, at the date of the grant which could have rendered it invalid. 7. The condition annexed to the grant has been performed. 8. It has been discharged by the act of the party imposing it.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the judge of the superior court for the eastern district of the territory of Florida.

After the acquisition of Florida by the United States, in virtue of the treaty with Spain, of the 22d of February 1819, various acts of congress were passed for the adjustment of private claims to land within the ceded territory. The tribunals appointed to decide on them, were not authorized to settle any which exceeded a league square; on those exceeding that quantity, they were directed to report especially their opinion for the future action of congress. The lands embraced in the larger claims were defined by surveys and plats returned; they were reserved from sale, and remained unsettled, until some resolution should be adopted for a final adjudication on their validity, which was done by the passage of the law of *the [*707
23d May 1828. (4 U. S. Stat. 284.) By the 6th section, it was provided, "that all claims to land, within the territory of Florida, embraced by the treaty, which shall not be finally decided and settled, under the previous provisions of the same law, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by the act, and which have not been reported as ante-dated or forged, shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the district judge and claimants, in Missouri, by the act of the 26th May 1824." By a proviso, all claims annulled by the treaty, and all claims not presented to the commissioners, &c., according to the acts of congress, were excluded.(a) *The seventh section provided for an [*708
appeal by the claimants, and the ninth, by the United States, to this court. The adjudication of the judge of the superior court having been rendered against the United States, the case comes before us by an appeal by them.

The law of 1824, which is thus referred to, and forms a part of that of 1828, furnishes the rules by which this court must be guided, in assuming and exercising jurisdiction to hear and determine the claim in controversy. This law was passed to enable claimants to lands within the limits of Missouri

(a) "§ 6. And be it further enacted, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States, of the 22d of February 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as ante-dated or forged, by said commissioners, or register and receiver acting as such, shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the district judge and claimants, in the state of Missouri, by act of congress, approved May 26th, 1824, entitled, 'an act enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims:' Provided, that nothing in this section shall be construed to authorize said judges to take cognisance of any claim, annulled by the said treaty, or the decree ratifying the same by the king of Spain; nor any claim not presented to the commissioners, or register and receiver, in conformity to the several acts of congress providing for the settlement of private land-claims in Florida."

and Arkansas, to institute proceedings to try the validity of their claims to land, prior to the consummation of the cession of the territory acquired by the United States by the Louisiana treaty; and enacted, that any person, or their legal representative, claiming lands by virtue of any French or Spanish grant, concession, warrant or order of survey, legally made, granted or issued, before the date of the 10th of March 1804, by the proper authorities, to any persons resident in the province, at the date thereof, which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty been transferred to the United States, may present his petition to the district court, setting forth the nature of his claim, the date of the grant, and quantity and boundary, by whom issued, and whether the claim had been submitted to any tribunal, and reported on by them, and how; *709] praying that *the validity of their title and claim may be inquired into and decided by the court. The court is authorized and required to hold and exercise jurisdiction of every petition presented in conformity with the provisions aforesaid, and to hear and determine the same, on the petition, in case no answer be filed, after due notice; or on the petition and the answer of any person interested in preventing any claim from being established, in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated. (4 U. S. Stat. 52, § 1.)

A reference to the petition presented by the claimants in this case, shows, that it contains a full statement of all the matters required by the first section of the Missouri law, excepting the condition of residence, which is not required by the act of 1828. (Record 1 to 22.) It presents a claim for land in Florida, embraced by the treaty, not finally settled, containing the requisite quantity of land, not reported on as ante-dated or forged, not annulled by the treaty, presented to and acted on by the commissioners according to law. The superior court of Florida then had jurisdiction of the petition, to hear and determine the same, according to the principles of justice and the laws and ordinances of Spain; and the case is now regularly before us, on an appeal from their decree. The power to hear and determine a cause is jurisdiction; it is "*coram judice*," whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law.

The proceedings on the petition are to be conducted according to the rules of equity, except that the answer on behalf of the United States need not be verified on oath. § 2. This court has often decided, that by these rules are meant the well-settled and established usages and principles of the court of chancery, as adopted and recognised in their decisions, which have been *710] acted on here, under the provisions of the *constitution and the acts of congress. In conformity with the principles of justice and the rules of equity, then, the court is directed to decide all questions arising in the cause, and by a final decree to settle and determine the question of the

validity of the title, according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of congress in relation thereto, and the laws and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise between the claimants and the United States, which decree shall, in all cases, refer to the treaty, law or ordinance under which it is confirmed or decreed against. As these are made the basis of our decision, and this is the first final adjudication on those laws, we think it necessary to declare the sense in which we think they were intended by congress, as well as their plain legal import, agreeable to the rules of construction adopted by this court, or those which form the principles of the common law. It is not necessary to define what was meant by referring to the law of nations.

The numerous cases which have been adjudged by this, and in the circuit courts, make it wholly unnecessary to refer to the sources from which it has been extracted. By the stipulations of a treaty, are to be understood its language and apparent intention, manifested in the instrument, with a reference to the contracting parties, the subject-matter, and persons on whom it is to operate. The laws under which we now adjudicate on the rights embraced in the treaty, and its instructions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation as a contract, on the principles of justice and the rules of equity. When the construction of this trerty was under the consideration of the court in the case of *Foster* v. *Neilson*, 2 Pet. 254, 299, it was under very different circumstances. The plaintiff claimed a title to the land in controversy, under a Spanish grant, prior to the treaty, which he alleged was confirmed by the eighth article ; he stood simply on his right, without any act of congress authorizing the suit, or conferring on the court any extraordinary powers. The first question which was decisive of the plaintiff's pretensions was, whether the lands in contest were within the boundaries of Louisiana, as ceded in 1803, or within *Florida, as ceded in 1819. The boundary [*711
between the two territories had been for many years the subject of controversy and negotiation between the American and Spanish governments, the one claiming that Louisiana extended eastward of the Mississippi to the Perdido ; the other, that it did not extend on that side of the river, beyond the island of Orleans, alleged to be separated from West Florida by the Iberville. To have decided in favor of the plaintiff would have been adopting the Spanish construction of the Louisiana treaty, in opposition to the pretensions and course of this government, which had taken possession of, and exercised the powers of government over, the territory between the Mississippi and the Perdido.

This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow, the action of the other departments of the government ; that when individual rights depended on national boundaries, "the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is, to decide upon individual rights according to those principles which the political departments of the nation have established." "If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." "We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the

province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." 2 Pet. 307. As to the other question depending on the stipulations of the eighth article, the court declared: "And the legislature must execute the contract, before it can become a rule for the court." 2 Pet. 314.

But this case assumes a very different aspect. The only question depending is, whether the claimants, or the United States, are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide, as between man and man, on the same subject-matter, and by the rules which congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same, form one of four *distinct ones. We must, therefore, be distinctly understood, *712] as not in the least impairing, but affirming, the principle of *Foster* v. *Neilson*. As the law giving jurisdiction to hear and determine this case not only authorizes but requires us to decide it according to the law of nations and the stipulations of the treaty, we shall consider, "that it has been very truly urged by the counsel of the defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred, in the view of policy, as well as of justice and humanity, is always required and is never refused." *Henderson* v. *Poindexter*, 12 Wheat. 535. When such an article is contained in a treaty of cession, and its meaning submitted to our consideration, we shall follow up and effectuate the intention of congress, by deeming the subject-matter to be, whether the land in controversy was the property of the claimants, before the treaty, and if so, that its protection is as much guarantied by the laws of a republic, as the ordinances of a monarchy. In so doing, we adopt and act upon another principle, contained in the opinion of this court in the same case, in alluding to the treaty of boundary between the United States and Spain, concluded on the 27th October 1795. "Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and national honor would have demanded, and which the United States could not have refused." *Henderson* v. *Poindexter*, 12 Wheat. 535. Spain was not regardless of those sentiments; she did not neglect; the United States did not refuse the stipulation in this treaty which did cede territory. In the same spirit of justice and national honor, the national legislature has required its highest judicial tribunal to finally decree on the effect of this stipulation on theirs and the rights of the claimants "according to the law of nations" which is "the usage of all civilized nations." Such is the authority conferred on this court, and by the rules prescribed by the laws, which are our commission, we feel, in its language, "both authorized and required," "with full power and authority to hear and determine all questions arising in this cause relative to the title of the claimants, the extent, locality and boundaries of the said claim, or *other matters connected therewith, fit and proper to be heard and *713] determined, and by a final decree, to settle and determine the same according to the law of nations." Act of 1824, § 2. Congress have laid this down as the first rule of our decision, in the spirit of justice and national honor which pervades this law; the court will consider it as neither

the last nor least of its duties, to embody it in such their final decree, if, in their judgment, the case before it calls for its application.

Our next rule of decision is, "and proceedings under the treaty." By these are to be understood the acts and proceedings of the government, or others, under its authority, subsequent to the treaty, in taking possession of the ceded territory, in organizing the local government, its acts within the authority of the organic law, the promises made, the pledges given by either the general or local government. Also, the proceedings of commissioners and other officers or tribunals appointed by congress to decide and report on these claims, so far as they have adopted and settled any rules and principles of decision within their powers, as guides to their judgment. These, in our opinion, are the "proceedings under the same," referred to, and intended by, the law, according to which we may decide, and are made a rule, a precedent, for us.

The next guide is, "the several acts of congress in relation thereto," clearly referring to the clause immediately preceding—"the stipulation of any treaty and proceedings under the same." By "the several acts of congress in relation thereto," must be taken as referring to all the laws on the subject-matter of either, necessarily embracing lands, property and rights depending on the stipulations and proceedings so made and had. Thus, the course of the legislature points to that of the judiciary—it must be in the same path. Where congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised; or which is, to all intents and purposes, of the same effect in law. It is a legislative ratification of an act done without previous authority, and this subsequent *recognition and adoption is [*714
of the same force as if done by pre-existing power, and relates back to the act done.

The next rule laid down for our direction is, "and the laws and ordinances of the government from which it is alleged to be derived." The laws of an absolute monarchy are not its legislative acts—they are the will and pleasure of the monarch, expressed in various ways; if expressed in any, it is a law; there is no other law-making, law-repealing power—call it by whatever name, a royal order, an ordinance, a *cedula*, a decree of council, or an act of an authorized officer, if made or promulgated by the king, by his consent or authority, it becomes, as to the persons or subject-matter to which it relates, a law of the kingdom. It is emphatically so in Spain, and all its dominions. Such, too, is the law of a Spanish province conquered by England. The instructions of the king to his governors are the supreme law of the conquered colony; *Magna Charta*, still less the common law, does not extend its principles to it. *King* v. *Picton*, 30 St. Tr. (8vo ed.) 866. A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it. The laws of the Indies have not their force as such, by any legislative authority vested in the council, their authority is by the express or implied expression of the royal will and pleasure; they must necessarily yield to an order, prescribing a new rule, conferring new powers abrogating or modifying previous ones.

The principle that the acts of a king are in subordination to the laws of the country, applies only where there is any law of higher obligation than his will; the rule contended for may prevail in a British, certainly not in a Spanish province. There is another source of law in all governments—usage, custom, which is always presumed to have been adopted with the consent of those who may be affected by it. In England, and in the states of this Union which have no written constitution, it is the supreme law; always deemed to have had its origin in an act of a state legislature of competent power to make it valid and binding, or an act of parliament; which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. 2 Inst. 58; Willes 116. So it is *considered in the states and by this court. 3 Dall. 400; 2 Pet. 656–7. A general custom is a general law, and forms the law of a contract on the subject-matter; though at variance with its terms, it enters into and controls its stipulations, as an act of parliament or state legislature. 2 Mod. 238; 2 W. Bl. 1225; 1 Doug. 207; 2 T. R. 263–4; 1 H. Bl. 7–8; 2 Binn. 486–7; 5 Ibid. 287; 2 S. & R. 17; 8 Wheat. 591–2; 9 Ibid. 584, 591; and the cases there cited from 4 Mass. 252; 9 Ibid. 155; 3 Day 346; 1 Caines 43; 18 Johns. 230; 5 Cranch 492; 6 T. R. 320; 3 Day 511; 5 Cranch 33. The court not only may, but are bound to notice and respect general customs and usage, as the law of the land, equally with the written law, and when clearly proved, they will control the general law; this necessarily follows from its presumed origin—an act of parliament or a legislative act. Such would be our duty under the second section of the act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain, to institute this proceeding, for the purpose of ascertaining their validity and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title, under and in conformity to the laws, usages and customs of Spain; makes a claim founded on them one of the cases expressly provided for. We cannot impute to congress the intention only not to authorize this court, but to require it to take jurisdiction of such a case, and to hear and determine such a claim, according to the principles of justice, by such a solemn mockery of it, as would be evinced by excluding from our consideration usages and customs, which are the law of every government, for no other reason than that in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide, whether the claim would be valid, if the province had remained under the dominion of Spain; we might as well exclude a royal order, because it was not called a law. We should act on the same principle, if the words of the second section were less explicit, and *according to the rule established in *Henderson* v. *Poindexter*, 12 Wheat. 530, 540.

*715]

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We are also required to finally decide "all other questions properly arising between the claimants and the United States." There is but one which has arisen in this case, which does not refer to the laws of nations, the treaty and proceedings under it, the acts of congress, or the laws of Spain—that is, the question of fraud in making the grant which is the foundation

of the plaintiff's title; which, as well as all others, we must, by the terms of the law, decide "in conformity to the principles of justice." We know of no surer guides to the principles of justice, than the rules of the common law, administered under a special law, which directs (§ 2), "that every petition which shall be presented under the provisions of this act, shall be conducted according to the rules of a court of equity, and it does not become this tribunal to acknowledge, that the decisions of any other are to be deemed better evidence of those rules or the principles of justice. In *Conrad* v. *Nicoll*, a great and lamented judge thus defined fraud: "The first inquiry is, what is fraud? From a view of all that has been said by learned judges and jurists upon this subject, it may be safely laid down, that to constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person by depriving him of some right, or otherwise impairing it, must be shown." He laid down three rules, which were incontrovertible—1. That actual fraud is not to be presumed, but ought to be proved by the party who alleges it. 2. If the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred; this is but a corollary to the preceding principle. 3. If the person against whom fraud is alleged should be proved to have been guilty of it, in any number of instances, still if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by these other frauds, unless in some way or other it be connected with or form a part of them. This court unanimously adopted these principles as the maxims *of the common law (4 Pet. 295–7, 310); and will be governed by them in this case, in their opinion on the question of fraud. [*717

The next subject for our consideration is, the evidence on which we are to decide. The third section of the act is as follows, "that the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence, and to report the same to the secretary of the treasury, or to the commissioners of the general land-office, upon all claims presented to them, respectively, shall be received and admitted in evidence, for or against the United States, in all trials under this act, when the person testifying is dead, or beyond the reach of the court's process, together with such other testimony as it may be in the power of the petitioner, the person or persons interested in the defence made against establishing any claim, or the United States attorney, to produce; and which shall be admissible according to the rules of evidence and the principles of law." These provisions of the act of 1824 are applicable to this case; they have not been altered by the act of 1828, and by the 8th section are expressly extended to the Florida claims. They are liberal—worthy of the government which has adopted and made them the rules by which to test the rights of private claimants to portions of the land embraced in the ceded territory. From a careful examination of the whole legislation of congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt, that it has, from the beginning, been intended, that the titles to the lands claimed should be settled by the same rules of construction, law and evidence, in all their newly-acquired territory. That they have adopted as the basis of all their acts, the principle that the law of the province in which the land is situated, is the law which gives efficacy to

the grant, and by which it is to be tested, whether it was property at the time the treaties took effect. The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain, before their right attached. In giving jurisdiction to the district court of Missouri to decide on these claims, the only case expressly excepted is that of Jacques Clamorgan (4 U. S. Stat. 56, § 12); and in the corresponding law, as to Florida; those annulled by
*718] the *treaty, and those not presented in time, according to the acts of congress. (§ 6.)

The United States have, by three cessions, acquired territory, within which there have been many private claims to land under Spanish titles. The first in point of time was by the compact with Georgia, in 1802, by the terms of which it was stipulated, "that all persons who, on the 27th October 1795, were actual settlers within the territory thus ceded, shall be confirmed in all their grants, legally and fully executed, prior to that day, by the former British government of West Florida, or by the government of Spain." (1 Laws U. S. 489.) The stipulations of the treaties by which they acquired Louisiana and Florida, contained provisions of a similar nature as to claims to land under Spain before the cession.

The whole legislation of congress, from 1803 to 1828, in relation to the three classes of cases, so far as respected Spanish titles, is of a uniform character in cases of corresponding description. The rules vary according to the kind of title set up; distinctions have been made in all the laws between perfect or complete grants, fully executed, or inchoate incomplete ones, where a right had been, in its inception, under or by color of local law or authority, but required some act of the government to be done to complete it. Both classes have been submitted to the special tribunals appointed to settle, to report finally or specially upon them, and the claimants have, under certain circumstances, been permitted to assert their rights in court, by various laws, similar in their general character, but varying in detail to meet the cases provided for. They are too numerous to be noticed in detail—some will be referred to hereafter; but it is sufficient, for the present, to observe, that from the whole scope and spirit of the laws on the subject of Spanish titles, the intention of congress is most clearly manifested, that the tribunals authorized to examine and decide on their validity, whether special or judicial, should be governed by the same rules of law and evidence in their adjudication on claims of the same given character. The second and third sections of the Missouri act of 1824, the first sixth and eighth of the Florida act of 1828, can admit of no other construction. It was within the discretion of the legislature to select the cases to be submitted to either tribunal;
*719] *they have directed that no claims should be decided on by a special tribunal, which is for a quantity greater than one league square; they had reserved to themselves the disposition of those for a larger amount, and finally have devolved on this court their final decision. These are good reasons for the jurisdiction being conferred—but the selection of this tribunal for a final and conclusive adjudication on the large claims, affords neither an indication of the intention of congress, nor furnishes us any reason, that in the exercise of that jurisdiction, we should consider that "the principles of justice," the rules of a court of equity, "the law of nations," of treaties "of congress," or of "Spain," the rules of evidence, or the "prin-

ciples of law," can be at all affected by the magnitude of the claim under consideration. The laws which confer the authority and point to the guides for its exercise, make no such discrimination, and every "principle of justice" forbids it. By the laws of congress on this subject, however, we must be distinctly understood as not comprehending those which have been passed on special cases or classes of cases, over which they have delegated to no tribunal power to decide, but which were disposed of according to circumstances of which they chose to be the exclusive judge.

There is another duty imposed on the court by the second section of the act of 1824, after making a final decree; "which decree shall, in all cases, refer to the treaty, law or ordinance, under which it is confirmed or decreed against;" so that we may make a final decree to settle and determine the validity of the title, according either to the law of nations, "the stipulations of any treaty, law or ordinance" referred to; and if, by either the one or more rules of decision thus prescribed, we shall be of opinion, that the title of the claimants was such as might have been perfected into complete title, under and in conformity to the laws of Spain, if the sovereignty of the country had not been transferred to the United States, in the words of the Missouri law of 1824; or which were valid under the Spanish government, or by the laws of nations, and which were not rejected by the treaty ceding the territory of East and West Florida to the United States, in the words of the Florida laws of 1822 and 1823 (3 U. S. Stat. 709, 754), referred to and adopted in that of 1828, we can decree finally on the title. These laws being in "*pari *materia*," and referred to in the one giving us jurisdiction, must be taken as one law, "*reddendo singula singulis.*" [*720

The counsel of the United States have considered the merits of this case as resting mainly, if not wholly, on the eighth article of the treaty; but the law compels us to take a view of it much less limited. That article names only grants; and if we decide alone on it, we must decree against the claim, unless we think the title good under it; though if it was for a quantity not exceeding a league square, any other tribunal would confirm it. This would be making a distinction so unworthy a just legislature, that we shall not impute to them the intention of directing it to be the rule of our action. We shall certainly not adopt it, unless it is clearly imposed by the authority of a law expressed in terms admitting of no doubt.

The fourth section of the Florida act of 1822 (3 U. S. Stat. 717), enacts, that every person claiming title to lands under any patent, grant, concession or order of survey, dated previous to 24th January 1818, which were valid under the Spanish government, or the laws of nations, and which were not rejected by the treaty, shall file his, her or their claim, &c. "And said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions and orders of survey agreeably to the laws and ordinances heretofore existing of the governments making the grants respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of the treaty of 22d of February" 1819. The intention of this provision cannot be misunderstood; due regard must be had to this article, it must be considered, weighed and deliberated upon, in connection with the other matters which form the rule of decision. A decree may be founded upon the stipulations of the treaty and proceedings under it—or it may be independent of them, according to the laws of

nations, congress or Spain; each of which is of as high obligation as the treaty, and on either of which alone we may found our decree. Though the term "law of nations" is not carried into the second clause of the fourth section of the act of 1822, yet we consider it a rule of decision for the reasons before stated, and on the authority of *Henderson* v. *Poindexter*—the manifest object of the law in directing those claims to be filed, which are
*721] valid by the *law of nations, is, that they shall be adjudicated on accordingly by the authorized tribunal. To impute to congress the intention of directing them to be filed, described and recorded; and for ever barred, if not so recorded, and of ordering the tribunal to examine and decide on their validity, and in the same sentence, withhold from the same tribunal the power of doing it, by the principles of the same law on which they were founded, and by which they were made valid, would be utterly inconsistent with every rule of law.

The sixth section of the act of 1828, is still more comprehensive, it provides, that all claims to land, within the territory of Florida, embraced by the treaty of 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land, &c., and which have not been reported on as ante-dated or forged, by the commissioners, not annulled by the treaty and reported on by the commissioners, shall be received and adjudicated by the judge of the superior court of the district. (4 U. S. Stat. 285.) This includes all claims, the former laws include only those specially designated; this embraced all not before decided, and not finally settled, with only two exceptions—one as to quantity, the other as to date and forgery. Whether, then, the present claim is by patent, grant, concession, warrant or order of survey, or any other act which might have been perfected into a complete title, by the laws, usages and customs of Spain, is immaterial as to our power to hear and determine. The fifth section of the Missouri act (4 U. S. Stat. 54), and the twelfth section of the Florida act (Ibid. 286), finally bars, at law and in equity, all claims to lands, tenements and hereditaments within their purview, which are not brought by petition before the court. They are, of course, not cognisable by them.

We now proceed to consider the validity of the present claim. The claimant offered and gave in evidence an original grant, from Don Alexandre Ramirez, styling himself, "intendant of the army, sub-delegate superintendent-general of the royal domain of the island of Cuba and the two Floridas," &c. It purported to convey the land in controversy to Arredondo & Son; to have been made in the exercise of the faculties which had been conferred on Ramirez by the king; it was made in the royal name, for the num-
*722] ber of acres of land, *under the limits, courses and distances pointed out in the figurative plat. In order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof, and in the terms mentioned in the decree therein recited; with an absolute dominion over and full property in it. The grant purports to be made on great deliberation and in solemn form; as a sentence in the official capacities which were assumed, "upon examination and in virtue of the royal order of 3d of September of the present year, in which his majesty having appointed me superintendent of the two Floridas, desires me in the strongest terms to procure the settlement of these provinces, by every means which my zeal and prudence can suggest." "In conformity with the fiscal (the attorney-gene-

ral) and the report made by the surveyor-general, I declare as crown property the territory of Alachua" (the lands in in question). The grant then followed, "signed with my hand, sealed with the royal arms, as used in my secretary's office, and countersigned by the commissary at war, Don Pedro Cerambat, secretary for his majesty in this intendency," and "registered in the book for that purpose in the office under the secretary's charge." No objection appears to have been made to the admission of this paper in evidence; its genuineness seems not to have been contested; no attempt was made to impeach it as ante-dated or forged, and its due execution in all the forms known to the local government was unquestioned. It was, therefore, before the court below, and is so here, at least, *primâ facie* evidence of a grant of the land it describes to the claimants; the rules of evidence and the principles of law give it this effect, and so it must be considered.

Here an important question arises—whether the several acts of congress relating to Spanish grants do not give this grant and all others which are complete and perfect in their forms, "legally and fully executed," a greater and more conclusive effect as evidence of a grant by proper authority? It is but a reasonable presumption, that congress, in legislating on the subject of Spanish grants in the three territories which they have acquired since 1802, and in devising and providing efficient means for the ascertaining and finally settling all claims of title under them, by persons asserting that the lands they claimed had been severed from the public *domain, before the cessions of the territory to the United States; that when they [*723 have, by a series of laws, from 1803 to 1828, authorized special and subordinate tribunals to decide on claims to the extent of a league square, inferior courts to decide on all claims to any amount, and finally, if no appeal is taken; and this court to pronounce a final decree on appeal, which may separate millions of acres from the common fund—they would have made what was deemed adequate provision to guard the public from spurious grants, by prescribing for the various tribunals authorized to decide on "claims, such rules of evidence applicable to those grants, as would secure the interest of the nation from fraud and imposition." Yet, in their whole legislation on the subject (which has all been examined), there has not been found a solitary law which directs, that the authority on which a grant has been made under the Spanish government should be filed by a claimant, recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity and the title it imparted; congress has been content that the rights of the United States should be surrendered and confirmed by patent to the claimant, under a grant purporting to have emanated under all the official forms and sanctions of the local government. This is deemed evidence of their having been issued by lawful, proper and legitimate authority, when unimpeached by proof to the contrary.

In providing for carrying into effect the stipulation of the compact of cession with Georgia, the fifth section of the act of 1803 provides: That all persons claiming land pursuant thereto should, before the 1st March 1804, deliver to the register of the land-office, in the proper district, a notice containing a statement of the nature and extent of his claim and a plat thereof; also, for the purpose of being recorded, every grant, order of survey, deed of conveyance, or other written evidence of his claim; in default whereof all his right, so far as depended on the cession, or the law was declared void—for

ever barred—and the grant inadmissible in any court in the United States against any grant from them. (2 U. S. Stat. 230.) By the sixth section, it was provided, that when it should be made to appear to the commissioners, that the claimant was entitled to a tract of land, under the cession, in virtue of a Spanish or British grant, legally and fully executed, they *724] *were directed to give him a certificate which amounted to a relinquishment of the claim of the United States for ever, when recorded. The fact which gave to the recorded certificate of the commissioners the effect of a patent, was the existence of a grant; the legality and fulness of its execution only was required to be made to appear. No inquiry was directed to be made as to the authority by which it was done; the United States were too just to exact from the grantees of land under an absolute colonial government, what no court requires from one who holds lands under the grant of the United States or of a state, fully executed; or, if inchoate, never compels a claimant to produce the authority of the officer who issues or executes a warrant or order of survey; it is always presumed to be done regularly, till the contrary appears, or such reasons are offered for doubting its authenticity, as are sufficient in law to rebut the legal presumption. By the first section of the supplementary act of 1804, claimants by complete British or Spanish grants are required to record no evidence of their claim, except the original grant or patent, with the warrant or order of survey and the plat; the other papers were to be deposited with the register of the land-office, in order to be laid before the commissioners for their consideration. Act of March 27th, 1804. (2 U. S. Stat. 303.)

As no law required the exhibition of the authority under which a grant, warrant, or order of survey was made; as it formed no part of the evidence of title to be recorded, deposited, or acted on by the commissioners, they were not authorized to call for it, before making their decision. The grant, legally and fully executed, was competent evidence of the matters set forth in it, and as none other was necessary, it was in effect conclusive. But congress thought it proper to authorize the commissioners not to confine their examination to the mere execution of the alleged grant. By the third section of the same law, it is provided as follows: "Or whenever either of the said boards shall not be satisfied that such grant, warrant or order of survey, did issue at the time it bears date, the said commissioners shall not be bound to consider such grant, warrant or order or survey as conclusive evidence of the title, but may require such other proof of its *725] validity; as they may think proper." Nothing can more *clearly manifest the understanding of congress, that such grant, &c., was conclusive evidence of title, and that the commissioners were not, under the existing laws, at liberty to require from the claimants any other proof, than their conferring on them, by express words, the power of doing so. "*Expressio unius est exclusio alterius*," is a universal maxim in the construction of statutes.

In the law of the succeeding session, passed for ascertaining and adjusting the titles and claims to land within the territory of Orleans and district of Louisiana, it was directed, that the evidence of claims to land should be recorded; but there was this proviso in the fourth section: "That where lands are claimed by virtue of a complete French or Spanish grant as aforesaid, it shall not be necessary for the claimant to have any other evidence of

his claim recorded, than the original grant or patent; together with the warrant, or order of survey, and the plat." Other provisions follow, similar to those in the preceding law, relating to claims included in the articles of agreement with Georgia. (2 U. S. Stat. 326.) By the 5th section, the commissioners are directed to "decide in a summary manner, according to justice and equity, on all claims filed with the register and recorder, in conformity with the provisions of this act, and on all complete French or Spanish grants, the evidence of which, though not thus filed, may be found of record on the public records of such grants, which decision shall be laid before congress in the manner hereinafter directed, and be subject to their determination thereon." The commissioners shall not be bound to consider such grant, warrant or order of survey as conclusive evidence of title, when they were not satisfied that it issued at the time it bears date, but that the same is ante-dated or otherwise fraudulent; they may then require such other proof of its validity as they may think proper. By proof of validity, must be understood of its genuineness and authenticity, and that it is not fraudulent; so as to satisfy themselves as to those doubts which authorized them to require further proof than the grant itself, of its legal, full and fair execution; not of the authority of the officer who made it—no law gives power to exact proof of that. This act of congress proves, that by considering the recorded grant as conclusive evidence of title (which cannot be without power in *the grantor), unless it is ante-dated or otherwise fraudulent, the authority of the officer making it was pre-supposed. [*726

The act of 1822, for ascertaining claims and titles to land in the territory of Florida (3 U. S. Stat. 709), directs all persons claiming title to lands under any patent, grant, concession or order of survey, to file before the commissioners their claim, "setting forth its situation and boundaries, if to be ascertained, with their deraignment of title, where they are not the grantees or original claimants," which shall be recorded, &c. § 4. This dispenses with the filing the warrant or order of survey, the survey or plat required by the laws relating to both the Georgia and Louisiana claims, as they need not set forth or file their deraignment of title, where they claim by a grant, patent, &c., to themselves. The direction of the law can apply only to such grant or patent, &c., this being filed and recorded; the fifth section enacts, "that the commissioners shall have power to inquire into the validity and justice of the claims filed with them, and if satisfied that said claims be correct and valid, shall give confirmation to them, which shall operate as a release of any interest which the United States may have." The second section of the act of 1823, supplementary to the last, dispenses with the necessity of producing in evidence, before the commissioners, the deraignment of title from the original grantee or patentee; but the commissioners shall confirm every claim in favor of actual settlers at the time of the cession, &c., when the quantity "claimed does not exceed 3500 acres." (3 U. S. Stat. 755.) By the act of 1824, for extending the time limited for the settlement of private land-claims in the territory of Florida, "the claimants shall not be required to produce in evidence a deraignment of title from the original grantee or patentee, but the exhibition of the original title-papers, agreeable to the fourth section of the act of 1822, with the deed or devise to the claimant, and the office abstracts of the intermediate conveyances for the last ten years preceding the surrender of Florida to the

United States; and when they cannot be produced, their absence being accounted for satisfactorily, shall be sufficient evidence of the right of the claimant or claimants to the land so claimed, as against the United States." (4 U. S. Stat. 7, § 2.)

*727] *It is thus clearly evidenced, by the acts, the words and intentions of the legislature, that in considering these claims by the special tribunals, the authority of the officer making the grant, or other evidence of claim to lands, formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants, to be even considered, much less adjudicated. They have submitted to the principle which prevails as to all public grants of land, or acts of public officers, in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, which is, that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be a usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption, that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country; especially, in the states whose tenures to land depend on every descriptive and inceptive, vague and inchoate equity, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal.

To apply the principle contended for to the various papers which are sent from the general or the local land-offices, as instructions to officers under their direction; or evidence of incomplete title to land, by requiring any other evidence of the authority by which it was done, than the signature of the officer, the genuineness of the paper, proved by witnesses or authenticated by an official seal, would be not only of dangerous tendency, but an entire novelty in our jurisprudence, as "a rule of equity or evidence," or "principle of law or justice." The judicial history of the landed controversies, under the land laws of Virginia and North Carolina, as construed and acted on within those states, and in those where the lands ceded by these states to the United States lie, and Pennsylvania, whose land tenures are very similar in substance, in all which the origin of titles is in very general, vague, inceptive equity—will show the universal adoption of the

*728] rule, that the *acts of public officers in disposing of public lands, by color or claim of public authority, are evidence thereof, until the contrary appears, by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted. Without the recognition of this principle, there would no safety in title-papers, and no security for the enjoyment of property under them. It is true, that a grant made without authority is void, under all governments (9 Cranch 99; 5 Wheat. 303), but in all, the question is, on whom the law throws the burden of proof of its existence or non-existence. A grant is void, unless the grantor has the power to make it; but it is not void, because the grantee does not prove or produce it. The law supplies this proof, by legal presumption, arising from the full, legal and complete execution of the official

grant, under all the solemnities known or proved to exist, or to be required by the law of the country where it is made and the land is situated.

A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *Patterson* v. *Winn*, 5 Pet. 241. The grants of colonial governors, before the revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony or province where it lies. A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been *considered as a special verdict; capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implication; an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence, on the ground of its not conducing to prove the matrer in issue. If admitted, the court, jury or chancellor must receive it as evidence, both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferrible by either, from what is so apparent on its face. [*729

Taking, then, as a settled principle, that a public grant is to be taken as evidence that it issued by lawful authority, we proceed to examine the legal effect of a Spanish grant, in adjudicating on their validity, by the principles of justice in a court; and by the rules of equity, evidence and law, directed by the act of 1824, which forms a part of the law under which their validity is submitted to our judicial consideration. The validity and legality of an act done by a governor of a conquered province, depends on the jurisdiction over the subject-matter delegated to him by his instruction from the king, and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, &c. *King* v. *Picton*, late governor of Trinidad, 30 St. Tr. 869–71. It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party.

All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1 Cranch 170–1), legislative (4 Wheat. 423; 2 Pet. 412; 4 Ibid. 563), *judicial (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167–8), or special (20 Johns. 739–40; 2 Dow P. C. 521, &c.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law. The principles of these cases are too important not to be referred to, and though time does not admit of their extraction and embodying in our opinion, we have no hesitation in declaring, that they meet with our entire concurrence, so far as applicable to this case.

*730]

But there are other cases which have been decided by this court, which have, in our opinion, so direct a bearing on the effect and validity of the grant in question, as to deserve a close examination; they will be considered in their order.

In *Polk's Lessee* v. *Wendell*, various objections were made to the validity of a grant from the state of North Carolina, as not having issued under the authority of law. The court laid down this general principle: "But there are cases in which a grant is absolutely void; as when the state has no title to the thing granted, or where the officer had no authority to issue the grant." 9 Cranch 99; repeated in the same case, 5 Wheat. 303. In a succeeding part of their opinion, they observe, in allusion to the law of the state: "This act limits the amount for which an entry may be made, but the same person is not in this act forbidden to make different entries, and entries were transferrible. No prohibition appears in the act, which should prevent the assignee of several entries, or the person who has made several entries, from uniting them in one survey and patent." 9 Cranch 85. "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are in general directory, and where all the proceedings are completed, by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every pre-requisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely unwarrantable, for any court to avoid a grant, for any irregularities in the conduct of those who are appointed by the *government to supervise the progressive course of a title from its commencement to its confirmation in a patent." 9 Cranch 99. In a review of their opinion, it is laid down, "As to what validity shall be given to the grants emanating from North Carolina, the decision places it upon the statutes of North Carolina; and although an opinion is expressed, that North Carolina could make no new grants, after the cession to congress, who could entertain a doubt upon the question? The right referred to here, was to perfect incipient grants; but what restraint is imposed on her discretion, or what doubt suggested of her good faith in executing that power? It will be perceived, that as to irregularities committed by the officers of government, prior to the grant, the court does not express a doubt, but that the government and not the individual must bear the consequences resulting from them." 5 Wheat. 304. They refer to the rule as to patents, laid down in the former case, and add:

*731]

"But in admitting that the grant shall support the presumption that every pre-requisite existed, it necessarily admits, that a warrant shall be evidence of the existence of an entry; nor is it by any means conclusive to the contrary, that the entry does not appear upon the abstracts of entries in Washington county, recorded in the secretary's office; on the contrary, if the warrants issued are signed by the entry-taker, it is conclusive, that the locations were received by him; and if he omitted to enter them, his neglect ought not to prejudice the rights of him in whose favor the warrants were issued." 5 Wheat. 304–5. This is a very important principle applying to all imperfect grants, concessions, warrants and orders of survey. That the perfection of either is legal evidence, from which the legal presumption arises, that all preceding acts necessary to give it legal validity have been done before it issued.[1]

Another, equally so, was established in that case: "There was one point made in the argument of this case, which from its general importance, deserves our serious attention, and which may have entered into the views of the circuit court in making their decision. It was, whether, admitting this grant to be void, innocent purchasers, without notice, holding under it, should be affected by its nullity. On general principles, it is incontestable, that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void *grant, can acquire nothing; but it is clear, that the courts of Tennessee have held otherwise. Yet the [*732 North Carolina act of 1777, certainly declares grants obtained by fraud, to be absolutely void; and the same result must follow, where the state has relinquished its power to grant, or no law exists to support the validity of the grant. But it seems, that the courts of Tennessee have adopted this distinction, that grants, in such cases, shall be deemed void only as against the state, and not then, until adjudged so by some process of law. If this be the settled law of Tennessee, we are satisfied, that it should rest on the authority of adjudication." 5 Wheat. 309. This evidences the respect paid by this court to local common law, which is but custom and usage, although opposed to general principles which are incontestable. "Hence, this court has never hesitated to conform to settled doctrines of the state on landed property, when they are fixed and can be satisfactorily ascertained; nor would it ever be led to deviate from them, in any case that bore the semblance of impartial justice. 5 Wheat. 302. The same principle applies to those of a territory, and to Florida, by the act of 1824. In *Hoofnagle* v. *Anderson*, a patent had issued for lands in the Virginia military district, in Ohio, on a continental warrant, issued by the register of the land-office, without authority by law, or a certificate of the governor, for state services. The question on which the title depended was, whether the illegality of the warrant could be inquired into, after the gran by a patent; on which the opinion of the court was given in these words: "But this reference to the certificate of the executive appears on the face of every warrant, and contains no other information than is given by law; the law requires this certificate as the authority of the register. It is considered as a formal part of the warrant. These warrants are by law transferrible; they are proved by

[1] United States *v.* Clarke, 8 Pet. 436; Delassus *v.* United States, 9 Id. 134; Voorhees *v.* United States Bank, 10 Id. 478.

the signature of the officer and seal of office; the signature and seal are considered as full proof of the rights expressed in the paper; no inquiry is ever made into the evidence received by the public officer. If the purchaser of such a paper takes it subject to the risk of its having issued erroneously, there ought to be some termination to this risk. We think it ought to terminate, when the warrant is completely merged in a patent, and the title consummated, without having encountered an adversary claim." 7 Wheat. 217–18.

*733] *A reference to the decisions of this court on titles in Florida will show, how they have been heretofore considered: "It is true, that the act of the 3d of March 1803, although making no express provision in favor of British or Spanish grants, unaccompanied with possession, does seem to proceed upon the implication that they are valid, recognising the principle that a change of policy produces no change in individual property, yet it imputes to them only a modified validity" (referring to the necessity of their being recorded, and the consequence of not doing it). *Harcourt* v. *Gallard*, 12 Wheat. 528. Had that claim been so recorded, and come before the court under a law and circumstances similar to this, there could have been no doubt of what its opinion would then have been. In the next case, after reciting the first section of the act of 1803, the court say: "This section places those persons who had obtained a warrant or order of survey, before 27th October 1795, on equal ground with those whose titles were completed." After reciting the residue of that act, and the preceding one of 1804, they express a very strong opinion, that a British or Spanish grant was cognisable before the commissioners appointed under those laws, though held by persons not residents of the country. That the commissioners might have decided in favor of its validity, and that such decision would have been conclusive. *Henderson* v. *Poindexter*, 12 Wheat. 536–43. The claim in that case was for 1500 acres; but the title was not recorded, nor the claim laid before the commissioners, and it was not, of course, embraced in the provisions of any act of congress authorizing any court to decide on the title. We conclude this review of the acts of congress and the decisions of this court, with repeating their words in *Rutherford* v. *Green:* "Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent implied and constructive repeals ought ever to be understood as to divest a vested right." 2 Wheat. 203. The course of the argument, the

*734] situation of the country in which the land *is situated, and the numerous titles depending on the principles which have been so fully discussed, has induced us to meet them fully and explicitly—they will narrow the scope of argument in future cases.

The claimants in this case did not rest their title merely on the grant. It appeared in evidence, by authentic documents, that, in 1816, a controversy arose between the captain-general and the intendant of the island of Cuba, as to the superintendency of the royal domain of the Floridas, which being referred to the king, he, by a royal order of the 3d September 1817, conferred it on the intendant, Ramirez, "commanding him therein to facili-

tate the increase of the population of those provinces, by all the means which his zeal and prudence could dictate." This is the order recited in the grant, and the authority under which it was made; with the general superintendency of the domain of the provinces, the local authorities acting under his direction and supervision, and acting under the command contained in the order, we can have no hesitation in saying, that the grant in question was within the authority thus conferred. This order was a supreme law, superseding all others, so far as it extended; its object was, to increase the settlement and population of the whole province, which could only be done by corresponding grants of land, adequate in extent to their desired effect. The power to do it was ample, and the means confided to the discretion of the officer, which was not limited. We cannot say, that in executing this grant, he has acted without authority. Our opinion, therefore, is, that both on the general principles of law and the acts of congress, the grant is perfect and valid, and even if a special authority was requisite, that it is conferred by the royal order referred to.

The bearing of the law of nations on such a title, and property thus acquired, while the province was in the possession and undisputed dominion of Spain, is manifest, according to its principles, recognised and affirmed by this court. 12 Wheat. 535, before cited at large. No article of the treaty professes to abrogate these rights, and all the laws of congress treat them as still subsisting, and they are now referred to our final decree by a special law. This relieves the court from the difficulty in which they found themselves in giving a construction to the treaty, in the case of *Foster* *v. [*735
Neilson. A treaty is in its nature a contract between "two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially, so far as its object is infra-territorial, but is carried into effect by the sovereign powers of the parties to the instrument; when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract, before it can become a rule for the court." 2 Pet. 314. But the court are, in this case, authorized to consider and construe the treaty, not as a contract between two nations, the stipulations of which must be executed by an act of congress, before it can become a rule for our decision, not as the basis and only foundation of the title of the claimants; but as a rule to which we must have a due regard, in deciding whether the claimants have made out a title to the lands in controversy—a rule by which we are neither directed by the law, nor bound to make our decree upon, any more than on the laws of nations, of congress or of Spain. The acts of 1824 and 1828 authorize and require us to decide on the pending title on all the evidence and laws before us. Congress have disclaimed its decision as a political question for the legislative department to decide, and enjoined it on us, as one purely judicial. Taking, then, the treaty as a legislative act, an item of evidence, or a rule of decision, relied on by one or both parties to this suit, we consider the second article as ceding to the United States only what of the territories belonged to Spain; that no land which had been severed from the royal domain, by antecedent grants, which were valid by the laws of Spain, and created any right of property to the thing granted in the grantees, passed to the United States; such lands were not liable to subsequent appropriation by a subsequent grant. Considering

the treaty as a legislative act, and applying to it the same rules, "the proposition is believed to be perfectly correct, that the act of 1783, of N. C., which opened the land-office, must be construed as offering for sale those lands only which were then liable to appropriation, not those which had before been individually appropriated." 2 Wheat. 203. So must the treaty be construed; and if a question arises, what lands were ceded, the answer is found in the second article, *"vacant lands," not those which, in the *736] language of this court, had been individually appropriated, and were not the subjects of a hostile and adversary grant. The renunciation, in the third article, by both parties, was only of their respective rights, claims and pretensions to the territory renounced; neither government had any rights to renounce over the lands to which a title had been conveyed to their citizens or subjects respectively. The United States do not come into court claiming this cession and renunciation as vesting them with the whole territory, in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations or parts of it, or not, at their pleasure; but require us to finally decide between them and the claimants, as grantees from the same grantor; which grant carries the title to the land. Thus deciding between the parties on these articles of the treaty, and in conformity to the laws, rules and principles before established, we should be of opinion, that the land embraced in the grant was no longer a part of the royal domain, at the date of the treaty, but private property—land not vacant, but appropriated by a prior valid deed. The eighth article was evidently intended for the benefit of those who held grants and were considered as proprietors of land in Florida; to give it a construction which would narrow and limit rights thus intended to be secured, would deprive them of the benefit of the fair construction of the second and third articles of the treaty, and leave them in a worse situation than if the eighth had been omitted altogether. To adopt one so severe and unjust, would require words and an evident intent clearly expressed—making it imperative on our judgment to divest rights already vested.

The original treaty has been examined in the department of state; it is executed as an original, and headed "original" in both languages; it cannot have escaped our attention, that it relates to the territory ceded, the boundaries between those of the two governments, the mutual renunciations, and the rights of the inhabitants of the ceded territories. There is an obvious reason for its being in Spanish as well as in English; the king had a direct interest, so far as affected his own dominions adjoining the United States, and a laudable desire to protect the inhabitants of the ceded provinces in all their rights and property. His honor was concerned most deeply in not *doing an act which should deprive his subjects of what *737] he had granted to them; by making a cession of the territory to a powerful nation; not content with ceding and renouncing only what belonged to himself, he was desirous of expressing his intention of preserving his faith, by an article which should show it to be not to leave the confirmation of grants by lawful authority, at the pleasure of the United States. Before the execution of the treaty, there was inserted a stipulation in Spanish, by which the ceded teritory should pass into the hands of the United States, with the declared intention on the part of the king of Spain, that the grants referred to operated "*in præsenti*" as an exception and reservation of lands

granted in his name and by his authority, using words which expressed his intention, in his own language, that the grants were ratified and confirmed by both governments, in the very act of cession, subject to no future contingency. This furnishes a powerful and obvious reason for inserting this article in Spanish, so that the intention would be clearly understood, by words denoting it in a manner not be mistaken, whenever any doubt should arise; and whenever the treaty should be produced as evidence of the cession, or for any other purpose, there should always appear in the native language of his then or former subjects, full evidence of his declared intention to protect their rights acquired by his grants, pledging his honor and faith for their security. His minister was not willing to trust so important a matter to a treaty only in the English language. The present situation of the holders of the grants, the state of the country, the opinion of this court in *Foster* v. *Neilson*, and the argument in this cause, show the wisdom and justice which prompted him to express the intention of the king, in his own language and that of his subjects. Similar or equally good reasons may have induced the ministers of this government to have the treaty drawn in its language, and thus considering the treaty in both languages, and each as is declared at its head, "original," the one version neither controls nor is to be preferred to the other; each expresses the meaning of the contracting parties, respectively, in their own language, as in the opinion of each, expressing and declaring the intention of both. If they are mistaken, and the words used do not and are not understood *afterwards by the parties to convey the same meaning in both languages; then, [*738 both being originals and of equal authority, we must resort to some other mode than the inspection of the treaty, to give it a proper construction, under the special acts of congress, which require us to decide on the validity of the grants referred to in the eighth article, by the principles and rules of justice and equity, the law of nations, the stipulations of the treaty, the acts of congress, and the laws of Spain, and on such testimony as may be admissible by the rules of evidence and principles of law.

Applying, then, these tests to the eighth article, and to ascertain its legal meaning, when the contracting parties understand it differently, we consider it as, in its effect and legal operation, an exception and reservation of the lands so granted, from the territory ceded to the United States. If the title was confirmed presently, the king had, within the bounds of the grant, no right or title to convey, and the United States could receive none. If no future act of theirs was necessary to their ratification and confirmation, the legal estate, much less the beneficial interest, never passed to them. A treaty of cession is a deed of the ceded territory, the sovereign is the grantor, the act is his, so far as it relates to the cession, the treaty is his act and deed, and all courts must so consider it, and deeds are construed in equity by the rules of law. A government is never presumed to grant the same land twice. 7 Johns. 8. Thus, a grant, even by act of parliament, which conveys a title good against the king, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land. 8 Co. 274 *b*; 1 Vent. 176; 2 Johns. 263. If land is granted by a state, its legislative power is incompetent to annul the grant, and grant the land to another; such law is void. *Fletcher* v. *Peck*, 6 Cranch 87, &c. A state cannot impose a tax on land,

granted with an exemption from taxation (*New Jersey* v. *Wilson*, 7 Cranch 164); nor take away a corporate franchise. *Dartmouth College* v. *Woodward*, 4 Wheat. 518. Public grants convey nothing by implication; they are construed strictly in favor of the king. Dyer 362 *a*; Cro. Car. 169. Though such construction must be reasonable, such as will make the true intention
*739] of the king, as expressed *in his charter, take effect, is for the king's honor, and stands with the rules of law. 4 Com. Dig. 428, 554, G, 12; 10 Co. 65. Grants of the strongest kind, "*ex speciali gratia, certa scientia, et mero motû*," do not extend beyond the meaning and intent expressed in them, nor, by any strained construction, make anything pass against the apt and proper, the common and usual, signification and intendment of the words of the grant, and passes nothing but what the king owned. 10 Co. 112 *b*; 4 Ibid. 35; Dyer 350–1, pl. 21. If it grant a thing in the occupation of B., it only passes what B. occupied; this in the case of a common person, *à fortiori*, in the Queen's case. 4 Co. 53 *b*; Hob. 171; Hardr. 225. Though the grant and reference is general, yet it ought to be applied to a certain particular, as, in that case, to the charter to Queen Caroline: *id certum est quod certum reddi potest.* s. p. 9 Co. 30 *a*, 46 *a*, 74 *b*. When the king's grant refers in general terms to a certainty, it contains as express mention of it as if the certainty had been expressed in the same charter. 10 Co. 64 *a*. A grant by the king does not pass anything not described or referred to, unless the grant is as fully and entirely as they came to the king, and that *ex certa scientia*, &c. Dyer 350 *b*; 10 Co. 65 *a*; 2 Mod. 2; 4 Com. Dig, 546, 548. Where the thing granted is described, nothing else passes, as "those lands." Hardr. 225. The grantee is restrained to the place, and shall have no lands out of it, by the generality of the grant referring to it; as of land in A., in the tenure of B., the grant is void, if it be not both in the place and tenure referred to. The pronoun "*illa*" refers to both necessarily, it is not satisfied, till the sentence is ended, and governs it, till the full stop. 2 Co. 33; s. p. 7 Mass. 8–9; 15 Johns. 447; 6 Cranch 237; 7 Ibid. 47–8. The application of this last rule to the words "*de illas*," in the eighth article, will settle the question whether its legal reference is to lands alone, or to "grants" of land. The general words of a king's grant shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, or to be deemed to be to his or the prejudice of the commonwealth. 1 Co. 112–13 *b*. "Judges will invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by
*740] rigid rules might be wrought out of the act." Hob. 277. *The words of the grant are always construed according to the intention of the parties, as manifested in the grant, by its terms, or by the reasonable and necessary implication, to be deduced from the situation of the parties and of the thing granted, its nature and use. 6 Mass. 334–5; 1 S. & R. 110; 1 Taunt. 495, 500, 502; 7 Mass. 6; 1 Bos. & Pul. 375; 2 Johns. 321–2; 6 Ibid. 5, 10; 11 Ibid. 498–9; 3 East 15; Cro. Car. 17–18, 57–8, 168–9; Plowd. 170 *b*; 7 East 621; Cowp. 360, 363; 4 Yeates 153.

These are the fixed rules governing private grants, which are construed strongly against the grantor and liberally for the grantee. Yet he shall never take, by general words or by construction, what the grantor had before granted to another. The controlling effect which the situation of

the grantor and the property alleged to be conveyed, as evidence of the intention of the grantor, is in law such, that in the case of *Moore* v. *Magrath*, in 1774, Lord MANSFIELD declared, "I am very clear, it might be plainer with the deed, but without seeing the deed, it is plain enough." The words of the deed were sweeping ones, "together with all his, the said Michael Moore's lands, tenements and hereditaments in Ireland;" yet it did not pass his paternal estate; the court was unanimous, Cowp. 9, 11; the authority of this case is unquestionable. In *Shirras* v. *Caig*, this court decided, that when there was a piece of property answering to the description in the deed, other property included in the deed, but not intended to be conveyed, did not pass. 7 Cranch 47–8. It is useless to pursue the inquiry, whether, by the common law, the grant of a king can be adjudged to pass what he had conveyed to another, and whose title he intended to ratify and confirm, by the very act of a grant to another, by excepting it from the generality of the thing granted, and reserving it from the operation of the new grant, for the use of a prior grantee. But it is not deemed useless, to show the doctrine of this court as to exceptions and reservations in public and private grants. "The instruction of this reservation in this act (a law of North Carolina), leads almost necessarily to the opinion, that the lands granted to Martin and Wilson were a part of those to which the act related, and the words of the section show that their title was acquired by this act:" "By no course of just reasoning can it be inferred, from these permissions to make appropriations within bounds, not *open to entry generally, that a vested right to lands, not lying within the limits to which the act relates, is annulled." *Rutherford* v. *Greene*, 2 Wheat. 205. In order, therefore, to ascertain what is granted, we must first ascertain, what is included in the exception; for whatever is included in the exception, is excluded from the grant, according to the maxim laid down in Co. Lit. 47 *a* (4 Com. Dig. 289, Fait, E. 6): *Si quis rem dat, et partem retinet, illa pars quam retinet semper cum eo est et semper fuit.* *Greenleaf* v. *Birth* (5 Pet. 132), opinion of this court by STORY, Justice, the other judges concurring unanimously on this point. [*741

It became, then, all-important to ascertain what was granted, by what was excepted. The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted in and by the grant. The Spanish version was in his words, and expressed his intention, and though the American version showed the intention of this government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted, and what reserved; the rules of law are too clear to be mistaken, and too imperative to be disregarded by this court. We must be governed by the clearly-expressed and manifest intention of the grantor, and not the grantee, in private, *à fortiori*, in public grants. That we might not be mistaken in the intention or in the true meaning of Spanish words, two dictionaries were consulted, one of them printed in Madrid, and two translations were made of the eighth article, each by competent judges of Spanish, and both agreeing with each other, and the translation of each agreeing with the definition of the dictionaries. "*Quedan*" in Spanish, correctly translated, means "shall remain;" the verb "*quedan*" is in French, "*reste*," Latin, "*manere*,"

"*remanere*," and English, "remain," in the present tense. In the English original, the words are "shall be"—words in the future. The difference is all-important as to all Spanish grants, if the words of the treaty were, that all the grants of land "shall remain confirmed," then the United States, by accepting the cession, could assert no claim to these lands thus expressly excepted. The proprietors could bring suits to recover them, without any
*742] action of congress, and any question arising would *be purely a judicial one. "Shall be ratified," makes it necessary that there should be a law ratifying them, or authorizing a suit to be brought, otherwise the question would be a political one, not cognisable by this court, as was decided in *Foster* v. *Neilson*.

But aside from this consideration, we find the words used in the Spanish sense, as to the grants made after the 24th of January 1818, which are, by the same article in English, "hereby declared and agreed to be null and void." The ratification is in Spanish and English. The Spanish words in the Spanish version are "*quedado*" and "*quedan*," in reference to the annulled grants; the English are, "have remained," "do remain." The principles of justice and the rules of both law and equity are too obvious, not to require that, in deciding on the effect and legal operation of this article of the treaty by the declared and manifested intention of the king, the meaning of Spanish words should be the same in confirming, as in annulling grants—a regard to the honor and justice of a great republic, alike forbid the imputation of a desire that its legislation should be so construed, and its laws so administered, that the same word should refer to the future as to confirming, and to the present, in annulling grants, in the same article of the same treaty. For these reasons, and in this conviction, we consider, that the grants were confirmed and annulled, respectively, simultaneously with the ratification and confirmation of the treaty, and that when the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants.

As this point was urged at length by counsel on both sides, it was due to them, that the court should consider it fully, and express their opinion upon it clearly; argued as this case has been, upon grounds deemed by both sides vital to its merits, we could not exclude them from our consideration. But there are other grounds, which, though not adverted to by counsel, would, in our view, have led to the same result. It is wholly immaterial to the decision of this case, whether the eighth article of the treaty is construed to be an actual present confirmation and ratification of the grants by both governments, or a stipulation of it for the future; for the laws of 1824 and 1828 require us to decide on the validity of the title
*743] of the *claimants under those grants, according to the stipulation of any treaty. Our decree is final, and, if in favor of the claimants, is conclusive against the title of the United States. Under these laws, the effect of the stipulation to ratify and confirm the grants is a judicial question, referred to us as such by congress; in deciding upon it by the rules prescribed, we assume no authority, we but obey the laws, as in duty bound, by decreeing according to our most deliberate and settled judgment. Should we be called on to decide on the validity of a title acquired by any Spanish grant, not embraced by these laws, we should feel bound to follow the course pursued in *Foster* v. *Neilson*, in relation to the stipulation in the

eighth article of the Florida treaty, "that the legislature must execute the contract, before it can become a rule for this court." 2 Pet. 314. We are thus explicit, to avoid possible misapprehension.

We are also of opinion, that the legal construction of the eighth article, in English, would lead to the same conclusion at which we have arrived, according to the view heretofore taken of the Spanish. 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 till he is ousted thereof by an actual adverse possession. This is a settled principle of the common law, recognised and adopted by this court, in *Green* v. *Liter*, 8 Cranch 229–30; *Barr* v. *Gratz*, 4 Wheat. 213, 233; *Propagation Society* v. *Pawlet*, 4 Pet. 480, 504, 506; *Clark* v. *Courtney*, 5 Ibid. 354–5, and is not now to be questioned.

This gives to the words "in possession of the lands," their well-settled and fixed meaning; possession does not imply occupation or residence; had it been so intended, we must presume they would have been used. By adopting words of a known legal import, the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles. To adopt the literal English version, and reject its meaning, as settled at common law and by this court, would make this article confine the confirmation of grants of lands to cases of actual occupation and residence. This would be to give to the *treaty a construction more limited than the acts of congress have done; to place Spanish grants on a worse footing under the [*744 Florida, than they were under the Louisiana treaty, or the compact with Georgia, and to exclude from our consideration many of the same classes of cases on which special tribunals, in their proceedings under the stipulations of the treaty had, decided and confirmed similar grants. We are satisfied, that by adopting and acting on this version, so taken literally, we should violate the intention and spirit of the laws which give us jurisdiction, and are the guides to its exercise; we cannot decide according to the principles of justice, in any other way than by considering the words according to their legal acceptation, too often given by this court, not to be respected by it. By grants of land, we do not mean the mere grant itself, but the right, title, legal possession and estate, property and ownership, legally resulting upon a grant of land to the owner.

There is one other expression in the second clause of the eighth article, which we deem it our duty to notice. In the English version, it is, "but the owners in possession of such land," &c.; there is no sentence in the Spanish version which can correspond with this, the word "*proprietarios*" means owners, but not "owners in possession of such land." The intention of the Spanish grantor is too apparent to be mistaken by any tribunal authorized to decide judicially on the true construction of a contract, according to the meaning and intention of the contracting parties. This furnishes another powerful reason in favor of the construction we have given to the English phrase, by which their legal intendment and effect are the same. This part of the eighth article was for the benefit of those persons who were purchasers under the faith of a public grant, evidently intended to be protected and secured in their rights, by the stipulation of a treaty, which ought to be construed liberally, by a tribunal authorized and required to decide on the validity

of these grants, by the principles of justice, and according to the rules of equity, having a due regard to this article of the treaty. We cannot better regard it, than by carrying into effect these principles and rules, by such an exposition of it as we are convinced meets the intention of the parties, and effectuates the object intended to be accomplished.

*745] *We now consider the conditions on which the grants were made. According to the rules and the law by which we are directed to decide this case, there can be no doubt, that they are subsequent, the grant is in full property, in fee, an interest vested on its execution, which could only be divested by the breach or non-performance of the conditions, which were, that the grantees should establish on the lands, two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant. No time was fixed for the completion of the establishment, and no new requisites or conditions appear to have been imposed. From the evidence returned with the record, we are abundantly satisfied, that the establishment was commenced within the time required (which appears to have been extended for one year beyond that limited by the grant), and in a manner which, considering the situation of that country, as appears by the evidence, we must consider as a performance of that part of the condition. Great allowance must be made, not only from the distracted state and prevalent confusion in the province, at the time of the grant, but until the time of its occupation by the United States. Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it *cy pres*, they will protect and save him from a forfeiture. 4 Dall. 203; 2 Fonb. 217–18, 220; 1 Vern. 224–5; 2 Ibid. 267 and note.

The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance, and divests the grant of that condition. It is an acknowledged rule of law, that if a grant be made on a condition subsequent, and its performance become impossible by the act of the grantor, the grant becomes single. We are not prepared to say, that the condition of settling two hundred

*746] Spanish families in an American territory has been, or is, *possible; the condition was not unreasonable or unjust, at the time it was imposed; its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance, after its cession to the United States, would be demanding the "*summum jus*" indeed, and enforcing a forfeiture, on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves, at all events, justified, if not compelled, to declare, that the performance of this condition had become impossible, by the act of the grantors—the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity, on such grounds as these, we are not either authorized or required by the

law which has devolved upon us the final consideration of this case, to be guided by such rules, or governed by such principles, in deciding on the validity of the claimants' title. Though we should even doubt, if, sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity, according to its established rules, our decree must be in conformity with the principles of justice, which would, in such a case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant.

It has been objected to the validity of the grant, that it exceeds the quantity authorized by the laws of the province. The view we have taken of the royal order, dated in September 1817, preceding the grant, and by the authority of which it purports to have been made, renders it unnecessary to say more in relation to this objection, than that, the disposition of the royal domain in Florida was within the jurisdiction of the intendant Ramirez. That he had power to make the grant, the terms and extent of which were within his discretion, of the proper exercise of which this court has neither the power nor right to judge. We will, however, observe, that we are well satisfied, that the local authority was competent to make grants of lands of a greater quantity than that to which the *counsel of the United States have contended that they were limited; the United States [*747 have never insisted on limiting grants to such a pittance. Their uniform legislation, and the proceedings of all the tribunals who have acted under their authority, during all the time which has elapsed since their acquisition of any territory, within which Spanish grants have been issued, show that they have never been disposed to confine them so narrowly, but the contrary. This case does not require us to define their extent.

The question of fraud has been pressed in the argument, but we perceive nothing in the evidence which shows its existence, so as to bring it home to the claimants, or that it exists at all, according to the definition and rules heretofore settled.

It is objected, that the lands in question are within the Indian boundary, and not subject to be granted. Of the fact of such location, there seems to be no doubt, as the centre of the grant is the Indian town of Alachua. The title of the Indians to these lands is not a matter before us; the grant is made subject to their rights, if they return to resume them; and their abandonment has been ascertained by a proceeding which the intendant, in the grant, calls a sentence pronounced by him in his official character, on the report of the attorney and surveyor-general. This seems to be a mode of proceeding known to the Spanish law in force in the province, in the nature of an inquest of office, as a judicial act, which, vitally affecting the royal domain, comes within its general superintendency, under the royal order of September. It was conducted, so far as we can perceive, by the proper officers; the law-officer of the crown to report on the laws affecting the subject, and the surveyor-general, as to the fact; so that on their joint report, the superior officer could decree officially, whether, from the nature of the Indian right of occupancy, it had, in law, and by the actual condition of the land, in fact, reverted to and become re-annexed to the royal domain, by the abandonment of the occupancy. The intendant pronounced his sentence on the report of these officers, and declared the granted lands to be a part of the

royal domain, and open to a grant, reserving the Indian right of occupancy, whenever it should be resumed. The fact of abandonment was the impor-
*748] tant one to be ascertained; if voluntary, the dominion of *the crown over it was unimpaired in its plenitude; if by force, the Indians had the right, whenever they had the power or inclination to return.

This is a matter which we feel bound to consider a judicial one, and that we cannot look behind the final sentence of an authorized tribunal, to examine into the evidence on which it was founded; but must take it as a "*res adjudicata*" by a foreign tribunal, judicially known and to be respected as such. Similar proceedings are directed by the various acts of congress; the land-commissioners, or officers of the land-offices, as the case may be, confirm or reject claims, and the land embraced in the rejected claims reverts to the public fund. So it is provided, by the seventh section of the act of 1824, as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this court. There is another answer to this objection, which deserves notice; grants of land within the Indian boundary are not excepted in the laws referring them to judicial decision; congress made what exceptions they thought proper; as the law has not done it, we do not feel authorized to make an exception of this.

It is lastly objected, that the extension of time, by the intendant, in December 1820, was without authority, being subsequent to the ratification of the treaty by the king of Spain. But the ratification by the United States was in February following, and the treaty did not take effect, till its ratification by both parties operated, like the delivery of a deed, to make it the binding act of both. That it may and does relate to its date, as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail. To exact the performance of the condition of settlement of two hundred Spanish families, or any great progress in its commencement, after the date of the treaty, and during the confused and uncertain state of things preceding its ratification, would be both unreasonable and unjust; and if the question were new in this court, we should have no hesitation in saying, that as to the grants of land, subject to the condition of settlement, the ratification of the treaty must be taken at its date. But the question is not a new one. In 1792, the state of Penn-
*749] sylvania passed a law for the sale of her *vacant lands; the warrants issued under it contained a condition of improvement and settlement, within two years from their date, unless prevented by force of arms of the enemies of the United States, from making and continuing such settlement. The treaty of Grenville was made in August 1794, but not ratified till December 1795. The uniform decisions of the supreme court of Pennsylvania, and the solemn decision of this court in *Huidekoper's Lessee* v. *Douglass*, have settled the date of the treaty to be its ratification, so far as it bears on or in any way affects the rights of parties under the land laws of Pennsylvania. The obligation to settle did not begin, till the expiration of two years thereafter, and if commenced in the course of the following spring, the condition has been considered as complied with. 3 Cranch 1, 65; 4 Dall. 199.

Being, therefore, of opinion, that the title of the claimants is valid, according to the stipulations of the treaty of 1819, the laws of nations, of

the United States, and of Spain, the judgment of the court below is affirmed.(*a*)

THOMPSON, Justice. (*Dissenting.*)—Not concurring in the conclusion to which the court has come in this case, and considering the magnitude of the property involved, not only in this case, but in the application of the principles which govern the decision, to other cases, and that the construction now given to the treaty is confessedly at variance with that which has been heretofore adopted, I shall briefly assign my reasons for dissenting from the opinion of the court. It is not my purpose to enter into an examination of all the questions which have been discussed at the bar. The view which I have taken of the case does not make it necessary for me to do so.

The grant under which the petitioners in the court below set up their claim, bears date on the 22d of December 1817, and is for a tract of land in East Florida, a little short of 300,000 acres. It was made by Don Alexander Ramirez, intendant of the island of Cuba, and superintendent of the two Floridas. It recites, that the memorial for the same was presented to the intendancy, on the 15th of November, then last past, praying a gratuitous *concession of the land, and offering to make an establishment in the territory, known by the name of Alachua, composed of two hundred [*750 families. The grant is, thereupon, gratuitously made, as therein expressed, in full property; and with the precise obligation to establish there two hundred families, which must be Spanish, the establishment beginning within the term of three years, at most; without which, the grant shall be considered null and void.

The validity of this claim depends on the construction of the eighth article of the treaty between the United States and the king of Spain, bearing date the 22d of February 1819. It is contended on the part of the appellees, that under the true construction of this treaty, the only questions open for inquiry are, 1st, whether the grant is genuine; and 2d, whether made by lawful authority. That upon the establishment of these points, the treaty, *ipso facto*, confirms the grant, and closes the door to all further inquiry—the date of the grant being antecedent to that of the treaty. It is admitted, that this is a different interpretation of the treaty from that which has heretofore prevailed in our own government; and the change of construction is rested upon an interpretation of the Spanish language, as used in the treaty, rejecting the English side of that instrument. The treaty, when signed, was in both languages; and each must be considered as the original language, and neither as a translation. It cannot be said, that the English is an erroneous translation of the Spanish, any more than that the Spanish is an erroneous translation of the English. The English side of the eighth article of the treaty reads thus: "All the grants of land made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession

(*a*) An impression of this opinion was submitted to, and corrected by, Mr. Justice BALDWIN, by the printer, before it was put to press.

of such lands, who by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of the treaty; in default of which the said grants shall be null and void. All the grants made since
*751] the 24th of January 1818, when *the first proposal on the part of his Catholic Majesty for the cession of the Floridas was made, are hereby declared to be null and void."

The material parts in which the English and Spanish are said not to agree are, 1st, where the English declares that the grants "shall be ratified and confirmed," the Spanish is, "shall remain ratified and confirmed;" and 2d, where the English is, "shall be ratified and confirmed to the persons in possession of the land," the Spanish construction is, "to the persons in possession of the grants;" and 3d, in that part of the article which extends the time for fulfilling the conditions, which, according to the English is, to the owners in possession of the "land," the Spanish construction is, "the owners in possesion of the grants." It will readily be perceived, that the different readings lead to very different results, and which materially affect the grant in question. If titles are confirmed only to persons in possession of the land, at the date of the treaty, the grant in question does not come within the saving; for there is no pretence, that Arredondo, or any person claiming under him, was, at the date of the treaty, in possession of the land, or had done anything towards fulfilling the conditions upon which the grant was made to depend, and without which it is declared to be null and void. If the construction of the Spanish side of the treaty, as now contended, is to be adopted, and all grants before the 24th of January 1818, are confirmed by the treaty, *proprio vigore*, the declaration that they shall be confirmed to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty, are entirely nugatory, and must be rejected; for we have no right to enter into the inquiry, how far they would be valid under the Spanish government. Such was, most manifestly, not the intention of the contracting parties; but that the United States should be substituted in the place of Spain, and should carry into execution, in good faith, the contracts made under the Spanish government, for the disposition of the lands, and which the Spanish government was bound *ex debito justitiæ* to carry into execution. The treaty must be considered as made in reference to an established system relative to the disposition of the land in the territories ceded; and that all
*752] grants would be open to examination, *whether valid or not, according to the rules and regulations established by such system. It seems to be admitted, that if the English side of the treaty is to govern, the grant in question would not come within the saving of the eighth article, unless the date of the treaty is to be considered as of the time it was finally ratified on the 19th of February 1821. Before which time, it is contended, the establishment was commenced, according to the conditions of the grant. This question will be noticed hereafter.

I do not profess to understand the Spanish language, and shall, therefore, not undertake to say, whether the criticisms are well founded or not. But it must strike any one, as a little extraordinary, not only that the negotiators of the treaty should have sanctioned such a material discrepancy; but that

congress should have been legislating for ten years past upon the English side of the treaty, different boards of commissioners sitting and trying the titles under such constructions, and that this court should have fallen into the same error, and the mistake not discovered until now.

But admitting this discrepancy, as now contended for, exists between the English and Spanish side of the treaty, the question arises, which must we adopt? I know of no rule that requires a court of justice to reject the English and adopt the Spanish. If congress, in their liberality, should think proper to do this, the power could not be disputed, and so far as it extended to the protection of actual *bonâ fide* settlers upon the land, the power, in my judgment, would be wisely and discreetly exercised. But it does not seem to me, that a court of justice can be called upon, as a matter of courtesy, to yield this to a foreign power, in the construction of a treaty; and no rules of law, applicable to the construction of contracts, will, in my judgment, justify it. It certainly will not be pretended, that the royal rule of construction applies to this case. That where a grant is made by the king, it is to be taken most beneficially for the king, and against the grantee. It is, I think, not claiming too much, to consider it a contract between equals, and the rule would be more applicable, which requires, in such case, that the grant should be construed most strongly against the grantor.

It is certainly true, as a general rule, that all written instruments are to be construed by themselves, without resorting *to evidence *dehors* the instrument, to ascertain the intention of the parties, except where [*753 there is a latent ambiguity, which is not the case here. But that principle cannot, with propriety, be applied to the present case; the difficulty does not arise from any obscurity either in the English or in the Spanish side of the treaty, if considered separately; but from a discrepancy, when compared together; and in my judgment, presents a proper case for an inquiry into the intention and understanding of the parties who negotiated the treaties. "Every treaty," says Vattel, "must be interpreted as the parties understood it, when the act was proposed and accepted." The lawful interpretation of the contract ought to tend only to the discovery of the thoughts of the author or authors of the contract; as soon as we meet with any obscurity, we should seek for what was probably in the thoughts of those who drew it up, and interpret it accordingly. This is the general rule of all interpretation. That all miserable subtleties and quibbles about words are overthrown by this unerring rule. Vattel, § 262, p. 228, 230.

Such understanding, in the present case, is to be collected from written evidence, which will speak for itself, and not from parol declarations, which might be misunderstood or misrecollected; and if we resort to such written evidence, no doubt, it appears to me, can remain, on the construction of the treaty, that it was not the understanding, either of Mr. Adams or Don Onis, that all grants of land, made before the 24th of January 1818, by his Catholic Majesty or his lawful authorities, should be confirmed by the mere force and operation of the treaty.

It is said, the treaty does not purport to transfer private property; that all such property is excepted, under the second article. This proposition cannot be true, in the broad extent to which it has been laid down. It may not transfer private property, but it annuls private property, if every grant, of whatever description, is to be considered private property. For

upon this construction, there would be a direct repugnancy between the second and the eighth articles; the latter declares that all grants made since the 24th of January 1818, shall be null and void. But the king of Spain did not consider a mere gratuitous grant, upon conditions which had in no manner whatever been fulfilled, as private property. This must have
*754] *been the ground upon which he annulled the grants to Alagon, Punon Rostro and Vargas. So it was understood by Don Onis, as will be shown hereafter by his correspondence. And the same power was assumed over like grants, in other cases, where no private right became vested, by taking possession, or doing some act towards fulfilling the condition of the grants; and where that has been done, the right is secured to the person in possession, according to the provisions of the eighth article. But let us look at the correspondence between Mr. Adams and Don Onis which led to this eighth article.

The material point of difference between the negotiators, in framing this article, was, whether it should absolutely confirm all grants made prior to the 24th of January 1818, or only *sub modo*, so as to inure to the benefit of actual *bonâ fide* settlers on the land, at the time the treaty was made; and the article resulted in the form in which it now stands. The article states that the proposition to cede the territory originated on the part of Spain, on the 24th of January 1818; or that is assumed as the date, though, doubtless, there must have been some previous communications on the subject, either here or by our minister in Spain; for Mr. Erving, by his letter of the 10th of February 1818, wrote to Mr. Adams, that the king of Spain had lately made large grants of land in East Florida to several of his favorites; and that he had been credibly informed, that by a sweeping grant to the Duke of Alagon, he had, within a few days past, given away the remainder. (1st vol. State Papers, 13.) Our government was, therefore, apprised of what was probably going on with respect to grants in Florida, and must be presumed to have intended to guard against them. On the 24th of October 1818, Don Onis sent to Mr. Adams a proposition to cede the Floridas, with the following clause: "The donations or sales of lands made by the government of his majesty, or by legal authorities, until this time, are nevertheless to be recognised as valid." On the 31st of October, Mr. Adams answered, declining his proposal, and requiring all the grants lately alleged to have been made by Spain should be cancelled, and proposed to carry back the time to all grants made after the year 1802. This Don Onis declined, but offered to annul all grants made after the 24th January 1818; saying, that
*755] the *grants had been made with a view to promote population, cultivation and industry, and not with that of alienating them; and that they should be declared null and void, in consideration of the grantees not having complied with the essential conditions of the cession. (1st vol. State Papers 25, 26.) Again, on the 9th February 1819, Don Onis, in his project of a treaty sent to Mr. Adams, reiterates the same provision, that all grants shall be confirmed and acknowledged as valid, except those which had been issued after the 24th of January 1818, which should be null, in consideration that the grantees had not complied with the conditions of the cessions. (1 State Papers, 87.)

In all this correspondence, we find Don Onis persisting in his claim, that all grants prior to the 24th of January 1818, should be absolutely confirmed;

and assigning as the reason why those issued subsequent to that date should be annulled, because the grantees had not complied with the conditions; and we find Mr. Adams continually rejecting the proposition to consider the grants before that period absolutely confirmed; and yet it is now insisted, that all such are confirmed by the treaty. The subsequent negotiation shows, that the article, as it now stands, was put into that shape, expressly for the purpose of guarding against such construction, and with the understanding, both of Don Onis and Mr. Neuville, who acted in his behalf, during a part of the negotiation, that the grants of land dated before, as well as after, the 24th of January 1818, were annulled, except those upon which settlements had been commenced, the completion of which had been prevented by the circumstances of Spain and the recent revolutions in Europe. It is unnecessary for me to state more particularly this correspondence; the result, as above stated, will be found fully supported by a reference to the correspondence in the first volume of State papers, pp. 13, 25, 26, 34, 46, 68, 74, 75. There can be no doubt, that such was the understanding of Don Onis and M. De Neuville; and Mr. Adams, in a letter to our minister in Spain, whilst the treaty was pending before the king for ratification, states, that the reasons why the grants to the Duke of Alagon and others were not excluded by name, were: 1st, Conformable to the desire of M. Onis, to save the honor of the king; and 2d, Because from the despatches of Mr. Erving, it was supposed there were other grants of the same kind, and *made under similar circumstances. To have named them might have left [*756 room for a presumptive inference in favor of others; the determination was to exclude them all.

That the grant to Arredondo was made under similar circumstances, and liable to the same objections with those to Alagon, Punon Rostro and Vargas, is most manifest. Applications for them all, were made within a few months of each other, in the latter part of the year 1817 and beginning of 1818, and no settlements made on either, at the date of the treaty; and to consider the treaty as precluding all inquiry into the validity of this grant, appears to me directly in the face of the very words of the treaty, and most manifestly against the clear understanding of those by whom it was made; and such is the construction given to this article by this court, in the case of *Foster* v. *Neilson*, 2 Pet. 314. The court say, the words of the article are, "that all the grants of land made, before the 24th of January 1818, by his Catholic Majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them? That article does not declare, that all the grants made by his Catholic Majesty, before the 24th of January 1818, shall be valid, to the same extent as if the ceded territories had remained under his dominion; and yet this is the very construction sought to be given to it in the present case. It does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it. But its language is, that those grants *shall* be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified

and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the court. *Boards of
*757] commissioners have been appointed for East and West Florida, to receive claims for lands, and on their reports titles to lands, not exceeding —— acres, have been confirmed, to a very large amount.

By the act of the 8th of May 1822, §§ 4, 5 (4 U. S. Stat. 717), concerning claims and titles to land within the territory of Florida, persons claiming title under any patent, grant, concession or order of survey, dated previous to the 24th day of January 1818, which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory, are required to file such claim with the commissioners; and power is given to the commissioners to inquire into the justice and validity of such claims. No patent or grant is exempt from such inquiry; and if they are absolutely confirmed by the treaty, how could the justice and validity of them be subject to the examination of the commissioners? And the same principle runs through all the laws in relation to these claims. See Act of 1828 (4 U. S. Stat. 284).

It appears to me, therefore, that the plain letter of the eighth article of the treaty, the clear and manifest intention of the negotiators, the uniform understanding of congress, and the opinion of this court, all concur in the construction, that grants made prior to the 24th of January 1818, are required to be ratified and confirmed to persons in the actual possession of the lands, at the date of the treaty, and to be held valid to the same extent only that they would have been binding on the king of Spain; giving to *bonâ fide* grantees, in such actual possession, and having commenced settlements, but who had been prevented, by the late circumstances of the Spanish nation, and the revolutions in Europe, from fulfilling all the conditions of their grants, time to complete them.

If, by the true construction of the treaty, the party claiming the benefit of this article must show an actual possession of the land, at the date of the treaty, it becomes necessary to inquire, what that date is? It was concluded and signed on the 22d of February 1819, ratified by the king of Spain on the 24th of October 1820, and by the United States on the 19th of February 1821; and the question is, which of these periods is to be taken as the date
*758] of the treaty? I think, the time the treaty *was concluded and signed must be taken as the date. The contracting parties had in view the state and condition of things at that time, and neither could, in good faith, change such condition, so as to affect any stipulations in the treaty. Any other construction would open the door to fraud and imposition. Suppose, the eighth article, instead of the 24th of January 1818, had said, all grants of land made before the date of the treaty shall be valid; would that have made valid, grants issued after the treaty was signed, and before being ratified by the United States? No one, it is believed, would contend for this; and if for any purpose, the date, as fixed by the instrument, would govern, it ought in all cases. The rule should be uniform, and not open to be changed, for the purpose of meeting particular cases. The date, as fixed in the instrument, is the only certain period; the time of ratification is altogether

uncertain. Changes may take place between the two periods, materially affecting the negotiation, and the ratification may be delayed, for the express purpose of accomplishing some such object.

The true rule on this subject is laid down by Mr. Justice WASHINGTON, in the case of *Hylton* v. *Brown*, 1 W. C. C. 312, that the treaty, when ratified, relates back to the time of signing. The ratification is nothing more than evidence of the authority under which the minister acted. A government is bound to perform and observe a treaty made by its minister, unless it can be made to appear, that he has exceeded his authority. But a ratification is an acknowledgment that he was authorized to make the treaty; and if so, the nation is bound, from the time the treaty is made and signed; and it is worthy of notice, that in all the acts of congress in relation to this treaty, it is referred to as of the date of 22d February 1819, the time it was signed; thereby showing the understanding of our own government on the subject. If this, then, is to be taken as the date of the treaty, there is no pretence, that at that time, or even when ratified by the king of Spain, any settlement had been made, or possession taken of any part of this tract. It is, therefore, in my opinion, a case not coming within the saving provision in the eighth article of the treaty.

But if the time of ratification is assumed as the date of the treaty, no possession of the land had then been taken, within any reasonable construction of the treaty. William H. Hall *testifies, that he, with two men, by the name of Smith and Lanman, went to Alachua, on the 7th of [*759 November 1820, and began to clear some land and erect some buildings. That he soon after went to St. Augustine, where he was taken sick, and remained some time. That on returning to Alachua, he found some persons there, employed by Mitchell and Arredondo, who were personally disagreeable to him, and he abandoned the project and settlement (Record 189); and what became of the others does not appear; they must have abandoned also, for William H. Simmons testifies (Record 174, 176), that he was at Alachua, in February 1822; saw five or six houses; Wanton was there, and he understood had been upwards of a year. That on his first visit, there was no other person established there but Mr. Wanton, and some negroes. So that in February 1822, one year after the ratification of the treaty by the United States, one white man and a few negroes, who, the witness understood, had been there upwards of a year, were the only persons on the land: and this is claimed to be a possession of nearly 300,000 acres of land, within the meaning of a solemn treaty. This view of the case renders it unnecessary for me to enter upon the inquiry respecting the authority of the intendant Ramirez to make the grant in question, or whether the conditions contained in it have been performed, or in any way dispensed with or discharged. Upon the whole, I am of opinion, that the judgment of the court ought to be reversed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On the consideration whereof, this court is of opinion, that there is no error in so much of the said decree as determines that the claim is valid and ought to be confirmed; and this court doth affirm so much thereof, and doth decree that the title of the claimants is valid, according to the stipula-

tions of the treaty betwhen the United States and Spain, dated the 22d day February, Anno Domini 1819, the laws of the United States in relation thereto, the laws of nations, and of Spain. And this court, *proceeding to render such decree as the said superior court ought to have done, doth finally order, determine and decree, that so much of said decree as directs the land embraced in the grant of Don Alexandro Ramirez, the intendant of Cuba, to Don Fernando de la Maza Arredondo y Hijo, dated the 22d day of December, Anno Domini 1817, to be laid off "in a square tract, containing 298,645⅞ acres of English measurement, the centre thereof being the known spot, monument or marked tree, at or near the house at present the dwelling of Edward M. Wanton; said spot, monument or marked tree, to be ascertained by the surveyor, who, under the law, shall survey the said tract," be and the same is hereby reversed and annulled. And this court doth further and finally order, adjudge and decree, that the said land be laid off in a square form, containing 289,645⅞ acres, English measure, the centre whereof to be a place known as Alachua, inhabited in other times by a tribe of Seminole Indians. And the centre of said place, known as Alachua, to be considered as the centre of the grant.

*760]

761*] *Pierre Gassies, Plaintiff in error, *v.* Jean Gassies Ballon, Defendant in error.

Citizenship.

A petition filed in the district court of the United States of Louisiana, alleged, that the defendant had caused himself to be naturalized an American citizen, and that he was, at the time of the filing of the petition, residing in the parish of West Baton Rouge: *Held*, that this was equivalent to an averment that the defendant was a citizen of the state of Louisiana.

A citizen of the United States, residing in any state of the Union, is a citizen of that state.

The authorities, on the question of the jurisdiction of the courts of the United States on the allegation of citizenship, in proceedings in those courts, have gone as far in limiting the jurisdiction of those courts, as it would be reasonable and proper to go.

Error to the District Court for the Eastern District of Louisiana. This case came before the district court of the eastern district of Louisiana, on a petition filed in November 1829, by Jean Gassies Ballon, for the recovery of the proceeds of certain goods, left in the hands of his son, Pierre Gassies, for sale, and for a balance of an account arising out of the sale of the said goods, and other transactions between them.

The petitioner described himself in the petition as a resident of the city of Barsac, and a French citizen, of the kingdom of France, and then in the parish of Baton Rouge, intending to return to France as soon as the settlement of his affairs would permit. The defendant, Pierre Gassies, his son, was described "as now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen."

The defendant appeared to the suit, and after a plea of no cause of action, which was overruled by the court, the cause was tried by a jury, and in February 1830, a verdict was rendered for the petitioner for $3100, for which sum, the district court entered judgment in his favor. The defendant prosecuted this writ of error.

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

*For the *plaintiff*, it was contended, that there was not a sufficient averment in the pleadings, that Pierre Gassies was a citizen of Louisiana, so as to sustain the jurisdiction of the district court of the United States. The averment is, that the plaintiff in error, the defendant below, "is now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen." To show that this was not a sufficient description of the defendant, to give the courts of the United States jurisdiction, the following cases were cited. Coxe's Digest 434; 3 Dall. 382; 4 Ibid. 11; 1 Cranch 343; 2 Ibid. 9, 126; 5 Ibid. 303; 6 Wheat. 450. [*762

Key, for the defendant in error.—The averment is, that the defendant in the district court resides in the parish of West Baton Rouge, where he has caused himself to be naturalized as an American citizen. He is, then, a citizen of the United States, made so by naturalization, and residing in Louisiana. This makes him a citizen of Louisiana; he became so by residing in that state. 3 W. C. C. 546; 1 Paine 580; Gordon's Digest 270.

Marshall, Ch. J., delivered the opinion of the court.—In this case, the court is of opinion, that the jurisdiction can be sustained. The defendant in error is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there; this is equivalent to an averment that he is a citizen of that state. A citizen of the United States, residing in any state of the Union, is a citizen of that state.

The authorities on this question have gone far enough; and this court is not disposed to narrow any more the limitations which have been imposed by the decided cases; they have gone as far as it would be reasonable and proper to go. The judgment of the district court of Louisiana is affirmed.

Judgment affirmed.

*Daniel F. Strother, Plaintiff in error, *v.* John B. C. Lucas, Defendant in error.

Comparison of hands.—Foreign laws.—Ejectment.—Land-claims in Missouri.

It is a general rule, that evidence by comparison of hands is not admissible, when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.[1] There may be cases where, from the antiquity of the writing, it is impossible for any living witness to swear, that he ever saw the party write; comparison of handwriting with documents in a known handwriting have been admitted; but these are extraordinary instances arising from the necessity of the case.

Foreign laws should be proved; the court cannot be charged with knowledge of foreign laws.

It was objected, that the claim of the plaintiff in error, which was for two arpens of land, adjoining the city of St. Louis, Missouri, was, from his own showing, no more than an equitable right, for which an action of ejectment would not lie; there is in the state of Missouri, an act of the legislature, regulating the action of ejectment, and enumerating various classes of cases of claims to lands, where the action will lie, among which is a claim under any French or Spanish grant, warrant or order of survey, which, prior to the 10th of March 1804, had been surveyed by proper authority, under the French or Spanish governments, and recorded according to the custom and usages of the country. This would seem broad enough to embrace the claim in question, and authorize the right to be tried in an action of ejectment. *Quære?* If, under this law, an ejectment could be maintained on an equitable title, in the courts of the United States, in the state of Missouri.

Construction of the act of congress of the 2d March 1805, entitled, "an act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," passed March 2d, 1805; and of the fourth section of an act respecting claims of land in the territories of Orleans and Louisiana," passed March 3d, 1807.

Error to the District Court for the district of Missouri. This was an action of ejectment, in the district court of Missouri, brought by Daniel F. Strother, of Kentucky, against John B. C. Lucas, of Missouri, to recover a tract of land, particularly described in the declaration, containing eighty arpens, adjoining the city of St. Louis.

The defendant pleaded the general issue, and the cause was tried at the September term 1830, when there was a verdict for the defendant, and judgment rendered thereon; to reverse which, this writ of error was prosecuted. The record contained a bill of exceptions, which set out at large all the testimony given at the trial, and the decisions of the court, which were excepted to.

*764] *The premises in dispute consist of two common field lots, of one by forty arpens, each. The common field of St. Louis (of which the premises in question are a part) is a large tract of land lying immediately

[1] Turner *v.* Foxall, 2 Cr. C. C. 324; Vickroy *v.* Skelley, 14 S. & R. 372; Wilson *v.* Kirkland, 5 Hill 182; People *v.* Spooner, 1 Den. 343. But the jury may compare the handwriting of genuine documents, properly put in evidence, with one which is alleged to be a forgery. United States *v.* Chamberlain, 12 Bl. C. C. 390; Dubois *v.* Baker, 30 N. Y. 355; Pontius *v.* People, 82 Id. 339; Travis *v.* Brown, 43 Penn. St. 9. Other papers, however, executed by the party, the signatures to which are conceded to be genuine, but which are not in evidence, cannot be submitted to the jury, to enable them to compare the signatures. Randolph *v.* Loughlin, 48 N. Y. 456; Glover *v.* New York, 7 Hun 232. The law has been altered in New York, by the act of 1880, ch. 36, which permits the comparison of a disputed writing with any writing proved, to the satisfaction of the court, to be genuine. Under this act, the genuineness of a paper to be used as a comparison of handwriting, is for the court, not for the jury. Hall *v.* Van Vranken, 28 Hun 403.

west of the former boundary of the town of St. Louis, and extending for some distance north and south of it. The lots are parallelograms, of one or more arpens in front, and extending westward to the uniform depth of forty arpens. The common field was separated from the town and town lots, by a fence extending the whole length of the eastern front; there were no division fences, though the lots were held and cultivated separately, and each proprietor was bound to keep up the fence in front of his lot. The witnesses, when speaking of these lots, used the term one arpen, two arpens, &c., meaning always the front of the lot spoken of, and the depth must be understood to be forty arpens: thus, a lot of one by forty arpens, was called one arpen, &c.

The facts of the cause were these: Some time in the year 1772, Don Manuel Duralde surveyed, and laid off into lots, the common field of St. Louis. It did not appear, however, that he was an official surveyor, nor did any authority for the survey appear. Among the lots laid off, were the two mentioned in the plaintiff's declaration. One of these appeared to have been surveyed for Joseph Gamache, and the other for Rene Kiercereau. These surveys were shown by two documents, set forth in the bill of exceptions, as extracts from the *Livre Terrien*, purporting to be a registry of the returns made by Duralde. In the margin of the registry of the survey for Kiercereau, were these words: "1798, St. Cir, 1 arpen;" and on the margin of the registry of the return of Gamache's survey, these words were found: "1793, St. Cir, 1 arpen;" and a memorandum in French, which rendered into English is as follows: "the name of said Gamache is Baptiste instead of Joseph." There was also some other evidence given at the trial, to establish the fact, that the person for whom the survey was made was not Joseph, but Baptiste or John Baptiste Gamache; the lots, thus surveyed, adjoined each other, that of Gamache being on the north, and Kiercereau's on the south; the northern lot was bounded on the north by a lot of Bissonet, *alias* Bijou, and the southern, on the south by a lot of Bequette.

On the 9th of January 1773, John Baptiste Gamache, by deed of exchange, conveyed to Louis Chancillier, the northern half *of the northern lot; and on the 6th of April 1781, a deed was executed by [*765 one Marie Reneux Robillar, purporting to convey to Louis Chancillier, the southern, or Kiercereau's lot. In the body of this deed, Rene Kiercereau was stated to be a subscribing witness, and there was a signature to the deed as such, alleged to be his. There was also some evidence, to show that the whole name of the grantor was not written by herself; both these deeds were, however, admitted as evidence. Chancillier cultivated a part of the two lots until his death, which happened in 1785; that is to say, he cultivated the whole front of the southern lot, and the southern half of the northern lot, to the extent of a few arpens in depth. On the 8th of June 1785, after the death of Chancillier, an inventory of his estate was taken, and among the items is found one arpen and a half of land in the common fields, which was admitted to have been regularly sold to, and all the title which Chancillier had vested in, Madame Chancillier, the widow. It did not appear, that any part of the land in question was ever occupied, possessed or cultivated, after the death of Chancillier, by anybody claiming under him. The widow remained about two years at St. Louis, when she intermarried with one Beauchamp; and she and her husband removed

immediately to St. Charles, in the same state, at a distance of about twenty miles from St. Louis, where Beauchamp died. The widow, some time after, was married to one Basil Laroque, who died in 1828. The widow of Chancillier, from the time of her marriage with Beauchamp, until the commencement of this suit, resided in St. Charles, and it did not appear that she claimed the premises in dispute, until about the year 1818, and it was alleged, not until she was urged to it by others. On the 12th September 1828, she transferred her claim by deed, to George F. Strother, who conveyed to the plaintiff.

Soon after the death of Chancillier, and some time in the year 1785 or 1786, Hyacinth St. Cyr was put into the possession of the two lots in question, by the syndic of the district, the fence in front not having been kept up, and the lots, therefore, considered as abandoned. St. Cyr soon after purchased of Gamache and Kiercereau their claims; he continued to cultivate and possess both lots, in his own right, from the time of his first entry in 1785 or 1786, and kept up his part of the fence, until the *whole
*766] common field inclosure was destroyed in 1798 or 1799. In 1801, Auguste Choteau became the purchaser of the two lots, at the public sale of the effects of St. Cyr, who was an insolvent debtor: and in 1810, the two lots were confirmed to Auguste Choteau, by the board of commissioners appointed for the adjustment of land-claims. Choteau had, previously to the confirmation, conveyed the lots to the defendant, Jean B. C. Lucas, who had been in the uninterrupted possession ever since the year 1808. These were the material facts of the case, as they appeared, by the bill of exceptions.

At the trial, the plaintiff offered sundry depositions, to prove the signature of Kiercereau, as witness to the deed of Marie Reneux Robillar. These depositions were rejected. It appeared, that not one of the witnesses ever saw him write, or knew his handwriting; but it having been proved, that Kiercerau had been a chanter in the Catholic church at St. Louis, the witnesses had examined the register of the interments and marriages, and the name of Kiercereau appearing subscribed to some of the entries, as witness, they were asked to deliver their opinion as to the signature on the deed, by comparison with the signatures in the registry, not one of which was proved to have been made by Kiercereau, nor did it appear to have been a part of his official duty, to sign the register; and it did appear, that there were living witnesses who had seen Kiercereau write and knew his signature; one of whom (Pierre Choteau) was actually examined as a witness in the cause.

On the testimony before the jury, the court, on the prayer of the defendant, gave the following instruction, to wit: If the jury find, from the evidence, that the two confirmations to Auguste Choteau, given in evidence by the plaintiff in this case, are for the same land, and include all the premises in the declaration mentioned, the plaintiff cannot recover in this action.

The jury found a verdict for the defendant, upon which judgment was entered by the district conrt. The plaintiff prosecuted this writ of error.

The case was argued by *Benton*, with whom was also *Taney*, for the plaintiff in error; and by *Wirt*, for the defendant.

Strother v. Lucas.

*Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the district court of Missouri. It was an action of ejectment, for two arpens of land in front, and forty arpens in depth, in and adjoining the city of St. Louis, in the state of Missouri. The material question in the case arises upon an instruction given to the jury, upon the prayer of the defendant below, who is the defendant here.

Upon the trial, no evidence was given on the part of the defendant, and the plaintiff having closed his case, the defendant moved the court to instruct the jury as follows: "that if the jury find from the evidence, that the two confirmations made by the board of commissioners to Auguste Choteau, given in evidence by the plaintiff in this case, are for the same land, and include all the premises in the declaration mentioned, the plaintiff cannot recover in this action." Which instruction was given, and the jury found a verdict for the defendant.

In the course of the trial, certain depositions were offered in evidence, which, among other things, went to prove the handwriting of Rene Kiercereau, whose name appeared as a witness to one of the deeds which had been admitted in evidence (and who, in the body of the deed, was described as a witness of assistance), by comparing the handwriting of the witness with the handwriting of entries made in a certain register of marriages and interments, alleged to have been made by the witness; of which, however, there was no direct evidence. The depositions, so far as they went to prove the handwriting of the witness to the deed, by comparison, were objected to and overruled by the court, to which exception was taken.

It is a general rule, that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. There may be cases, where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents, known to be in his handwriting, has been admitted. But these are extraordinary instances, arising from the necessity of the case, and which do not apply to the one before the court. For there were living witnesses examined as to the handwriting, and besides, the *deed was received and read in evidence, and the plaintiff had the full benefit of it. [*768

But it is said, the evidence was offered for the purpose of identifying the witness, and to show that he was the original grantee of the forty arpens, and the husband of Marie Reneux Robillar; and being named in the deed as a witness of assistance, it operated, by the Spanish and French law, as a conveyance of his own title, the same as if he had signed the deed as grantor. There are two answers to be given to the objection made to the ruling of the judge in the court below, in the view now presented. In the first place, that was not stated as the purpose for which it was offered, nor was it shown that such was the operation of the deed thus witnessed, by the Spanish or French law; and these, being foreign laws, should have been proved. The court cannot be charged with knowledge of foreign laws. But in the second place, the record does not show that the judge was called in to express any opinion, without respect to the legal effect and operation of the deed, or that the plaintiff had not the full benefit of its being con-

sidered his deed. And, indeed, it would seem, from the course of the trial, that it was so considered, or at all events, the contrary does not appear from any question presented to the court on the subject.

Two other points have been made and argued here, which do not appear to have been raised in the court below, and which will be very briefly noticed. It is objected on the part of the defendant, that the plaintiff's claim, even from his own showing, is no more than an equitable right, for which an action of ejectment will not lie. There is in the state of Missouri an act of the legislature regulating the action of ejectment, and enumerating various classes of cases of claims to land, where the action will lie; among which a claim under any French or Spanish grant, warrant or order of survey, which, prior to the 10th of March 1804, had been surveyed by proper authority under the French or Spanish governments, and recorded according to the customs and usages of the country. (Rev. Laws Mo. 343.) This would seem broad enough to embrace the claim now in question, and authorize the right to be tried in an action of ejectment in the state courts. How
*769] far the courts of the *United States will adopt such practice, has come under the consideration of this court in several cases, *Robinson* v. *Campbell*, 3 Wheat. 212; *De la Croix* v. *Chamberlain*, 12 Ibid. 599; and the court has been strongly inclined against sustaining the action upon a mere equitable title, except, perhaps, where, by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be valid at law. We do not mean, however, to be understood as expressing any opinion upon this question in the present case. But as the cause had been tried upon the merits, and so argued here, we think best to decide upon the merits, without noticing the objection to the form of the action.

An objection rather of a novel character has been made on the part of the plainliff to the confirmation of the title in Choteau, because the defendant was one of the commissioners who confirmed the claim, and had purchased the lots of Choteau, before the confirmation. On reference to the proceedings of the commissioners, the allegation does not appear to be founded in fact, although he was one of the commissioners, he did not sit with them, when this claim was confirmed. But it is a little singular, that the plaintiff should himself give this confirmation in evidence, in support of his own title, and then attempt to impeach it.

The main question in the cause, however, grows out of the instructions given by the court to the jury; and to a right understanding of that question, a brief statement of the case, as it stood when the instruction was given, becomes necessary. The plaintiff, as the origin of his title, gave in evidence two certified copies of entries of surveys from what is called the *Livre Terrien*. The one, purporting to be an entry of a survey made for Rene Kiercereau of one by forty arpens; the other, a survey purporting to have been made for Joseph Gamache for the same quantity. On the 29th of January 1773, Gamache conveyed to Louis Chancillier, one-half of the lot surveyed for him, and on the 6th of April 1781, Marie Reneux Robillar (the wife of Rene Kiercereau) conveyed to Louis Chancillier, the lot surveyed for him. Chancillier cultivated a part of these lots, until his death in 1785;
*770] after his death, his widow, Madame Chancillier, became the purchaser of the one and a *half arpens of land, but did not take possession of

or cultivate these lots ; nor does it appear, that she laid claim to them, until about the year 1818 ; and in September 1828 she sold the lots to George F. Strother, who conveyed the same to the plaintiff. Soon after the death of Chancillier, and some time in the year 1775 or 1786, Hyacinth St. Cyr was put into possession of the two lots, by the syndic of the district, the fence in front not having been kept up ; and from the proceedings of the commissioners, introduced by the plaintiff himself, it appears, that Kiercereau, on the 23d of October 1793, conveyed to St. Cyr his claim to the lot surveyed for him, and on the same day, Gamache conveyed to St. Cyr his claim to the lot surveyed for him. And by the same proceedings, it appears, that at a public sale, in the year 1801, made of the property of St. Cyr, Auguste Choteau became the purchaser of these lots, and on the 11th of January 1808, he conveyed the same to the defendant. St. Cyr, from the time of his first entry on the lots, in 1785 or 1786, continued to cultivate and possess them, and keep up his part of the fence, until the whole common field inclosure was destroyed, about the year 1798 ; and Choteau, from the time of his purchase in 1801, until he sold to the defendant, and the defendant from the time of his purchase, have continued to occupy the same, to the present time ; and in the year 1820, the claim to the two lots was confirmed to Auguste Choteau by the commissioners.

From this statement of the case, according to the plaintiff's own showing, there is a regular deduction of title or claim, from the persons for whom the lots were surveyed to the defendant. But it appears, that those persons, Kiercereau and Gamache, sold their claim twice ; in the first place, to Louis Chancillier, under whom the plaintiff claims ; and in the second place, to St. Cyr, under whom the defendant claims. If these title-papers were to be considered, independent of the acts of congress and the proceedings of the commissioners, the plaintiff, being prior in point of time, would prevail, so far as depended upon the deduction of a paper title, and independent of the question of possession. It becomes necessary, therefore, to inquire how far the acts of congress apply to and affect any part of these title-papers, keeping in mind, that it is all the plaintiff's own evidence ; he *having produced the proceedings before the commissioners, is not now at liberty to deny the facts therein stated. [*771

No grant has been shown, under which the plaintiff sets up his claim ; his title was therefore, incomplete, and by the 4th section of the act of 1805 (2 U. S. Stat. 326), the person claiming the land was bound to deliver to the register of the land-office, or recorder of land titles, within the district where the land lies, a notice in writing, stating the nature and extent of his claim ; and also to deliver to the said register or recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance or other written evidence of his claim. And the law directs, that they shall be recorded by the register or recorder, &c.; with a proviso, however, that where the lands are claimed by virtue of a complete French or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded, than the original grant or patent, together with the warrant or order of survey and the plat ; but all the other conveyances or deeds shall be deposited with the register or recorder, to be laid before the commissioners. And the act then declares, that if such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such

written evidence of the same, all his right, so far as the same is derived from the first two sections of the act, shall become void, and for ever thereafter barred. If any doubt should arise whether the original right, claimed in this case, comes within the first two sections of the act, that is removed by the act of 1807 (2 U. S. Stat. 440), which repeals the provise to the first section of the act of 1805, and the power of the commissioners is enlarged. The fourth section declares, that the commissioners shall have full power to decide, according to the laws and the established usages and customs of the French and Spanish governments, upon all claims to land within their respective districts, where the claim is made by any person or persons, or the legal representative of any person or persons, who were, on the 20th of December 1803, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, &c., which decision of the commissioners, when in favor of the claimant, shall be final against the United States. And the time is extended for delivering notices and evi-
*772] dences of *the claim, but declaring that the rights of such persons as shall neglect so doing, shall, so far as they are derived from or founded on any act of congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law whatever. There is no evidence that notice of the claim now set up, was ever given, as required by these laws ; or that the deeds from Kiercereau and Gamache to Chancillier were ever delivered to be recorded as required by the law. And Madame Chancillier, having slept upon this claim for so great a length of time, from the year 1785 to 1818, there is every reason to conclude, she had abandoned it ; and these deeds cannot now, under the provisions of these laws, be received as evidence of any right to be established under the acts of congress. And it must have been understood, upon the trial, that the plaintiff sought to establish his right under these acts of congress, or he would not have produced the confirmation of the commissioners, as evidence of his right. But having relied upon it, in support of his own claim, he ought not now to be permitted to deny, that it was one properly submitted to the commissioners. Had he rested his claim upon a title derived from Chancillier, without the aid of the acts of congress, the evidences of his title would not have been affected by those acts ; but the defendant would, in that case, have been fully protected by his length of possession. When, however, a part of the plaintiff's evidence was the proceedings of the commissioners upon this very claim, this court must consider the instruction of the judge as referring only to the effect and operation of the confirmation, under the laws in relation to such claims. And in that view of the case, the instruction was perfectly correct.

There is, however, some obscurity in the application of the instruction given by the court ; but from the evidence set out in the bill of exceptions, we cannot say there was any error. And the justice and law of the case, growing out of such a length of possession, are so manifestly with the judgment of the court below, if we look at the whole evidence on the record ; that we feel disposed to give the most favorable interpretation to the instructions of the court. And we the more readily incline to think the light in which the instruction is here considered, was that in which it was understood
*773] on the *trial, because the counsel for the plaintiff in error has contended, on the argument here, that this confirmation inures to the

benefit of the owner of the claim; that the commissioners decide only the abstract right, as against the United States, without regard to the person who sets up the claim. And it is upon this ground only, that the plaintiff would have introduced in evidence the decision of the commissioners which was directly against his own right; he thereby probably expecting to destroy the effect of the adverse possession, and make the possession, as well as the confirmation of the commissioners, inure to his benefit. But this view of the case cannot be sustained, and the judgment of the court below must be affirmed.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that the judgment of the said district court in this court be and the same is hereby affirmed, with costs.[1]

Ex parte Martha Bradstreet. [*774

In the matter of Martha Bradstreet, Demandant, *v.* Apollos Cooper *et al.*, Tenants

Mandamus.

Jones, of counsel for the demandant in the above-named cases, moved the court for a rule to be granted, to be served on the district judge of the District Court of the United States for the northern district of New York, commanding him to be and appear before this court, either in person, or by an *attorney of this court, on the first day of the next January term of this court, to wit, on the second Monday of January, Anno Domini [*775 1833, to show cause, if any he have, why a *mandamus* should not be awarded to the said district judge of the northern district of New York, commanding him,

1. To reinstate, and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the *mises* thereon joined, lately pending in said court, and said to have been dismissed by order of aid court, between Martha Bradstreet, demandant, and Apollos Cooper *et al.*, tenants.

2. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid.

3. Or, if sufficient cause should be shown by the said judge, on the return of this rule, or should otherwise appear to this court, against a writ of *mandamus* requiring the matters and things aforesaid to be done by the said judge, then to show cause, why a writ of *mandamus* should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismission in the several suits aforesaid, and of the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders, upon writs of error, such records showing upon the face of each what

[1] For a further decision, in a second ejectment on the same title, see 12 Pet. 410.

judgments or final orders dismissing, or otherwise definitively disposing of said suits, were rendered by the said district court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said demandant, or on her behalf, to the judgments of decisions of the said district court in the premises, or to the motions whereon such judgments or decisions were founded; and what motion or motions, application or applications, were made to such court by the demandant, or on her behalf; and either granted or overruled by said district court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially, what motions or applications were made by said demandant, or on her behalf, to said district court, to be admitted to amend her counts in
*776] the said suits, or to produce evidence *to establish the value of the lands, &c., demanded in such counts, together with all the papers filed, and proceedings had in said suits respectively.

On consideration whereof, it is now here considered and ordered by this court, that the rule prayed for be and the same is hereby granted, returnable to the first day of next Jauuary term of this court, to wit, on the second Monday of January, in the year of our Lord 1883. *Per* Chief Justice Marshall.(*a*)

July 20, 1832.

(*a*) Sir:—I take the liberty to inclose a copy of the clerk's entry of the case "*Ex parte* Martha Bradstreet," and to ask, if you dissented from the order of the court in the case. I shall be obliged by the return of the paper. I am, your obedient servant,

Mr. Justice Baldwin. Richard Peters, Reporter, &c.

Philadelphia, 21st July 1832.

Sir:—In the case *Ex parte* Bradstreet *v.* Cooper *et al.*, on the motion by Mr. Jones for a *mandamus* to the district court of the northern district of New York, I dissented from the order of the court in the following respect: 1. In ordering the suits to be reinstated. 2. Requiring the court to permit amendments to be made.

The ground of my dissent was, that a *mandamus* was not a proper remedy; that the dismissal of a suit for want of jurisdiction, was a final judgment, on which a writ of error could be brought; but that the supreme court had no power to issue a *mandamus* in such a case, the judgment being strictly a judicial act, and that though an appellate court could direct amendments, it could only do so, when a case was before them by writ of error or appeal. It was stated in the affidavit, that the court had actually rendered a judgment of dismissal, for the want of jurisdiction, but that there was no entry of it on the record, and that the judge had neglected or refused an application to direct it to be done. I had no doubt, that this was a proper case for a rule to show cause why a *mandamus* should not issue, directing the entry of such judgment as had been rendered by the court, so as to give the plaintiff the benefit of a writ of error. My opinion was confined to this subject-matter. The order of the court, of which you inclosed me a copy in your note of to-day, which is herewith returned, was not shown to me, at the time it was made; and until to-day, I was not aware of its extent on the last point, embracing matters not taken into consideration by me. Yours, &c.

Richard Peters, Esquire, Henry Baldwin.
Reporter of Supreme Court.

UNITED STATES, Plaintiff, *v.* ZALEGMAN PHILLIPS.

Practice.

After a writ of error had been taken out to this court, on an indictment found and tried in the circuit court for the eastern district of Pennsylvania, a *nolle prosequi* was entered in that court, by order of the president of the United States, and a copy of the same having been filed in the office of the clerk, the supreme court, on motion of the attorney-general, dismissed the cause.

Mr. *Attorney-General*, of counsel for the plaintiff, having informed the court that a *nolle prosequi* had been entered in this cause in the circuit court of the United States for the eastern district of Pennsylvania, agreeable to instruction from the President of the United States, of which a copy has been filed in the office of the clerk of this court, and which was read in open court, now here moved the court to dismiss this cause; on consideration whereof, it is ordered by this court, that this cause be and the same is hereby dismissed.

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*VEITCH & Co. *v.* FARMERS' BANK OF ALEXANDRIA. [*777

Dismissal of appeal.

Appeal dismissed: the appellees having failed to lodge a transcript of the record of the cause with the clerk of the court, agreeable to the rules of the court, and the appeal-bond and security not having been given.

ON motion of Mr. *Swann*, of counsel for the complainant and appellee in this cause, and a certificate of the clerk of the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, stating, "that at a court continued and held for the said district and county, the 24th day of November 1830, the defendants prayed an appeal from the decree of the court pronounced in this cause, to the next supreme court of the United States, which was granted, upon giving bond and security in the sum of $200, to be approved by one of the judges of said court; and further certifying that the said bond and security had not been given, nor had a transcript of the record been ordered," having been filed; and the said appellants having failed to lodge a transcript of the record in said cause with the clerk of this court, agreeable to the rules of this court: it is now here ordered and adjudged, that this cause be docketed, and that the said appeal be and the same is hereby dismissed.

BOYCE *et al. v.* FELIX GRUNDY.

Appeal-bond.

The transcript of the record showed that no appeal-bond was taken or approved by the judge who signed the citation in the cause; the appeal was dismissed.

ON consideration of the motion made in this cause by Mr. *Key*, of counsel for the appellee, on a prior day of the present term of this court, to wit, on Saturday the 28th instant, to dismiss this cause, on the ground, that it appears from the transcript of the record in this cause, that no appeal-bond was taken or approved by the judge signing the citation in said cause, it is now here ordered and adjudged by this court, that for the reason aforesaid, this appeal from the circuit court of the United States for the district of West Tennessee be and the same is hereby dismissed.

INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

CHEROKEE INDIANS.

COLLECTORS OF THE CUSTOMS.

See PENALTIES AND FORFEITURES.

CONSTITUTIONALITY OF STATE LAWS.

See CHEROKEE INDIANS.

ENTRY OF LAND.

ERROR.

See JUDGMENT, 3.

ESTOPPEL.

EVIDENCE.

LANDLORD AND TENANT.

LANDS AND LAND TITLES.

PENALTIES AND FORFEITURES.

PRIORITY OF THE UNITED STATES.

RECORDING OF DEEDS.

REMAINDER.

WILL.

WRIT OF ERROR.

See ERROR, 1: Worcester *v.* State of Georgia.