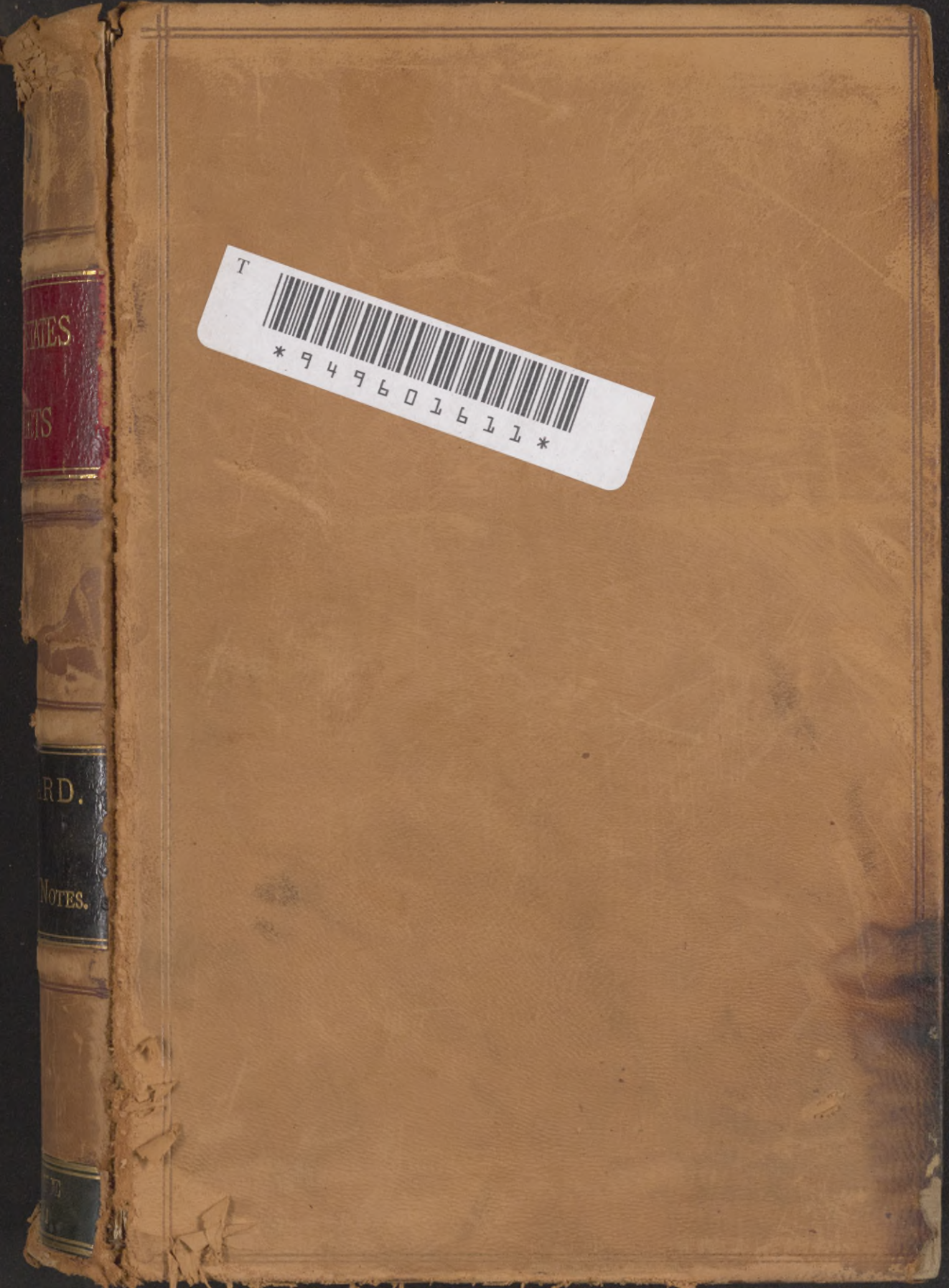
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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

JANUARY TERM, 1844.

By BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. II.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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1883.

SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, (*a*) Chief Justice.

HON. JOSEPH STORY, Associate Justice.

HON. JOHN McLEAN, Associate Justice.

HON. HENRY BALDWIN, Associate Justice.

HON. JAMES M. WAYNE, Associate Justice.

HON. JOHN CATRON, Associate Justice.

HON. JOHN McKINLEY, Associate Justice.

HON. PETER V. DANIEL, Associate Justice.

HUGH S. LEGARÉ, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

ALEXANDER HUNTER, Esq., Marshal.

(*a*) The Chief Justice was attacked, very early in the session, by a severe indisposition, which rendered him unable to take his seat upon the bench during the remainder of the term.

A TABLE 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.

C.

D.

H.

N.

O.

P.

V.

W.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

JANUARY TERM, 1844.

ALEXANDER G. MCNUTT, GOVERNOR OF MISSISSIPPI, WHO SUES FOR THE USE OF LEGGETT, SMITH, AND LAWRENCE, *v.* RICHARD J. BLAND AND BENJAMIN G. HUMPHREYS.

By a law of the state of Mississippi, sheriffs are required to give bond to the governor for the faithful performance of their duty.

A citizen of another state has a right to sue upon this bond; the fact that the governor and party sued are citizens of the same state, will not oust the jurisdiction of the Circuit Court of the United States, provided the party for whose use the suit is brought, is a citizen of another state.[1]

Under the resolution passed by Congress in 1789, relating to the use of state jails, and the law of Mississippi passed in 1822, a sheriff has no right to discharge a prisoner in custody by process from the Circuit Court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the Circuit Court of the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Mississippi.

It was a suit upon a sheriff's bond, given by Bland, sheriff of

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[1] APPLIED. *Huff* v. *Hutchinson*, 14 How., 587. DISTINGUISHED. *Coal Co.* v. *Blatchford*, 11 Wall., 176. REVIEWED. *Foss* v. *First National Bank of Denver*, 1 McCrary, 477. CITED. *Florida* v. *Georgia*, 17 How., 499; *Rice* v. *Houston*, 13 Wall., 67; *Walden* v. *Skinner*, 11 Otto, 589. See *Humphreys* v. *Leggett*, 9 How., 297; s. c. 21 How., 70; *Knapp* v. *R. R. Co.* 20 Wall., 123, 124. See also *Bonafee* v. *Williams*, 3 How., 574; *Ward* v. *Arredondo*, 1 Paine, 410; *Brown* v. *Strode*, 5 Cranch, 303.

A suit against a collector, to recover back money paid for duties alleged to have been illegally exacted, may be brought in the Circuit Court, notwithstanding both parties reside in the same state. *Schneider* v. *Barney*, 13 Blatchf., 37. Since the passage of the act of March 3, 1875, a non-resident assignee of a mortgage may foreclose it in the Circuit Court, though the mortgagor and assignor are both citizens of the state in which the court sits. *Seckel* v. *Backhaus*, 7 Biss., 354.

In patent causes the Circuit Court has jurisdiction, at least by injunction, where both parties are citizens of the same state. *Sayles* v. *Richmond, &c., R. R. Co.* 3 Hughes, 172. And see *Hartell* v. *Tilghman*, 9 Otto, 574.

Claiborne county, dated 10th November, 1837, and in the penalty of $15,000.

At the May term, 1837, of the Circuit Court of the United States for the southern district of Mississippi, Leggett, Smith, and Lawrence, citizens of New York, instituted a suit against George W. McNider, a citizen of Mississippi, and in November following obtained a judgment for $3,910.78.

On the 30th December, 1837, Leggett, Smith, and Lawrence sued out a writ of *capias ad satisfaciendum*, against the body *10] of the said *George McNider, which was directed to the marshal of the state of Mississippi. The writ was executed, and McNider taken into custody. The marshal handed him over for safe keeping to Bland, the sheriff of Claiborne county.

Whilst thus in custody, McNider applied to McDougall, a judge of probate, duly commissioned in and for the county of Claiborne, for the benefit of the insolvent law of the state of Mississippi, passed in June, 1822. The forms of that law being complied with, the judge directed McNider to be discharged from imprisonment, and the sheriff accordingly discharged him.

At May term, 1839, Leggett, Smith, and Lawrence brought suit against the sheriff and his securities, of whom Humphreys was one, using for this purpose the name of the governor of Mississippi, to whom the bond had been given. The breach assigned was that the said Bland, in violation of his duty as sheriff, did discharge, release, and set at liberty his said prisoner, not by force or operation of law or in pursuance of any power or process emanating therefrom, but in violation thereof, and without the license or consent of said plaintiffs, or of their lawful agent or attorneys, and against their will, they the said plaintiffs being wholly unsatisfied and unpaid, and said judgment aforesaid being then and there in full force and effect, and not in any respect reversed or annulled, paid off, or discharged.

The defendants pleaded two pleas:

1. That the act of June, 1822, passed by the legislature of Mississippi, provided amongst other things that where an insolvent person should not be able to satisfy or pay his ordinary prison fees, if the creditor, upon notice given to him or her, his or her attorney or agent, should refuse to give security to the jailer or sheriff for the payment of such prison fees, or should fail to pay the same when demanded, the sheriff or jailer should discharge such debtor out of prison; and it was further provided that whereas it was unreasonable that sheriffs should be obliged to go out of their counties to give notice to

creditors at whose suit any person might be in custody of such sheriff, where any execution should be delivered to the sheriff of any other county than that where any creditor resided, such creditor should name some person in the county where the execution was to be levied, to be his, her, or their agent for the particular purpose of giving to and receiving from the sheriff any notices which might be necessary relating thereto; and if any creditor should fail *to appoint such agent, [*11
the sheriff should not be obliged to give notice previous to the discharge of such prisoner for want of security for his prison fees, but such prisoner should be discharged without any notice to be given to the creditor so failing.

The defendants then averred that Leggett, Smith, and Lawrence, at the time of the commitment, were not residents of Claiborne county, nor were they ever so afterwards, and that they failed to appoint any agent or attorney to receive a notice from the sheriff; that McNider was unable to pay his prison fees, and that the plaintiffs wholly failed to give security to the sheriff for the payment of the said prison fees.

2. That McNider was regularly, and according to the provisions of the acts of the legislature of Mississippi for the relief of insolvent debtors, brought before McDougall, a judge of probate, and then and there, by the order and warrant of the said judge, discharged from the custody of the said sheriff.

The replication of the plaintiffs to the first plea was, that at the time of the discharge of McNider, they had an agent residing within the state of Mississippi, to wit, in the county of Warren, and that no application whatever was made to the plaintiffs or their agent, for the payment of jail fees, or to give security for the same; nor was any notice whatever given to the plaintiffs or their agent or attorney of an intention to discharge the prisoner, or of his application to be discharged, either for that cause or any other.

The replication to the second plea was, that the prisoner was, by virtue of process legally issuing from the Circuit Court of the United States, taken into custody by the marshal of the district, and by him was delivered to the defendant, Bland, for safe keeping, who was then sheriff of the county in which the prisoner was taken. That the prisoner was not discharged from custody aforesaid by virtue of any process emanating from any court of the United States or judge thereof, nor by virtue of any law of the United States, but that he was discharged contrary to the provisions of the several acts of Congress made and provided, prescribing the mode and manner of discharging prisoners confined under process from the courts of the United States.

To both these replications the defendant demurred. There was a joinder in demurrer as to the first; what was done with the second, the record did not show.

The court below sustained both demurrers.

*12] *Jones*, for the plaintiffs in error.

Walker, for the defendants.

Jones contended,

1. That the laws of the United States and of Mississippi, and the bond of the sheriff, bound the defendant to receive and hold McNider as a prisoner, under the laws and jurisdiction of the United States, not of the state of Mississippi.

2. That the pleas of the defendant were insufficient, and whether the replications were good or not, the court would look to the first error in the pleadings, the insufficiency of the pleas.

3. That the United States and Mississippi have each separate systems for insolvent debtors; that they cannot be reconciled with each other.

4. That the courts of the United States and of the states can each look only to their respective systems and act upon them.

5. That the state courts cannot discharge a debtor in confinement under execution from a court of the United States, either under the laws of insolvency, or by any other state authority.

He considered this case as coming fully within the principle established by this court in *Duncan* v. *Darst*, 1 How., 301. No state can change the laws of the United States. The insolvent law of Mississippi is confined to cases where persons are under execution by process issued by any court of record within the state. 1 Howard & Hutchinson, 637. It provides also, that no creditor shall receive anything unless he shall have obtained a judgment. The discharge by the sheriff in consequence of not being indemnified is also a branch of the state system. The marshal could not have discharged the prisoner, and the sheriff was *pro hac vice* the marshal. The latter was responsible to the former for the fees.

Walker contended that the equity of the case was with the defendants, inasmuch as the discharge had been ordered by a court of competent jurisdiction, which would have enforced its order by an attachment. The first replication averred that the plaintiffs had an agent in an adjoining county, which was tendering an immaterial issue. The demurrer to this was

therefore properly sustained. There was no question raised below as to the power of the state. But the court below had no jurisdiction in the case, as it was between citizens of the same state. Although this court has decided that where the real party is out of the state, he may use the name of a nominal *plaintiff within it, yet it has also decided [*13 that where the assignment is by operation of law, such a plaintiff cannot sue. The law of Mississippi gives no right of action on a sheriff's bond, but provides other remedies. Howard & Hutchinson, 625 *et seq.* They are by motion against the sheriff and his securities.

Jones, in reply.

The replication must be overlooked, if the plea itself is bad, which is the case here. It is settled that the real party to a suit is the party for whose use it is brought. The governor's name is only used *pro forma*. If the argument on the other side be sound, there is no remedy on the bond at all; for an escape could not be tried upon motion. The object of requiring a bond was to secure the interest of all the citizens of the state, and yet the bond would become of no use in cases of escape. The law of Mississippi accepting the Resolutions of 1789, gives a remedy to all parties concerned. How. and Hut., 49.

Mr. Justice BALDWIN delivered the opinion of the court.

As the judgment below was rendered on a general demurrer, it is necessary to ascertain in what part of the pleadings the first demurrable defect occurred, which the defendant here alleges was in the declaration, inasmuch as it appears that the plaintiffs and defendants were citizens of Mississippi, and consequently the court below had not jurisdiction of the case.

By the law of that state, How. and Hut., 290, 291, all sheriffs must give a bond to the governor of the state for the time being, and his successors, conditioned for the faithful performance of the duties of his office; which bond may be put in suit and prosecuted from time to time at the costs and charges of any party injured, until the whole amount of the penalty thereof be recovered. This suit was accordingly brought in the name of the governor, for the use of Leggett, Smith, and Lawrence, citizens of New York.

The parties in interest, therefore, had a right to sue the defendants in the Circuit Court in their own names, by a bill in equity in an appropriate use, or by an action of debt, or for an escape, against the sheriff himself, as in *Darst* v. *Duncan*, 1 How., 301, if he made out a cause of action in either form,

and we can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor,
*14] who is a purely naked trustee for any party injured. *He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the sheriff's bond.

It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriffs' bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. The constitution extends the judicial power to controversies between citizens of different states; the 11th section of the Judiciary act gives jurisdiction to the Circuit Courts, of suits between a citizen of the state where the suit is brought, and a citizen of another state. In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants: as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the constitution or law can he be considered as a litigant party: both look to things not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law.

This court must have acted on these principles in *Browne et al.* v. *Strode*, 5 Cranch, 303, which was a suit on an administration bond of an executor, for the faithful execution of the testator's will, in conformity with a law of Virginia, 5 Hen. St., 461, which requires all such bonds to be payable to the justices of the county court, where administration is granted, but may be put in suit and prosecuted by, and at the costs of the party injured. The object of that suit was to recover a debt due by the testator to a British subject; the defendant was a citizen of Virginia; the persons named in the declaration as plaintiffs were the justices of the county, who were

also citizens of Virginia, yet it was held that the Circuit Court of that state had jurisdiction. We are aware of no subsequent decision of this court, which in the least impairs the authority of that case, or contravenes the principle *on [*15 which it was decided, that where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in, or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists.

Executors and administrators are not in this position, they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons, be the cause of action what it may; nor can they interfere with the conducting of the suit to assert their rights to the property of the decedent, which do not vest in them. The personal representative is, therefore, the real party in interest before the court, 12 Pet., 171, and succeeds to all the rights of those they represent, by operation of law; and no other persons are capable, as representatives of the personalty, of suing or being sued. They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal courts in cases where the decedent could not. 8 Wheat., 668; 4 Cranch, 308, S. P. By the 11th section of the Judiciary act, assignees cannot sue where the assignor could not, nor can they sue in their own names if the assignor could, unless the assignees were aliens or citizens of another state than that of the defendant, and the instrument sued on was so assigned as to vest the right of action in the assignees, in which latter case, the suit must be by the party originally entitled to sue. Thus where the payee of a promissory note, which was neither negotiable nor assignable, so as to sustain an action by the assignees, sued for the use of a corporation incapable of suing in the federal courts, this court held that the Circuit Court had jurisdiction, on the ground that the suit was on a contract between the plaintiff and defendant. The legal right of acting being in the plaintiff, it mattered not for whose use the suit was brought, the parties being citizens of different states. *Irvine* v. *Lowry*, 14 Pet., 298. In that case the decision in 5 Cranch was reviewed and affirmed; and as it is in all respects analagous to, it must govern this and similar cases, where the cause of action is not founded on a contract between the parties or their legal representatives.

The objection to the jurisdiction cannot, therefore, be sustained.

*16] *The next question arises on the defendant's first plea in bar, which sets up a discharge of the prisoner by the sheriff, in default of the plaintiff in the execution paying the prison fees due, pursuant to the act of 22d June, 1822, sects., 35, 47; Hut. and How., 640—644.

This law, by its own force cannot apply to persons committed on executions from the courts of the United States, it must first be adopted by act of Congress, or some rule of court under the authority conferred on the courts of the United States by law. It is a peculiar municipal regulation, applicable and intended to apply only to persons committed under state process, as clearly appears by the 62 section of the same law, in the revised code, as to process of the United States. How. and Hut., 649, 650. After reciting in full the resolution of Congress relating to jails, passed in 1789, 1 Story, 70, it proceeds, "And whereas it is just and reasonable to aid the United States therein, on the terms aforesaid, until other provisions shall be made in the premises, it is enacted, That all sheriffs, &c., within this state, to whom any person or persons shall be sent or committed by virtue of legal process, issued by or under the authority of the United States, shall be, and are hereby required to receive such prisoners into custody, and to keep the same safely until they shall be discharged by due course of law, and be liable to the same pains and penalties, and the parties aggrieved be entitled to the same remedies, as if such prisoners had been committed under the authority of the state. The sheriff may require of the marshal the fulfilment of the proposals of the general government, with regard to rent and sustenance, at least quarter yearly; and on the discharge of the prisoner shall make a statement of charges, &c., to enable him to make his return to the proper department of the general government."

Taking this section of the law in connection with the resolution of 1789, there appears an evident intention in the legislature, that the law should cover the whole resolution, so as to carry it into effect in all its parts and provisions. Hence the terms in each must be made to harmonize; whereby the phrase in the 62d section, "and to keep the same safely until they shall be discharged by due course of law," will be referred to the corresponding phrase in the resolution, "until they shall be discharged by due course of the law thereof," (the United States,) so as to authorize no discharge by virtue of any state law, incompatible with the resolution. If any doubt could arise on these words in the resolution, "all pris-

oners, committed under the authority of the United States," whether they applied to cases *between individuals, it is removed by the explicit language of the law, "any person or persons who shall be sent or committed by virtue of legal process, issued by, or under the authority of the United States," &c., "and the parties aggrieved shall be entitled to the same remedies," &c., which necessarily embrace all cases, civil or criminal.

As it would be wholly inconsistent with this view of the resolution and law for the legislature to authorize the sheriff to discharge any person from custody, otherwise than by the due course of the laws of the United States, we cannot attribute such an intention to them, unless the words of their act clearly indicate it; but there is nothing in the act to that effect, or any words which admit of such construction. On the contrary, as the resolution of Congress positively requires it, as the preamble to the state law declares it to be "just and reasonable to aid the United States therein," the enacting part must be taken accordingly; otherwise the law would conflict with the resolution.

The act of Congress passed in 1800 provides for the mode of discharging insolvent debtors, committed under process from the courts of the United States, and the cases in which it may be done; it is obligatory on the sheriffs in every county of the states who have acceded to the resolution of 1789, and no discharge under any state law not adopted by Congress, or a rule of court, can exonerate the officer. *Vide* 1 Story, 715; 3 Id., 1932, 1939; *Suydam* v. *Broadnax*, 14 Pet., 75; 10 Wheat., 36, 37. From the time of *Palmer & Allen*, 7 Cranch, 554, to *Darst* v. *Duncan*, the language and decisions of this court have been uniform for more than forty years, that a state law, which is "a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on state officers in the execution of the process of their courts, is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. By the process acts of 1789, 1792, and 1828, Congress have adopted such state laws as prescribe the modes of process and proceedings in suits at common law, as are not in conflict with the laws of the United States, which can be executed by the courts of the United States; which impose no restraint on, or obstruction of their process from its inception till ultimate satisfaction from the defendant, or the marshal, sheriff, or other officer, intrusted with its execution." 2 Pet., 525; 10 Wheat., 40, 56, &c. "Congress, however, did not intend *to defeat the execution of [*18

judgments rendered in the courts of the United States, but meant they should have full effect by force of the state laws adopted, and therefore all state laws regulating proceedings affecting insolvent persons," or that are addressed to state courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. 1 How., 306; 14 Pet., 74, S. P. For these reasons we are of opinion that the defendants' first plea is defective, in not setting forth a case which justifies the discharge of the person committed on the execution.

The second plea sets up a discharge of the prisoner pursuant to the laws of Mississippi, as an insolvent debtor, by order of a judge of probate; which presents a case covered by the decision of this court in *Darst* v. *Duncan*, that such a discharge by a sheriff was no defence to an action of debt for an escape. 1 How., 304. The judgment of the court below must therefore be reversed, and judgment rendered for the plaintiff.

Mr. Justice DANIEL dissented.

From the opinion just pronounced on the part of the court in this cause, I am constrained to differ. Although it ever must be with unaffected diffidence that I shall find myself opposed to a majority of my brethren, still a feeling like that just adverted to, should not, and properly cannot, induce in me a relinquishment of conclusions formed from examinations carefully made, and upon decisions which appear to be distinctly, as they have been repeatedly announced. My opinion is, that the judgment of the Circuit Court against the plaintiff below ought to be affirmed, for the reason that the court could not properly take cognizance of his cause. Under systems of polity compounded as are the federal and state governments of this Union, instances of conflicting power and jurisdiction, real or apparent, will frequently arise, and will sometimes run into niceties calculated to perplex the most astute and practised expositors. For myself, I must believe that the surest preventive of such instances, their safest and most effectual remedy when they shall occur, will be found in an adherence to limits which language in its generally received acceptation prescribes, and in shunning not merely that which such acceptation may palpably forbid; but, as far as possible, whatever is ambiguous or artificial. In adopting or commend-

*19] ing the rule thus indicated, I undertake to propound no new principle of *construction to this court, to essay no innovation upon its doctrines. I plant myself, on the con-

trary, upon its oft repeated decisions, and invoke their protection for the interpretation now insisted upon.

The action in the Circuit Court was instituted in the name of Alexander McNutt, governor of the state of Mississippi, (who was the successor of Charles Lynch,) who sues for the use of Thomas Leggett and others, citizens of the state of New York, against Bland, Humphreys, and Geissen, citizens of the state of Mississippi. It was founded on a bond executed by Bland, as sheriff of the county of Claiborne in the state above mentioned. The pleadings, so far as they relate to the conduct of the sheriff in fulfilment of his duties, or in dereliction thereof, are irrelevant to the question here raised, and need not therefore be examined. The proper question for consideration here is this—whether upon the case as presented upon the declaration, the Circuit Court of Mississippi could take jurisdiction. McNutt is the party plaintiff upon the record, in whom is the legal right of action. Leggett and others, who are said to be the beneficiaries in the suit, and in whom is the equitable interest, are not the legal parties to the suit at law, and could not maintain an action upon the bond to which they were not parties.

Is McNutt to be considered as suing in his private individual character, and the addition "governor of the state of Mississippi," to be regarded as merely a phrase of description? Or is he to be viewed as the representative of the state of Mississippi, or rather as identified with the sovereignty of that state, and having vested in him the exercise of her executive authority? Let both branches of this inquiry be cursorily pursued. If McNutt is to be regarded as a private party to the action, whether in his own interest, or as the private agent of the state for certain purposes, it would indeed seem to be too late, and entirely supererogatory, to construct an argument to prove, that to warrant either the commencement or prosecution of a suit in his name in a Circuit Court of the United States, his citizenship must be averred and shown upon the record. Decisions to this effect may be said to have been piled upon the question, for they may be traced from a period coeval almost with the passage of the judicial act, down to a comparatively recent day; ranging through at least ten volumes of the decisions of this court: and ruling, it is believed without an exception, that wherever jurisdiction is to be claimed from the citizenship or alienage of parties, such citizenship or alienage must be expressly set forth: ruling moreover, that wherever jurisdiction is *claimed from [*20 the character of parties, it must be understood as meaning the parties to the record.

The first case in support of these positions, is that of *Bingham* v. *Cabot et al.*, from 3 Dall., 382, instituted in 1797, in which the plaintiffs were styled in nar. as John Cabot, (with the co-plaintiffs,) described as being "all of our said district of Massachusetts," and as complaining that "said William at Boston being indebted, &c." Lee, attorney-general, insisted "that there was not a sufficient allegation in the record of the citizenship of the parties to maintain the jurisdiction of the Circuit Court, which is of limited jurisdiction." Dexter, on the other hand, urged "that stating in the declaration the party to be of a particular place, designates his home, and of course his citizenship." The court were clearly of opinion, "that it was necessary to set forth the citizenship (or alienage where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court." In the year 1797, were decided in the Supreme Court the cases of *Turner* v. *Eurille*, and of *Turner, admin., &c.* v. *The Bank of North America*, reported in 4 Dall., the former at pp. 7 and 8, the latter on pp. 8, 9, 10 and 11. The declaration in the former case set out a demand by the Marquis de Casa Eurille, of ——, in the island of ——, against Stanley and the intestate of Turner & Greene, merchants and partners at Newbern in the said district. Upon objection to the jurisdiction for want of a proper description of parties—By the court—"The decision in the case of *Bingham* v. *Cabot et al.* must govern the present case; let the judgment be reversed with costs." *Turner, admin. of Stanley* v. *The Bank of North America* was an action upon a promissory note drawn at Philadelphia by Stanley, endorsed by Biddle & Company to the Bank of North America. The nar. stated that the president and directors were citizens of the state of Pennsylvania, that Turner the administrator, and Stanley the intestate, were citizens of the state of North Carolina; but of Biddle & Company, the payers and endorsers, there was no other description than "that they used trade and merchandise at Philadelphia or North Carolina." Ellsworth, chief justice, in delivering the opinion of the court, after remarking that the Bank of North America, as well as the drawer of the note, was properly described, proceeds thus: "The error assigned is, that it does not appear from the record that Biddle & Company, the promisees, or any of them, are citizens of a state
*21] other than that of North Carolina. The Circuit Court, though an inferior *court in the language of the Constitution, is not so in the language of the common law. A Circuit Court, however, is of limited jurisdiction, and has cognizance not of cases generally, but only of a few specially

circumstanced; and a fair presumption is, not (as with regard to a court of general jurisdiction) that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary to set forth, upon the record of a Circuit Court, the facts and circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant is a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien. Here the description of the promisee only is, that he used trade at Philadelphia or North Carolina, which contains no averment that he was a citizen of a state other than North Carolina, or an alien. We must therefore say there was error." In *Mossman* v. *Higginson*, 4 Dall., 14, the same doctrine is affirmed, and the court conclude their opinion with the following explicit language: "Neither the Constitution, nor the act of Congress, regards, on this point, the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction. There is here no such description." The case of *Course et al.* v. *Stead et ux.*, 4 Dall., p. 22, is marked by one trait which peculiarly illustrates and enforces the principle ruled in the cases previously cited. In this last case, a supplemental bill was filed making a new party to a suit previously pending, but in the supplemental bill no description of the citizenship of this new defendant was given: the absence of such description having been assigned for error, it was contended that such a description was not necessary in the supplemental suit, which is merely an incident of the original bill brought in the same court; but the Supreme Court sustained the objection, and reversed the decree of the Circuit Court on the ground of jurisdiction. Next in the order of time is the case of *Wood* v. *Wagnon*, 2 Cranch, 9. Where the statement in the pleadings was that Wagnon, a citizen of Pennsylvania, showeth, that James Wood, of Georgia, &c. The judgment was reversed for the defect that the plaintiff and defendant were not shown by the pleadings to be citizens of different states.

In *Hepburn and Dundas* v. *Elzey*, 2 Cranch, 445, the decision turned upon a defect in the description of a party necessary to give *jurisdiction. *Winchester* v. *Jackson*, [*22 3 Cranch, 515. The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states. In *Kemp's Lessee* v. *Kennedy*, this court declare, that "the courts of the United States are all of limited jurisdiction, and their proceedings are erroneous

if the jurisdiction be not shown upon them." 5 Cranch, 185. The same in effect, the same indeed in terms, is the decision of this court in *Montalet* v. *Murray*, 4 Cranch, 46. Again, the principle that the character which authorizes access to the Circuit Court must be apparent upon the record, is strikingly exemplified in *Chappedelaine et al.* v. *Dechenaux*, 4 Cranch, 306. In this case the plaintiffs were trustees, not suing in their own interest; yet as they were aliens and as such entitled to sue in the Circuit Courts of the United States, this court, in virtue of that character, and their title flowing therefrom apparent on the record, sustained the jurisdiction of the Circuit Court. Passing, with a mere mention of them, the cases of *The Hope Insurance Company* v. *Boardman et al.*, 5 Cranch, 57; *Hodgson and Thompson* v. *Bowerbank et al.*, 5 Cranch, 303; *Skillern's Ex'rs*, v. *May's Ex'rs.*, 6 Cranch, 267; *The Corporation of New Orleans* v. *Winter*, 1 Wheat., 91, all full to the point; I will quote an emphatic and more comprehensive affirmation of Judge Washington in reference to the powers of the Circuit Courts, expressed in the opinion of that judge in *McCormick* and *Sullivant*, 10 Wheat., 199: "They are all (says he) of limited jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error or appeal be reversed for that cause." But the fullest and clearest exposition and vindication of the doctrine contended for in this opinion, will be found in the reasoning of Chief Justice Marshall, in delivering the decision in the case of *Osborn* v. *The Bank of the United States*. The portion of the reasoning particularly referred to commences on the 856th page of the 9th volume of Wheaton: "The judicial power of the Union," says the chief justice, "is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest: but it has never been suspected that, if the executor
*23] be a resident of another state, the jurisdiction of the *federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that the jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in

which the existence of an interest out of the party on the record is more unequivocal than in that which has been stated. Why then is it universally admitted, that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record." Again he remarks, p. 857, "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record."

This reasoning of the late chief justice seems to meet the present case in every aspect of which it is susceptible, and to dispel every shade of doubt that could possibly be cast upon it. The doctrine this reasoning so well sustains, is reaffirmed by the same judge, in the still later case of *The State of Georgia* v. *Juan Madrazo*, 1 Pet., 122; and amongst other authorities there cited, the principles ruled as above mentioned in *Osborne* v. *The Bank of the United States*, are referred to and approved. *Vide* also *Keary et al.* v. *The Farmers' and Mechanics' Bank of Memphis*, 16 Pet., 90.

Alexander McNutt, in the case under examination, must be regarded as a private person acting in a private capacity; at most as a mere agent under a law of Mississippi, in whom the interests of other individuals may to a particular extent have been vested, and through whom they were authorized to sue. He represented or was identified with no political or fiscal rights or interests of the state of Mississippi. That state had no interest involved in the conducting of that suit by McNutt, and much less was she a party to the record in that suit. Standing then in the relation of a mere agent in the transaction, and there being no law of the United States investing the federal courts with jurisdiction as incident to such agency, he could have access to those courts, and the courts themselves could have jurisdiction, solely in virtue of his character of citizen of a state different from that in *which the defendants resided, and that character it was indispensable [*24
should appear upon the record. These are positions which it has seemed to me impossible successfully to assail; positions encompassed with a chain of authorities comprehending the entire existence and duration of the government itself. This, however, is said to have been broken by the act of this court, and by that act an opening made for farther power and jurisdiction in the Circuit Courts. The mean by which such im-

portant consequences are supposed to have been effected, is the decision of the case of *Brown at al.* v. *Strode*, to be found in 5 Cranch, 303. In this case, which was submitted without argument, and in which the certificate directed to the Circuit Court is comprised in two lines, no reason whatever is assigned for the conclusion at which the court appear to have arrived The facts of the case, as presented in the short abstract of it, are thus stated: "It was an action upon an executor's bond given in conformity with the laws of Virginia. The object of the suit was to recover a debt due from the testator in his lifetime to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs, were the justices of the peace for the county of Stafford, and were all citizens of Virginia." The court ordered it to be certified as their opinion "that the court below has jurisdiction in the case." This is the whole case, and it is confidently believed to stand entirely solitary; without support, and without a likeness in the whole history of our jurisprudence: and, in commenting upon this case, it may be safely asserted, that if the court in their certificate have intended to affirm, that the holders of equitable interests, *cestuis que trust*, who are not the holders of the legal interests, or rights of action at law, are in actions at law the regular and proper parties to the record, then, indeed, they have not merely overturned the series of decisions in this court, from the case of *Bingham* v. *Cabot*, in 3 Dall., decided in 1798, down to the case of *The Governor of Georgia* v. *Madrazo*, 1 Pet., 110;—they have reversed, moreover, what is believed has been regarded as a canon of the law, wherever the principles of the common law have been adopted; and this they have accomplished by one short sentence, and without a single word to explain this mighty revolution. But can it be reasonably presumed that this court have in so cursory a mode intended to reverse its own well-considered, well-reasoned, and oft-repeated decisions; and this, too, without professing to review them—nay, without one word of reference to them of any kind? A
*25] *presumption like this seems scarcely compatible with that cautious reluctance with which innovation on settled principles is always admitted by the courts. Is it not far more probable, that the short and isolated abstract in question, exhibits an imperfect picture of the action and purposes of the court as applicable to some particular state of case which may not be fully and accurately given, for the record of the case in the court below is not set out *in extenso*. But let it be supposed that the objects and the language of the court, in the case of *Browne and Strode*, are accurately given; still

the inquiry recurs, does that case establish the law of this cause at the present day? *Browne and Strode* was decided in 1809. Turning, for the moment, from the decisions of this court prior to 1809, supposed (strong and explicit, and numerous as they are) to have been silently demolished by *Browne and Strode*, what must be understood with respect to the decisions of *Skillern's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267; of *Osborne* v. *The Bank of the United States*, 9 Wheat., 733; of *McCormick* v. *Sullivant*, 10 Wheat., 199, and of *The Governor of Georgia* v. *Madrazo*, 1 Pet., 110—all posterior in date to 1809? If these cases are to be received upon the import solely of their own terms, uninfluenced by any reference to prior decisions, still as they are posterior in time to *Browne and Strode*, and are wholly irreconcilable therewith, they should be understood as controlling and reversing that decision. How much stronger, then, nay, how irresistible appears this conclusion, when it is ascertained that the several decisions subsequent to 1809 refer expressly to those of previous date, rely upon them as forming their own foundation, and reaffirm them as the law of the federal courts.

The only decision in this court which would appear, upon a superficial view of it, to give color to the decision of *Browne et al.* v. *Strode*, is the case of *Irvine* v. *Lowry*, reported in 14 Pet., 293. An attentive examination of the latter case, however, will show that, so far from resembling *Browne and Strode*, the facts of the two cases differ essentially; and that the former does not sustain, but, in effect, contradicts the latter. In *Irvine* v. *Lowry* the action was in the name of Irvine the payee of the note, for the benefit of the Lumberman's Bank. On behalf of Lowry the defendant, exception was taken to the jurisdiction upon the ground that the Lumberman's Bank, the beneficiaries in the suit, consisted, in part, of persons who were citizens of the same state to which the defendant belonged. The case of *Browne et al.* v. *Strode* was relied on to show that these *beneficiaries and not [*26 the nominal parties or those who held the legal interest, should be considered the true parties on the record. This exception was overruled, and the jurisdiction sustained in the name of the party holding the legal right, in conformity with the current of authorities before cited. 'Tis true that, in the opinion delivered in this case, the decision in *Browne et al.* v. *Strode* is mentioned, and accounted for upon an hypothesis which by no means divests it of its anomalous character, any more than it rests the case of *Irvine* v. *Lowry* upon any real similitude with it. The argument is this, that although in *Browne et al.* v. *Strode* the plaintiffs and defendant were citizens of the same

state, yet the statute of Virginia, which requires the executor's bond for the protection of creditors and legatees, passes the legal right to those whose interests the bond is designed to protect. To this reasoning several answers at once present themselves, either of which appears to be sufficient. 1. If this could be so understood, it would leave the objection precisely where it stood before. The parties to the action would still be all citizens to the same state, whereas the judicial act declares they shall be (that is the plaintiffs and defendants) of different states. 2. The Virginia statute professes to effect no such transmutation of legal rights. 3. It confers no right of action on the beneficiaries under the bond. 4. It orders the prosecution of the suit in the names of the justices the obligees, and by consequence, forbids such proceeding in the names of any other persons. 5. In point of fact, in the case commented on, (as doubtless would be found to be the fact in every suit ever instituted under the statute,) the action was brought in the names of the justices, so that those whose interests were designed to be protected by the bond, were never parties to the suit at all, much less the real or only parties representing the right of action under the bond.

My mind, then, is impelled, by considerations like these, to the deductions, that *Browne* v. *Strode* does not furnish the rule for the decision of this cause; and that, if it ever was a rule for the federal courts, it has been clearly and emphatically annulled. As a corollary from the above reasoning and the cases adduced in support thereof, it follows, that Alexander McNutt, without appearing as the party plaintiff upon the record to be a citizen of some state other than that to which the defendants belong, could have no standing in the Circuit Court; and that failing so to appear, the Circuit Court could have no jurisdiction over the cause.

*27] *It cannot be requisite here to meet any argument, should any be attempted, designed to maintain the right of McNutt to sue in virtue of his character of governor of Mississippi, and as such representing the sovereign or supreme executive power of that state. In that aspect, the suit would be virtually by the state herself, and not be the suit of Alexander McNutt; such a suit, too, could take place only where some direct right or interest of the state should be involved. Of such a controversy, the Circuit Court could unquestionably have no jurisdiction; this having been settled as one of those instances, the cognizance whereof belongs exclusively to the Supreme Court. See *The State of Georgia* v. *Brailsford*, 2 Dall., 402, and *The Governor of Georgia* v. *Madrazo*, 1 Pet., 110; *Fowler et al.* v. *Lindsay et al.*, 3 Dall., 411.

To any argument, *ab inconvenienti*, which may be urged in support of the jurisdiction in this case, I would simply oppose the observations of two distinguished members of this bench, in reply to a similar argument addressed to them in the case of *Turner, admin., &c.* v. *The Bank of North America*, 4 Dall., 10; in which Chief Justice Ellsworth inquired: "How far is it intended to carry this argument? Will it be affirmed that, in every case to which the judicial power of the United States extends, the federal courts may exercise jurisdiction without the intervention of the legislature to distribute and regulate the power?" And Chase, justice, remarked: "If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to this or any other court, it still remains at the legislative disposal." *Est boni judicis ampliare jurisdictionem* was once quoted as a wise judicial maxim; how far this may accord with systems differently constituted from ours, and having their foundations in a large and almost undefinable discretion, it is, perhaps, unnecessary here to inquire; it seems, however, scarcely compatible with institutions under which the political and civil state is referred, almost exclusively, to legislative or express regulation.

Upon the views above given, I conclude that the judgment of the Circuit Court should be affirmed.

ORDER.

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 Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment *of the said [*28 Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court, to enter judgment in this case for the plaintiff in that court.

The decree of the Circuit Court in this case was reversed on the 30th of January, 1844, and the cause remanded, with directions to enter judgment for the plaintiff. On the 31st of January, *Jones*, for the plaintiff in error, suggested the death of Bland, and moved that the writ of error stand against the survivor, Humphreys, and that judgment be entered against him alone.

Mr. Justice STORY, in delivering the opinion of the court said, that if Bland died since the commencement of the term, the judgment might be entered against both defendants, on a day prior to the death of Bland, *nunc pro tunc*. If he died before the commencement of the term, then upon the suggestion of his death before the term being entered of record, the cause of action surviving, the judgment might be entered against the surviving defendant, Humphreys. There certainly is no objection in this case, under all the circumstances, to granting the application as asked for by the plaintiff's counsel; that is, to enter the suggestion of Bland's death upon the record, and then entering judgment against Humphreys alone, as the survivor; and it is accordingly so ordered by the court.

Alexander McNutt, Gov., &c., plaintiff in error,
v.
Richard J. Bland et al.

Mr. *Jones*, of counsel for the plaintiff in error, having suggested the death of Richard J. Bland, one of the co-defendants, since the last continuance of this cause, now here moved the court that his writ of error stand as against the surviving defendant. Whereupon this court not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

January 31, 1844.

Alexander McNutt, Gov., &c., plaintiff in error,
v.
Richard J. Bland et al.

On consideration of the motion made in this case on a prior day of the present term of this court, to wit: on Wednesday, the 31st day of January, it is now here ordered by this court
*29] that the suggestion of Bland's death be entered on the record, and that then judgment *be entered against Humphreys alone as the survivor, and that the mandate of this court direct the Circuit Court to enter judgment for the plaintiff against Benjamin G. Humphreys alone as the survivor

March 12*th*, 1844.

WILLIAM M. GWIN v. JAMES W. BREEDLOVE.

A statute of the state of Mississippi, passed on the 15th of February, 1828, provided that if a sheriff should fail to pay over to a plaintiff money collected by execution, the amount collected, with 25 per cent. damages, and 8 per cent. interest, might be recovered against such sheriff and his sureties, by motion before the court to which such execution was returnable.

A marshal and his sureties cannot be proceeded against jointly, in this summary way, but they must be sued as directed by the act of Congress.[1]

But the marshal himself was always liable to an attachment, under which he could be compelled to bring the money into court; and by the process act of Congress, of May, 1828, was also liable, in Mississippi, to have a judgment entered against himself by motion.

This motion is not a new suit, but an incident of the prior one; and hence, residence of the parties in different states need not be averred in order to give jurisdiction to the court.[2]

Such parts only of the laws of a state as are applicable to the courts of the United States are adopted by the process act of Congress; a penalty is not adopted, and the 25 per cent. damages cannot be enforced.[3]

A marshal who receives bank-notes in satisfaction of an execution, when the return has not been set aside at the instance of the plaintiff, or amended by the marshal himself, must account to the plaintiff in gold or silver; the Constitution of the United States recognizing only gold and silver as a legal tender.[4]

THIS case was brought up by writ of error, from the Circuit Court of the United States for the southern district of Mississippi, and arose upon the following statement of facts:

At some period prior to the 13th day of February, 1839, James W. Breedlove, the defendant in error, had recovered a judgment in the Circuit Court of the United States for the southern district of Mississippi, against certain persons there, for the sum of $12,976, with interest at the rate of 8 per

[1] FOLLOWED. *Gwin* v. *Barton*, 6 How., 7, 10.

[2] CITED. *Bank* v. *Turnbull*, 16 Wall, 195; *Arnold* v. *Frost*, 9 Ben., 268.

[3] S. P. *United States* v. *Mundel*, 6 Call, (Va), 245. State laws do not *proprio vigore*, affect the process or procedure of the federal courts. *Kelsey* v. *Forsyth*, 21 How., 85; *Babcock* v. *Weston*, 1 Gall., 168; *Binns* v. *Williams*, 4 McLean, 580; *Campbell* v. *McManus*, 5 Id., 106; *Goodyear* v. *Providence Rubber Co.*, 2 Fish Pat. Cas., 499; *New England Screw Co.* v. *Bliven*,, 3 Blatchf., 240; *Stanton* v. *Wilkeson*, 8 Ben., 357. Thus the rules of practice under the New York Code of Procedure are held not to apply to writs of error and bills of exceptions in the United States Courts sitting in that state. *Whalen* v. *Sheridan*, 18 Blatchf., 308, 324; and a creditor's bill may be entertained though the Code of Practice of the state in which this court sits, provides a special proceeding to reach the property of a judgment debtor. *Frazer* v. *Colorado &c. Co.*, 2 McCrary, 11.

[4] APPROVED, *in dissenting opinion*. *Legal Tender Cases*, 12 Wall., 586, 618, 657. S. P. *Griffin* v. *Thompson*, *post* *244; *McFarland* v. *Gwin*, 3 How., 717. If the execution creditor directs the marshal's deputy to receive payment other than in lawful money, such deputy becomes his agent, and the marshal cannot be held responsible upon the deputy's failure to pay over what he does in fact receive. *Gwin* v. *Buchanan*, 4 How., 1.

cent. per annum, from the 24th of May, 1838, until paid; and on the said 13th of February, an execution was issued upon the judgment, and placed in the hands of Gwin, the marshal.

*30] The sum of $5000 was collected in unexceptionable *money, and paid over to plaintiff; the balance was received in notes of the Commercial Bank of Vicksburg, and Planter's Bank of Mississippi, which the plaintiff refused to receive.

At the November term, 1839, of the Circuit Court of the United States, Breedlove moved for a judgment against Gwin, the marshal, for the sum of $7976, being the balance due to the plaintiff on the execution. This motion was made under a statute passed by the legislature of Mississippi on the 15th day of February, 1828, which had been adopted in the practice of the Circuit Court by a rule of that court. The statute provided, (Howard and Hutchinson, 296,) that if the sheriff should fail to pay, on demand by the plaintiff, money collected by execution, such sheriff and his sureties should be liable to pay to the plaintiff the whole amount of money so collected, together with 25 per cent. damages thereon, with interest at the rate of 8 per cent. per annum, to be recovered by motion before the court to which such execution is made returnable. The statute further provided for a jury, if the sheriff should deny that the money was collected by him. In case the sheriff failed to return an execution on the return day thereof (Howard and Hutchinson, 298,) the plaintiff was allowed to recover judgment against the sheriff and his sureties, with 5 per cent. damages, by motion before the court. It was also declared to be a misdemeanor for the sheriff to refuse to pay over money which he had collected, and punishable on conviction, by removal from office. How. and Hut., 299.

The reasons filed in support of the motion were, that the marshal had made the money and failed, or refused, to pay it over to the plaintiff.

Gwin demurred to the motion; but the demurrer being overruled, he filed four pleas. In the first two, he denied having received money. In the last two, he alleged that he had collected and received notes of the Planter's Bank of the State of Mississippi, and of the Commercial and Rail Road Bank of Vicksburg, due and payable on demand, when said banks were paying gold and silver on all their notes payable on demand; which notes, so collected and received, were collected and received without any instructions from the plaintiff or his attorney that gold or silver would be required, and at a time when the bank-notes received were the current circulating medium; and the same were tendered to the

attorney of the plaintiff, before the suspension of specie payments by any or either of said banks—all of which said bank-notes said defendant had always been ready and *willing, and was then ready and willing, to pay over to the plaintiff or his attorney. [*31

The plaintiff joined issue upon the first two pleas, and replied, specially, to the last two, that the defendant was, previous to the reception of the notes, instructed, that gold or silver would be required of him. Issue was joined upon the last two replications.

Evidence was offered at the trial, that the attorney of the plaintiff, Breedlove, told the marshal frequently, before the money was collected, that specie would be required; that he had demanded the money of the marshal, who refused to pay him; that the marshal never tendered him any bank-notes, and that the notes of those banks, before their suspension, were received in the community everywhere as specie, and by the sheriffs and officers in collection of executions.

The execution was issued on the 13th of February, and the banks suspended specie payments on the 15th or 22d of March, 1839.

The counsel for the defendant prayed the court to instruct the jury as follows:

1. That if the jury believe from the evidence that bills of exchange and bank-notes were received by the marshal, and not gold or silver, then the jury will find the issues on the first and second pleas in favor of the defendant.

2. If the jury believe that the instructions given to the marshal were intended to authorize the marshal to collect gold or silver, or its equivalent, and he collected bank-notes which were equivalent to gold or silver, then they should find the issue for the defendant.

3. And that if they find that the marshal received bank-notes or bills of exchange and not money in specie, which the plaintiff refused to receive as money, then they must find the issues for the defendant, as the issue is, whether he received and collected money or not.

The first and third of which charges, the court refused to give, but gave the second charge to the jury; to which refusal to give the first and third charges, the defendant excepted.

The jury found for the plaintiff.

Walker, for Gwin, the plaintiff in error.
C. Cox, for the defendant.

Walker made the following points:

1. That the statute of Mississippi had not been strictly pursued.

2. That it did not apply to marshals of the United States.

*32] *3. That there is a want of jurisdiction, inasmuch as the record does not show, in any part of it, that Breedlove was not a citizen of Mississippi.

1. The statute is highly penal in its character; and, therefore, like all other penal statutes, must be construed strictly. It provides (Howard and Hutchinson, 296,) two remedies against sheriffs; one for not paying over the money which they may have collected, and the other for neglecting to levy the execution. The motion below was under the first head, which was an erroneous proceeding, because bank-notes are not money. The return states the collection to have been in bank-notes; but, if they had been notes of a mercantile firm, it would clearly not have been money. The one is no more money than the other. The statute is so highly penal that a refusal on the part of the sheriff to pay, is declared to be a misdemeanor, (page 299,) and punished by removal from office.

The agreement of the sheriff, to receive any thing but money, does not bind the plaintiff. 5 How., 246. Where the sheriff returned that he had received bank bills, it was not considered a legal return or binding on the plaintiff, and a new execution was awarded. 5 How., 621. A sheriff cannot take a negotiable note and return the execution satisfied. 1 Cow. (N. Y.), 46. The payment must be in cash. 9 Johns. (N. Y.), 263. There being no money received, the remedy pursued ought to have been for omitting to collect the money. How. and Hut., page 642, sec. 42.

2. The statute does not apply to marshals. It was passed on 16th February, 1828. The process act of Congress was passed on 19th May, 1828; but no rule of court has ever adopted the state law. How came marshals, then, to be under the state law? Their duties are pointed out by acts of Congress, (Gordon's Digest Laws of the United States, articles 610, 611,) and a party injured may sue on their bond and recover damages legally assessed. But the sheriffs, under the state law, are subject also to a penalty of 25 per cent. in addition: Can the marshals be legislated by a state into this responsibility? The sheriffs are also to be removed from office: Can a state law require the President of the United States to remove a marshal? If not, where can the line be drawn?

The words in the act of Congress of 1828 are borrowed from the act of 1792, and direct that the process at common

law used in state courts should be adopted in the courts of the United States. But the process in the original suit below had been exhausted. The *motion against [*33 the marshal was a new proceeding, and not a part of the process of the other case.

10 Wheat., 1, 32; 6 Pet., 658; 7 Cranch, 654; 1 How., 300.

2 Dall., 396, 5 Mason, 26, 12 Pet., 300, } that attachment laws of states are not included in the process act.

The courts of the United States do not adopt state, criminal, or penal laws; 17 Johns. (N. Y.), 1, 4.

3. Breedlove is not shown in the record to have been a citizen of another state. This court has decided that, as the courts of the United States are of limited jurisdiction, it must appear on the face of the record. 10 Wheat., 192; 2 Cranch, 9; 2 Baldw., 275; 13 Pet., 45; 4 Wash. C. C., 32.

C. Cox, for defendant, argued:

1. That it was no ground of exception to defendant's motion; that it does not show him to be a citizen of a state other than Mississippi; in all other respects it is formal.

2. The plaintiff was accountable on his return, and on the facts established by the verdict, for the amount of $7,000 in money.

3. The statute of Mississippi is applicable to the present case.

1. The question of jurisdiction was settled by the original judgment; and a ministerial officer of the court cannot be permitted to raise the objection. After an appearance, the objection cannot be made. 3 Pet., 459; 5 How., 432; 9 Pet., 156.

2. Issue was joined below upon the question whether the marshal received notice that coin would be required, and decided against him. The plaintiff below was, therefore, entitled to consider the marshal's return as of money. A tender of bank-notes is good, unless objected to. 10 Wheat., 333.

3. The act of Congress of 1828 was subsequent to the statute of Mississippi. Process means the proceedings until the end of the suit, the possession of the fruits of the judgment. 10 Wheat., 1, 51.

The statute of Mississippi was adopted by rule of court.

The bond of the marshal is a cumulative remedy. All courts have authority over their officers, and the remedy for injury is by motion. There is nothing unusual in the proceeding. All amercements are penal. In 9 Pet., 156, a judgment was entered on motion and refused to be re-opened.

* *Walker*, in reply.

If the return of the marshal was that the execution was satisfied, was it not an end of that suit?

No matter who makes the question of jurisdiction, the court will always notice it. The original judgment does not settle it, because the proceedings there do not make the necessary averment.

The case in 9 Peters does not apply: there is no case where the penal laws of a state have been applied to marshals.

Mr. Justice CATRON delivered the opinion of the court.

The writ of error in this case is prosecuted by the former marshal to reverse a judgment recovered against him by motion in the Circuit Court of the United States for the district of Mississippi. The proceeding in this form is founded on a law of that state governing sheriffs, as will be seen by the statement of the reporter.

The first objection raised on behalf of the plaintiff in error is, that it does not appear on the record, that Breedlove was a citizen of a different state from the defendant; and therefore it is insisted the court below had no jurisdiction as between the parties. As this does not appear, in an ordinary case jurisdiction would be wanting. On the other hand, it is contended that the motion against the ministerial officer of the court for not performing his duty, was an incident, and part of, the proceeding in the suit of Breedlove against Marsh and others, in which the execution issued; and that no question of jurisdiction can be raised.

The motion for a judgment being a proceeding according to the statute of Mississippi, it is also objected that Congress by the act of 1806 (ch. 31,) had provided a complete and exclusive remedy on marshal's bonds by suit; but if it was otherwise, still, the additional remedy furnished by the state law when substituted, must be treated as an independent suit, in like manner as an action on the marshal's bond, and the residence of the parties be such as to give the federal court jurisdiction.

These propositions are so intimately blended that it is most convenient to consider them together.

We think it true beyond doubt, that if the bond had been proceeded on against the marshal and his sureties, it could not have been done by motion, according to the state practice pre-
*35] scribed by the statute of Mississippi; but the proceeding must have been according *to the act of Congress. Yet before the act of 1806 was passed, and ever since, the common law remedy by attachment has been the most usual

to coerce the marshal to perform his various duties; and among others, to bring into court moneys collected on executions. So in the state courts, nothing is more common than to proceed by attachment against the sheriff, instead of resorting to a summary motion, for judgment against him by force of a statute, where he withholds moneys collected. The marshal's bond is for twenty thousand dollars; the sureties are bound to this amount only; and if no other remedy existed save on the bond, after the penalty was exhausted, he might set the court at defiance; the marshal could also be sued in assumpsit, by the plaintiff in the execution. It has therefore never been true, that a suit on his bond, governed by the acts of Congress, furnished the exclusive remedy as against the marshal himself; and we think that Congress intended by the new process act of 1828, to add the cumulative remedies, then existing by statute, in the new states, where they could be made to apply, because they were more familiar to the courts and country, and better adapted to the certain and speedy administration of justice. In our opinion, the act of Mississippi authorizing a judgment by motion, against a sheriff for failing to pay over moneys collected on execution, to the party on demand, or into court at the return day, was adopted by the act of 1828, and does apply in a case like the present, as a mode of proceeding in the courts of the United States, held in the district of Mississippi; and could be enforced against the marshal in like manner it could be against a sheriff in a state court.

The same facts that justified the judgment against the goods, &c., of the marshal, would have authorized an attachment against his person; operating even more hastily than a *capias ad satisfaciendum* founded on a judgment; and therefore no objection to this means of coercion can be perceived, that did not apply with still more force to the old mode by attachment. The latter remedy was never deemed an independent suit, but a means to compel the ministerial officer of the court to perform his duty, so that the plaintiff should have the fruits of his judgment; and the same end is attained by the new remedy under the state law; each, is an incident of the suit between the plaintiff and defendant to the execution, of which the proceeding against the officer is part; and to that suit the question of jurisdiction must be referred: It follows the officer had no right to raise the question.

[*36 *The next inquiry is, to what extent does the statute of Mississippi apply to the courts of the United States held there?

It is contended for the defendant in error, that the act of

Congress of 1828 did intend, and could only have intended, to adopt the state law entire; that when the process and modes of proceeding were adopted, the provision carried with it the penalties prescribed to enforce their performance; to recognize part as governing the practice of the federal courts, and reject other parts, as not applicable to them, would break up the whole system. That so doing is a delicate, and difficult duty, experience has taught us; it is impossible, however, to do otherwise in many cases. That of *Amis* v. *Smith*, 16 Pet., 303, was an instance. It also came up from Mississippi. By the laws of that state, the sheriff is commanded to take a forthcoming bond for the delivery of property on the day of sale, levied on by virtue of an execution; if the bond is forfeited for not delivering the property, it operates as a new judgment against the defendant to the execution, and also against the sureties to the bond; and no writ of error is afterwards allowed to reverse the original judgment. Pursuant to the laws of Mississippi a delivery bond had been taken by the marshal; it was forfeited, and then the defendant prosecuted a writ of error to this court to reverse the judgment on which the execution issued. It was held here, that that part of the state law authorizing the delivery bond to be given, was adopted by the act of 1828, and that a new execution might issue on it; but the part cutting off the writ of error must be rejected. Another instance will be given, which is presented by the statute of Mississippi, on which the present motion against the marshal was founded. The 27th and 28th sects. enact, that if the sheriff shall make a false return on an execution or other process, to him directed, for every such offence he shall pay a fine of $500, one half to the plaintiff, and the other half to the use of the literary fund, recoverable by motion. If the fact that the return is false does not appear of record, the court shall immediately empannel a jury to try such fact, and on its being found, proceed to assess the fine.

The recovery of the penalty could with quite as much propriety have been on conviction by indictment as on a summary motion; and in neither mode can it be plausibly contended that the courts of the United States could inflict the penalty on its marshal; the motion and assessment of the fine being distinct from the process and mode of proceeding in the cause of which the execution was *part, on which the false return was made. This being an offence against the state law, the courts of the state alone could punish its commission; the courts of the United States having no power to execute the penal laws of the individual states.

*37]

A judgment below for 25 per cent. damages was given

against the marshal for failing to pay over the debt collected; the penalty amounted to $1,750. The motion for judgment was founded on the 25th section of the act; it declares judgment on motion shall be rendered against the marshal, for the money collected, with legal interest; and also, for 25 per cent. damages on the amount.

This is just as much the infliction of a penalty, as if a fine had been imposed under the 27th and 28th sections for a false return; and for the same reasons was beyond the competency of the Circuit Court; and for so much the judgment cannot stand.

We next come to the question whether the marshal is rendered liable by his return, and the proofs, and pleadings.

By the state statute he was allowed to contest the fact by pleading to the motion, that he had not received the money. He first demurred to the written grounds of the motion; being in the nature of a declaration. The demurrer was overruled, and the defendant had leave given to plead over. He pleaded 1st, That he did not receive or collect on said execution the moneys specified in the motion. The 2d plea is to the same effect, but for the larger sum, including a bill of exchange, about which there is no controversy.

3d. That he received and collected the notes of the Commercial and Railroad Bank of Vicksburg, and the Planter's Bank of Mississippi, due and payable at said banks; and which were paying specie on their notes on demand—that is on the 12th day of March, 1839; which notes were collected and received without any instructions from the plaintiff or his attorney that gold or silver would be required; and at a time when the bank-notes were the current circulating medium; and that the same on the day aforesaid were tendered to the attorney of the plaintiff before the suspension of specie payments by the banks—all of which bank-notes he has always been ready, and is yet ready and willing to pay over to the plaintiff. The 4th plea is the same in substance.

On the first two pleas issues were joined to the country: To the other two, the plaintiff replied—That previous to the reception of the bank-notes, the defendant was instructed that gold and silver would be required upon the execution; and issues were tendered to *the country, which were [*38 joined on the single point, whether the marshal had been instructed that gold or silver would be required.

Two instructions were asked on behalf of the marshal and refused—1st,

"If the jury believe from the evidence that the bills of exchange and bank-notes were received by the marshal, and

not gold and silver, then the jury will find the issues on the first and second pleas in favor of the defendant."

3d. "And that if they find that the marshal received bank-notes or bills of exchange, and not money in specie, which the plaintiff refused to receive as money, then they must find the issues for the defendant; as the issue is, whether he received and collected money, or not."

The 2d instruction asked was given, and need not be noticed.

The return of the marshal was, that he had received on the execution, bank-notes due on demand and payable in specie—on the two banks, named in the return, amounting to $7,000—the subject of the present motion.

No question is, or can be raised, on the two last issues; they were found against the defendant on the proof that he had been instructed that nothing but gold or silver would be received in satisfaction. The merits of the case therefore turn on the two instructions refused; they are referable to the facts giving rise to the instructions; the facts briefly are, that the marshal was instructed to collect specie on the execution; he failed to do so, and took bank-notes from the debtor to the amount of $7,000 in lieu of specie. A few days after the notes were received, one of the banks at which a part of them were payable suspended specie payments, and its notes thereby became depreciated in value. The instructions raise the question, who shall bear the loss: If the officer's return is treated as a nullity, then it will fall on Marsh and others, defendants to the execution; if the marshal's offer to deliver the notes to Breedlove's attorney, and his plea of tender had been good, then the execution creditor must have sustained the loss—but failing in these grounds of defence the officer must bear it himself.

By the Constitution of the United States (section ten) gold or silver coin made current by law can only be tendered in payment of debts: Nevertheless, if the debtor pays bank-notes, which are received by the creditor in discharge of the contract, the payment is just as valid as if gold or silver had
*39] been paid. Had Marsh paid *his creditor Breedlove in the manner he did the marshal, then there can be no doubt Breedlove could not have treated the payment as a nullity, and on this assumption have issued an execution on his judgment, and enforced payment again in specie.

By the writ of execution the marshal was commanded to collect so many dollars; this meant gold or silver of course: And the court of errors and appeals of Mississippi, in the case of *Nutt* v. *Fulgham*, 5 How. (Miss.), 621, ordered the return of a sheriff, like the one before us, to be struck out, on motion

of the plaintiff in the suit. That court says: "The return of the sheriff, that he took the Union bank-notes, is not a legal return, and the plaintiff is not bound by it, unless the plaintiff had agreed to receive that kind of money or notes in payment; and no such agreement appears.

In the case before us no motion was made to strike out the return on the part of the plaintiff Breedlove; nor did the marshal ask leave to alter his return, stating he had not made the money: the three parties interested treated the payment as a valid discharge of the judgment against Marsh; and we think, for the purposes of this motion, at least, it must be so deemed. Gwin, the marshal, did receive bank-notes in payment, and intended they should be taken in discharge of the execution; the record throughout shows he did so receive them—and, that they were received as money. Still, he could only pay into court gold or silver, if required by the execution creditor to do so; and therefore he ran the risk of converting the notes into specie when he took them; having incurred the risk, the marshal must bear the loss of depreciation. We apprehend this view of an officer's responsibility who collects bank-notes, is in conformity to the general practice of the courts and collecting officers, throughout the country.

This court therefore reverses so much of the judgment of the Circuit Court, as adjudged the plaintiff in error, Gwin, to pay the twenty-five per cent. damages, on the amount recovered against him —, and affirms, the residue of said judgment.

Mr. Justice DANIEL dissented.

I am unable to concur with the majority of the court in their opinion just announced. 'Tis my opinion, that the judgment of the Circuit Court should have been wholly reversed.

Congress, by express enactment, have defined the duties and responsibilities of the marshals, and prescribed the modes in which *they shall be enforced. These express regu- [*40
lations, designed for the government of the peculiar officers of the federal courts, cannot, I think be varied or controlled by rules established by the states for the conduct of their respective ministerial agents; but must be of paramount authority.

The laws of Mississippi, therefore, denouncing penalties against the misconduct of sheriffs, and directing the manner of enforcing them, cannot govern this case. Should it be conceded, however, that the laws of Mississippi concerning sheriffs could have effect in this motion against the marshal, it seems obvious, to my mind, that the appropriate remedy under the state law for an act like that complained of, has not, in

this case, been adopted. The alleged delinquency in the marshal, made the foundation of this motion—a delinquency identically the same for which a like proceeding is authorized against a sheriff—is the refusal to pay over money actually made and in his hands, and collected in satisfaction of an execution. For such a refusal, a peculiar penalty, the very same sought and adjudged by the court in this instance, is provided. By the return of the marshal, relied on in proof by the plaintiff, it is conclusively shown, that the money which the officer was commanded to make, had never been received; but that he had received, in part, that which was not money, and which had never been converted into money, and which the plaintiff in the execution, would never have received in lieu of money. Nay, the oral evidence introduced by the plaintiff was brought in to prove that the marshal, in opposition to the plaintiff's positive instructions, had received that which was not money, excluding, upon this proof as well as upon the return, every inference that money had been actually received in satisfaction of the process in his hands. A refusal or an omission to levy or to return an execution, the statutes of Mississippi designate as different and distinct offences, and the conduct of the marshal as shown in the proofs, approaches more nearly to either of these than it does to the misfeasance alleged in the notice, and, for which, the court has awarded a penalty against him, although the fact charged is positively disproved by all the testimony, as it is also by the plaintiff's replications to the defendant's 3d and 4th pleas. But whether or not the conduct of the marshal can in literal strictness be denominated a failure or refusal to levy or to return an execution, it is surely not a failure or refusal to pay over money actually levied, and, therefore, the proceeding, under color of the statute of Mississippi, is not *the proceeding appropriate to the act of the officer, however that act may be characterized. This is, too, a statutory proceeding, and should strictly conform to the power which authorizes it. It cannot be extended either to modes or objects not clearly embraced within the terms of that authority. It cannot, therefore, in any event, warrant the judgment now proposed, as that is clearly for a penalty wholly different from the one imposed by the law of Mississippi, for an offence such as is assumed by the court to have been committed in this instance. Surely the law of Mississippi either should or should not govern this case.

*41]

Again, I do not think that the jurisdiction of the Circuit Court is made out as between the parties to the judgment. The motion on which it is founded is neither process nor a mode

of proceeding in the suit between Breedlove and Marsh and Company, nor can it be deemed an execution or process or proceeding upon or regularly incident to the judgment between those parties. It is a distinct and substantive and original proceeding against a third person no party to the controversy. A right of action is claimed against this third person for his own acts or delinquencies, independently of the contract or controversy between the parties to the judgment. In his character of officer of the court, he would, doubtless, be amenable to the authority it possesses to supervise the conduct of its own officer, and to secure the enforcement of its own judgments; an attachment would, therefore, lie against him, to effect these ends of justice. He would, also, be liable upon his official bond as marshal: because the judicial act confers a right of action thereon, without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But if a farther or different recourse is sought against the marshal, one which may be supposed to arise neither from the inherent power of the court over its peculiar officer, or its judgments; then it is presumed that those who seek such recourse, must show their right as arising out of their character to sue in the federal courts; they must show themselves by regular averment to be citizens of a state other than that of him whom they seek to implead. The present case closely resembles that of *Course et al.* v. *Stead et ux.*, 4 Dall., 22, in which it was ruled that the want of a proper description of parties in a supplemental suit was not cured by a reference to the original suit.

The judgment should, I think, be reversed.

*ORDER. [*42

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 Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that so much of the judgment of the said Circuit Court in this cause as adjudges William M. Gwin, the plaintiff in error, to pay 25 per cent. damages thereon be, and the same is hereby reversed and annulled, and that the residue of the judgment of the said Circuit Court in this cause, be in all respects, and the same is hereby affirmed.

*DAVID SHRIVER JUNIOR'S LESSEE *v.* MARY LYNN, WILLIAM LYNN, GEORGE LYNN, JOHN G. LYNN, JAMES C. LYNN, ELLEN JANE LYNN, MARY MAGRUDER, JONATHAN W. MAGRUDER, ANNA B. TILGHMAN, FREDERICK AUGUSTUS SCHLEY, (WHO MARRIED WITH FRANCINA C. LYNN DECEASED, DAUGHTER OF DAVID LYNN) FREDERICK AUGUSTUS SCHLEY, WILLLIAM HENRY SCHLEY, AND ELIZA M. SCHLEY (CHILDREN OF FREDERICK A. SCHLEY AND FRANCINA HIS WIFE) DEVISEES OF DAVID LYNN.

The following words in a will, viz.: "I give and bequeath unto my brother, E. M. during his natural life, 100 acres of land. In case the said E. M. should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid, to him, the said E. M., his heirs and assigns forever; but should he, the said E. M., die without an heir so begotten, I give, bequeath, devise, and desire, that the 100 acres of land aforesaid, be sold to the highest bidder, and the money arising from the sale thereof, to be equally divided amongst my six children," give to E. M. only an estate for life, and not a fee-simple conditional.

Under the statute of Maryland, passed in 1785, (1 Maxcy's Laws, ch., 72,) the chancellor can decree a sale of land upon the application of only a part of the heirs interested; and as he had jurisdiction, the record must be received as conclusive of the rights adjudicated.[1]

The decree of the chancellor must be construed to conform to the sale prayed for in the petition, and authorized by the will; and a sale beyond that is not rendered valid by a final ratification.[2]

A sale ordered by a court, in a case where it had not jurisdiction, must be considered as inadvertently done, or as an unauthorized proceeding; and, in either branch of the alternative, as a nullity.[3]

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[1] CITED. *Moore* v. *Jeffers*, 53 Iowa, 207.

[2] CITED. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall., 641.

[3] FOLLOWED. *Williamson* v. *Berry*, 8 How., 541, 542; *Thompson* v. *Whitman*, 18 Wall., 467. CITED. *Hatchett* v. *Billingslea*, 65 Ala., 31; *Doctor v. Hartman*, 74 Ind., 231. S. P. *O'Brien* v. *Woody*, 4 McLean, 75.

But the regularity of the sale cannot be questioned collaterally except on the ground of fraud participated in by the purchaser. *Griffith* v. *Bogert*, 18 How., 158; *Gillis* v. *Carter*, 29 La. Ann., 698. Thus it cannot be alleged collaterally, to defeat the sale, that the averments as to citizenship in the record were not true, and that the court had not jurisdiction to order the sale. *Erwin* v. *Lowry*, 7 How., 172; or that the record does not affirmatively show that all the preliminary steps required by law, as conditions precedent to the validity of the sale, were taken. *Voorhees* v. *Bank of United States*, 10 Pet., 449. But see *Parker* v. *Overman*, 18 How., 137.

In a *direct* proceeding, however, properly instituted for the purpose of obtaining such relief, the court will set aside a sale because of the following irregularities:

A sale unfairly made. *Bank of Alexandria* v. *Taylor*, 5 Cranch C. C., 314.

A sale made by the marshal under an erroneous description of the premises. *McPherson* v. *Foster*, 4 Wash. C. C., 45; *Whitaker* v. *Birkey*, 11 Phil. (Pa.), 199. But see *Walling* v. *Morefield*, 33 La. Ann., 1174.

Or after his removal from office. *United States* v. *Bank of Arkansas*, Hempst., 460; *Stewart* v. *Hamilton*, 4 McLean, 534.

Or under a judgment which does not authorize the issuing of an execution. *Murphy* v. *Lewis*, Hempst., 17.

A sale of land under an execution

Shriver's Lessee *v.* Lynn et al.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland, and was an ejectment for 100 acres of land, lying in Alleghany county, in that state.

The plaintiff, who was also plaintiff in the court below, claimed title under a sheriff's sale; but the opinion of the court, upon a case stated, being against him, he brought it up to this court.

The facts were as follows:

In 1789, Zachariah Magruder was in possession of a tract of land called George's Adventure, containing 456 acres. His title was admitted, upon all sides, to be good.

In that year he made his will, which contained the following bequest *to his wife: I also give to my said [*44 beloved wife the full use of my dwelling plantation, containing in the whole, cleared and uncleared, after the legacy hereafter given is taken out, about 356 acres, called George's Adventure, to be by her peaceably and quietly possessed and enjoyed without molestation during her natural life.

After sundry other bequests, he goes on to say:

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not bearing the seal of the court. *Roseman* v. *Miller*, 84 Ill., 297.

A sale of land by the sheriff to his own wife as purchaser. *Dexter* v. *Stroback*, 56 Ala., 233.

A sale made after execution returned satisfied, under a second execution issued at the instance of one of the judgment debtors, of the property of a co-defendant. *French* v. *Edwards*, 5 Sawy., 266.

A sale made at a place other than that named in the notice of sale. *Murphy* v. *Hill*, 77 Ind., 129.

The following grounds are held insufficient to warrant the setting aside of a sale, even when urged in a direct proceeding instituted for the purpose of attacking its validity:

Inadequacy of price, no fraud being alleged. *West* v. *Davis*, 4 McLean, 241; *McHany* v. *Schenk*, 88 Ill., 357. But where, in addition to inadequacy of price other irregularities are shown, which of themselves would not, perhaps, be ground for vacating the sale, it will sometimes be set aside. *Morris* v. *Robey*, 73 Ill., 462; *Grede v. Daunenfelser*, 42 Wis., 78; *Hilleary* v. *Thompson*, 11 W. Va., 113; S. P. *Ray* v. *Womble*, 56 Ala., 32; *Mathison* v. *Prescott*, 86 Ill., 493; *Sheldon* v. *Saenz*, 59 How. (N. Y.) Pr., 377; *Whitaker* v. *Birkey*, 11 Phil. (Pa.), 199; *Barret* v. *Bath Paper Co.*, 13 So. Car., 128; *Pell* v. *Vreeland*, 6 Vr. (N. J.), 22; *Johnson* v. *Crawl*, 55 Tex., 571; *Hudson* v. *Morris*, Id., 595; *Massey* v. *Young*, 73 Mo., 260. Or where the inadequacy of price is very gross, *e. g.* $190 for property worth $30,000. *Chapman* v. *Boetcher*, 27 Hun. (N. Y.), 606; or $704 for land worth $25,000. *Bradley* v. *Luce*, 99 Ill., 234.

The fact that, at the purchaser's request, the deed was made to a third person. *Voorhees* v. *Bank of United States*, 10 Pet., 449.

The fact that the advertisement names a wrong day of the week, the day of the month being correctly stated. *Chandler* v. *Cook*, 2 MacArth., 176.

The failure of the sheriff to deliver a certificate of sale. *O'Brien* v. *Hashagen*, 20 Hun. (N. Y.), 564.

The subsequent reversal of the judgment under which the sale was made will not affect its validity, if the purchaser was not a party to the suit. *McGoon* v. *Scales*, 9 Wall., 23.

Otherwise when no deed has been given and the judgment debtor remains in possession twelve months after the sale. *Hays* v. *Cassell*, 70 Ill., 669.

Item.—I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land, being part of a tract of land called George's Adventure, lying and being in Washington county, and state aforesaid; to be laid off at the upper end of the tract aforesaid, so as to include the plantation whereon he now lives. In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid to him, the said Elias Magruder, his heirs and assigns, for ever; but should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise, and desire, that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof to be equally divided among my six following children, to wit: Samuel Beall Magruder, William B. Magruder, Richard Magruder, Josiah Magruder, Norman Bruce Magruder, and Nathaniel Beall Magruder.

Item.—I devise, give, bequeath, and desire, that the remaining part of my land, called George's Adventure, being about 356 acres, lying and being in Washington county, and state aforesaid, to be sold to the highest bidder, by, and at the discretion of my executrix and executor hereafter named; and the money arising from such sale to be divided equally amongst my six sons, to wit: Samuel Beall Magruder, William Beall Magruder, Richard Magruder, Josiah Magruder, Norman Bruce Magruder, and Nathaniel B. Magruder.

After some further provisions, the testator appointed his wife and son executrix and executor.

In 1796 Zachariah Magruder died, and his brother Elias took possession of the 100 acres, which were laid off agreeably to the directions of the will. The title of the defendants is derived wholly from Elias Magruder, who conveyed the 100 acres to David Lynn, their ancestor, in fee-simple in 1806.

In 1805, four of the six children mentioned in the will, filed a petition in the high court of Chancery of Maryland, stating that the executrix was dead; that the letters testamentary *45] which had been granted to the executor had been revoked; that no sale of the real *estate had been made; that the testator devised that the remaining part of his land called George's Adventure, being about 356 acres, should be sold to the highest bidder, and the money equally divided amongst his six children, including the petitioners. The petition prayed the court to grant them relief, by appointing a trustee to sell all the property devised to be sold, and apply the proceeds to the purposes directed by the will.

The chancellor granted the prayer, and decreed that the

real estate directed to be sold in the will, should be sold, and appointed a trustee in the usual way.

The decree ran thus: "That Roger Perry be, and he is hereby appointed trustee for making the said sale, and that the course and manner of his proceedings shall be as follows: He shall first file with the register of this court a bond executed by himself and a surety or sureties approved by the chancellor," &c., &c.

The decree was passed at December session, 1805.

On the 10th of March, 1806, Elias Magruder conveyed to David Lynn, as has been already stated, the 100 acres of land upon which he, Elias, lived.

On the 22d of March, 1806, the trustee proceeded to sell the 356 acres mentioned in the will, stating in his report that he excepted the 100 acres devised to Elias Magruder, saying, "The 100 acres, part of said tract devised to be sold in case Elias Magruder should die without heirs, as expressed in the will, still remains unsold."

The report passed through the regular process, and was finally ratified in June, 1807; the net proceeds of sale being equally amongst the six children of Zachariah Magruder.

At some period, prior to the 1st of January, 1812, Elias died unmarried, not having at the time of his decease, nor ever having had, any heir or issue begotten by him in wedlock.

On the 15th of February, 1812, the trustee proceeded to sell, as he said in his report, "all the remaining part of the real estate of Zachariah Magruder, deceased, consisting of 100 acres of land, part of a tract of land called George's Adventure, it being that part devised to Elias Magruder," when Walter Slicer became the highest bidder and purchaser.

This report was finally ratified in February, 1813; and, in August, 1813, the trustee executed a deed to Slicer, describing the 100 acres by the same metes and bounds by which they had been originally located when Elias Magruder took possession under the will.

*In October, 1817, one Arnold, for the use of David [*46
Shriver, junior, the lessor of the plaintiff in this cause, and one Lamar, for himself, brought suits against Slicer in the county court of Alleghany county; and in February, 1818, one Evans, also for the use of Shriver, brought suit against Slicer in the same court.

The defendant in the present case relying, as a ground of defence, upon an outstanding title existing in Lamar or his heirs under these proceedings, and the plaintiff resting his title wholly upon them, their progress is exhibited in a tabular

form, showing the history of each one, up to the consumma tion by a sale of the 100 acres now in dispute.

	ARNOLD.	EVANS.	LAMAR.
1817.	Sues Slicer.		Sues Slicer.
1818.	Gets judgment against Slicer. Judgment superseded.	Sues Slicer.	
1819.	June — Sues out Fi. Fa. October— Fi. Fa. countermanded.	April 20. Gets judgment. June—Issues Fi. Fa. October—Fi. Fa. countermanded.	April 28. Gets judgment. October—Issues Fi. Fa.
1820.		February 2d. Fi. Fa. "to lie."	February—Injunction on the judgment.
1821. 1822.			April—Answer filed. October—Injunction dissolved.
1823.	December 31. Sci. Fa. issued.	December 31. Sci. Fa. issued.	2d. Fi. Fa. 100 acres sold to Lamar. In September sheriff makes deed.
1824.	Fiat. Fi. Fa. issued. 100 acres sold to Shriver by sheriff.	Fiat. Fi. Fa. issued. 2d Fi. Fa. 100 acres sold to Shriver by sheriff.	
1825.	Sheriff makes deed to Shriver.	Sheriff makes deed to Shriver.	

*47] *In 1827, Shriver, the purchaser under the two elder judgments, brought suit in the Circuit Court of the United States, he being at that time a citizen of Virginia, against David Lynn, the assignee of Elias Magruder, as already stated.

In 1836, the death of David Lynn was suggested and his devisees became defendants.

In 1839 a verdict was found for the plaintiff subject to the opinion of the court upon a case to be stated; upon which case, when stated, the opinion of the court below was in favor of the defendants and judgment rendered accordingly. To review this opinion, the writ of error was sued out.

It was agreed at the trial of the cause, "that the court might, in deciding this case, presume from the aforesaid proceedings in Chancery, any fact which they would direct a jury to presume from said proceedings."

R. Johnson, for the plaintiff.

Schley, for the defendants.

The points made respectively were, for the plaintiff:

1. That by the will of Z. Magruder, of 26th March, 1789, Elias Magruder took a life-estate only in the land sued for, and, under the facts in the case, had no other estate to his death; and that, at his death, the land was to be sold for the benefit of the six children of the testator mentioned in the devise.

2. That this being the case, the Court of Chancery of Maryland had authority, upon the petition of four of such children, to decree a sale of the land.

3. That the court did so decree, and

4. That the sale made under the decree to Walter Slicer, under whom the lessor of the plaintiff claims, passed to Slicer the fee, which is now in the plaintiff's lessor.

For the defendants,

1. That under the devise to Elias Magruder, (in the 8th clause of the will of Zachariah Magruder,) said Elias Magruder virtually took, under the laws of Maryland, an estate in fee-simple.

2. That even if Elias Magruder, under the facts stated, took only an estate for life, yet the proceedings in Chancery were not effectual to vest in Walter Slicer (through whom the plaintiff claims) a legal title to the parcel of land sought to be recovered in this suit.

3. That even if, upon the facts stated, said Walter Slicer acquired *a legal title to said land, yet the lessor [*48
of the plaintiff, upon the whole facts, does not show that such title had become vested in him at the time of the demise.

4. That even if the lessor of the plaintiff had, at the time of the demise, a legal title to undivided parts of the tract, he could not recover at all, the demise being for an entirety.

Johnson, for plaintiff.

The first question is, what estate did Elias Magruder take under the will? We say, only an estate for life: the other side say that it was either an estate in fee, by virtue of the rule in Shelly's case, or a fee-tail, or a fee-simple conditional at common law. It is perfectly clear that if the will had stopped at the first paragraph, the estate devised would have been only for life; the doubt is as to the second paragraph. If the contingency happened, the estate was to become a fee to the devisee; if he died without children, then it was to go to the children of the testator.

Is it enlarged by the rule in Shelly's case?

1 Co., 93, contains the rule. It was recognized as an old one, and is, that where an estate is given for life with limitation over to heirs, it is an estate in fee, and taken by virtue of the rule. But if the contingency had happened here, the devisee would have taken under the will an estate in fee; and the distinction is in his taking under the will or under the rule. Fearne, Con. Rem., 28, note; 1 Hargrave's Law Tracts, 490; 1 Preston on Estates, 263 to 419; 4 Kent Com., 214.

Is it a conditional fee-simple?

The defendant is understood to place it in this class. But a conditional fee-simple at common law is an estate limited over to some particular heirs, in exclusion of heirs general. Before statute of Westminster, courts held that where the contingency happened, the estate became absolute and could be aliened; but in no other case than where heirs special are preferred to heirs general. A qualified or base fee is where a deed is made to A. and his heirs, tenants of the manor of Dale; where they hold only as long as they are tenants. The error of the other side is in not distinguishing between a fee-simple conditional at common law and an estate to arise upon condition. The difference between estates upon condition precedent and condition subsequent is, that in the former *49] there is no estate in the party until the contingency happens, whilst in the latter there is. *Here, the estate in fee was to arise upon the happening of a future contingency, in case Elias married and had children; otherwise he was a mere tenant for life. 2 Bl. Com., 109.

2. Was the chancery proceeding regular?

1. Did the Maryland statute give jurisdiction?

2. Was it a case of ordinary chancery jurisdiction?

1. The Court of Chancery is created by the constitution of the state, and invested with all chancery powers, unless restrained by law. In case of doubt, we look at the statute to see whether it takes away any of the ordinary chancery powers. The act of 1785, ch. 72, is intended to enlarge jurisdiction; its title being, "An act to enlarge the jurisdiction of the High Court of Chancery." The 4th section is applicable to this case. The executrix was dead, and the authority of the executor was revoked. No regular bill was necessary; a petition was sufficient. All that the chancellor had to be satisfied of were two things: 1st, That the sale ought to be made, and 2d, That there was no person to make it.

2. It was a case also of ordinary chancery jurisdiction. A trust was to be executed and there was no trustee. The petition prayed for a sale, and the decree was that all directed by

the will to be sold should be sold. The trustee, therefore, sold the whole.

Our title is good, if Slicer's was. He claims under the proceedings of a court of competent jurisdiction, whose decision must be presumed to be right. Elias must be presumed to have been dead, if it is necessary to sustain the authority of the court. It is objected also that it does not appear that the trustee ever gave a bond; but this court must presume that every thing was properly done. 10 Pet., 449.

It is also objected that the power to sell was in the surviving executor. This court and the Court of Appeals in Maryland have differed upon this point. 10 Pet., 533, that it survives; 4 Gill & J. (Md.), 323, that it does not. But the ground of the decision in Peters was, that the sale was to be made to pay debts. In this case there were no debts. The devisees cannot deny the validity of the chancery proceedings.

Schley, for defendant.

By the laws of Maryland (1789, ch. 45) estates of fee-tail general or fee-simple conditional are in fact fee-simple estates, because they are descendible as such, (1 Harr. & G. (Md.), 111,) and are liable *for the debts of the deceased. Elias took a fee-simple conditional. 2 Preston on Estates, 289, 295, 298, 303, 304. [*50

Elias had something more than an estate for life. 1 Brock., 131; 2 Va., 11; 7 Harr. & J. (Md.), 244; Fleta, lib. 3, chap. 9, page 186; Bracton, 17; 1 Reeves' History of English Law, 293; 2 Preston, 296; Plowd., 233, 250; 2 Ld. Raym., 779; Co. Litt., 18.

If Elias had issue, they would have taken by descent after his death; he must therefore have had a fee in himself. 1 Preston on Estates, 264; 2 Powel on Devises, 602; Willes, 3; 2 Gill & J. (Md.), 458.

Suppose Elias had only an estate for life; how does Slicer get the residue? In 1805, Elias Magruder was alive, because in 1806 he sold land. The chancellor ordered the land sold free of all claims of heirs or devisees; but Elias was a devisee and living on the land. Was his land sold over his head? He had not joined in the petition, or forfeited his estate. The petition, therefore, does not include the 100 acres, but states that the 356 acres had not been sold. True, the decree covers all; but it must be limited by the petition.

The act of 1785 does not include this case, because it is confined to cases where the party neglects or refuses to act; but Elias being alive, there was no neglect to sell the 100 acres,

because the time to sell had not yet come. Elias might even then be married and have children.

The power of the trustee was only that which the executor had, the proceeding being *ex parte*. Elias did not die until 1812, and the chancellor could not divest him of his rights upon a petition filed by other persons.

The bond of the trustee is a condition precedent, and he had no right to act without complying with it. The law required a bond. The case in 2 Gill & J. (Md.), 114, is not applicable, because no final ratification appeared there, and there was much evidence on the subject.

Suppose that Slicer had a good title, did the plaintiff obtain it? The two elder judgments were dormant for three years prior to Lamar's sale. If there is an outstanding title in Lamar, the plaintiff must fail in his ejectment; on this subject some analogous cases may be found in 12 Wheat., 179; 4 Cond. Rep., 457, note.

In Maryland, there is no law limiting the lien of a judgment, but the judgment itself is good for twelve years. The chancellor, however, decided (2 Bland (Md.) Ch., 323) *51] that a judgment cannot lie dormant *for ever. Some illustrative cases are 2 Harr. & J. (Md.), 66; 8 Gill & J. (Md.), 38; 7 Id., 360.

It is settled in Maryland that there must be a *scire facias* where a new party is to be charged; such party must have a day in court. 2 Harr. & J. (Md.), 72; 10 Gill & J., 373.

4. The demise is for an entirety.

Two children did not join in the petition, and the record does not show that they ever received a distributive share of the proceeds of the second sale of 100 acres. Their title is not extinguished; and whatever may be the condition of the other four children, the plaintiff, not having acquired the title of these two, cannot succeed under his present demise.

Johnson, in reply.

It does not appear that any of the children ever objected to the proceedings of the trustee.

As to the 356 acres, it must be admitted that there was no other mode of making a sale than under the act of 1785; and there was the same necessity as to the 100 acres. The executor had not power to sell them; here was a case, then, where property ought to be sold, and there was nobody to sell it. If the chancellor appoints a trustee, he has decided that a trust exists. This court has said that the decision of a court of competent jurisdiction must stand; and must assume that the necessary facts were proved.

The Court of Appeals in Maryland have decided (M. S. Denison and Dublin) that a proceeding under the fourth section of the act of 1785 is like a suit. One person is enough to petition; others can go in and be heard. If one were not enough to petition, the act would be of little use. The trustee was directed to "sell and convey the property," not merely the interest of the petitioners. The act was designed for a practical purpose, to reach the estate.

Was the trustee appointed for the 100 acres also? True, the petition speaks only of 356 acres, but it refers to the will, and states it. The same children who were to receive the proceeds of the 356 acres, were, by the will, also to receive the proceeds of the 100 acres. The right to the 100 acres was prospective and contingent; but the trustee was vested with power to sell all, for the sake of convenience. It is objected that Elias was still alive; but the court may as well presume him to be dead, as that there was error in the decree. The admission in the record is, that the court may presume any fact which *they would instruct a jury to presume. [*52 If, therefore, they would instruct a jury to presume the death of Elias, it can presume it too. The trustee first reported that he had not sold the 100 acres, and afterwards reported specially that he had. The court, by ratifying this last report, have made it conclusive that they considered the trustee to have been authorized.

This party cannot object to these proceedings; if any persons could, it would be the children who did not join, but the court would not now tolerate an ejectment, if brought by them.

The bond is not necessary to give the chancellor jurisdiction, but to secure the parties; its omission is a mere irregularity, and not to be brought into view upon a collateral matter. Besides, it must be presumed to have been given. In 2 Gill and J. (Md.), a ratification was presumed (page 130).

It is said that we do not show a title to the whole. But the two children who did not petition received their share of the proceeds, and by that act made themselves parties. They are estopped. The decree gave authority to sell the whole land, and the whole title was conveyed to us.

The Court of Appeals did say once, that a plaintiff could not recover an undivided part, claiming title to the whole. The act of 1832 corrected this. This act has been repealed in part, but not in this.

As to an outstanding title in Lamar:—

Until the chancellor said otherwise, the profession had no doubt of the propriety of the lien of an elder judgment.

Before the act of 1823, execution had to be issued within a year and a day. Now three years are allowed. All judicial liens must be noticed by all. A purchaser under a junior judgment must be presumed to have notice of the first. The chancellor says that the object of requiring a prompt issue is to protect purchasers; but they are already protected by the records.

What estate did Elias take?

It is true that an estate-tail general or fee-simple conditional is by the laws of Maryland, synonymous with a fee-simple. But a fee-simple conditional is where the limitation is to heirs special, to the exclusion of heirs general. 2 Bl. Com., 110. There is no such special limitation in this will. No estate of inheritance passed on the death of the testator. 2 Bl. Com., 151, 154, defines an estate upon condition.

*53] If a fee passed upon the death of the testator, it was not by virtue *of the will. Rules giving a different direction to an estate from that pointed out in the will are not applied except from necessity. The devise to the children is a good executory devise, to take effect unless a contingency happened. The object of the testator was to benefit his children; but the argument of the other side would defeat that intention.

Mr. Justice McLEAN delivered the opinion of the court.

This case comes up on a writ of error to the Circuit Court for the district of Maryland. An action of ejectment was commenced by the lessor of the plaintiff, to recover the possession of 100 acres of land, part of the tract called George's Adventure, situated near the town of Cumberland. In the Circuit Court a verdict was found for the plaintiff, subject to the opinion of the court upon a case stated. A judgment was entered for the defendant; and the cause is now before us, on the facts agreed.

By his last will and testament, Zachariah Magruder, a citizen of Maryland, among other things, devised to his wife Sarah, "the full use of his dwelling-plantation, containing in the whole, after a certain legacy was deducted, about 356 acres, called George's Adventure, in Washington county; to be by her peaceably and quietly possessed and enjoyed without molestation, during her natural life."

The will also contained the following, "I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land, being part of a tract of land called George's Adventure, lying and being in Washington county, and state aforesaid; to be laid off at the upper end of the tract afore-

said, so as to include the plantation on which he now lives. In case the said Elias Magruder should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid to him, the said Elias Magruder, his heirs and assigns, for ever; but should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise, and desire, that the 100 acres of land aforesaid be sold to the highest bidder, and the money arising from the sale thereof be equally divided among my six following children, to wit: Samuel," &c. The testator having died, proof was made of his will, and letters testamentary were granted, the 3d of May, 1796, to Sarah Magruder his wife and his son Nathaniel B. Magruder, named as executrix and executor in the will.

After the decease of the testator, Elias Magruder took possession *of the 100 acres of land devised to him, and being so in possession he conveyed the tract to David Lynn, who devised the same to the present defendants. [*54

On the 30th of December, 1805, Samuel B. Magruder and three other brothers, sons of Zachariah Magruder, filed their petition to the chancellor of Maryland, representing that their father after making particular dispositions of property, devised that the remaining part of his lands, called George's Adventure, being about 356 acres, should be sold to the highest bidder, by and at the discretion of his executrix and executor, and the money equally divided amongst his six children, including the petitioners.

The petitioners stated that the executrix was deceased, and that Nathaniel B. Magruder, being insolvent, at the instance of his sureties, his power as executor had been revoked by the Orphan's Court. And the petitioners prayed that a trustee might be appointed "to sell all the property devised to be sold by the will, and such other and further relief," &c. The will was filed as an exhibit.

On the day of filing the petition, the chancellor decreed, "that the real estate in the said will directed to be sold shall be sold; that Roger Perry be appointed trustee, who shall give bond in $2000, conditioned for the faithful performance of the trust reposed in him by the decree, or to be reposed in him by any future decree or order in the premises, and that he shall proceed to sell," &c.

Afterwards on the 22d of May, 1806, the trustee reported that he "had sold the real estate in the said will and decree mentioned," and had made distribution, &c. At the close of his report he says, "the 100 acres, part of the said tract devised to be sold in case Elias Magruder should die without

heirs, as expressed in the will, still remains unsold." The sale was ratified by the chancellor.

And afterwards, on the 9th of June, 1812, the trustee made a second report, that he "had sold the remaining part of the real estate of Zachariah Magruder, deceased, consisting of 100 acres of land," &c. This sale was also ratified by the chancellor, and a deed was executed to Walter Slicer, the purchaser. In the year 1818, a judgment was obtained against Walter Slicer, and two others in the year 1819. On one of the junior judgments execution was issued, under which the land in question was sold to Lamar. On the other junior judgment, obtained at the same term, an execution was issued, and the
*55] same tract was sold, after the above sale, to David Shriver, jr., *the lessor of the plaintiff. He also purchased, subsequently, the same tract, under the prior judgment.

The first question for consideration arises out of the devise, in the will, to Elias Magruder. Did he take a life-estate only, or a fee-simple? That he took an estate in fee-simple conditional in the 100 acres, is urged by the defendants' counsel. And a statute of Maryland of 1786, entitled "an act to direct descents," (2 Ketty's Laws, ch. 45,) which provides that lands held "in fee-simple or fee-simple conditional, or in fee-tail to the heirs of the body generally," shall descend in the same manner, is relied on as giving a fee-simple to the devisee. Under this statute, it must be admitted, whether the estate vested be technically considered a fee-tail general or a conditional fee-simple, in effect, it is a fee-simple.

In 1 Inst., 20 s., it is said that "all limitations confined to the heirs of the body, either by direct or circuitous expression, and which are not estates-tail under the statute *de donis*, remain conditional or qualified fees at the common law. A gift of land to a man and his heirs generally, if he shall have heirs of his body, without any other expression to qualify the words heirs of his body, is a conditional fee." Fleta, b. 3, c. 9, 136. And in Plowd., 233, it is said, "and the Lord Dyer in his argument took exception to the ratification, for that it confesses the estate-tail in King Henry VII., and then says, that he having issue, Prince Arthur, entered and was seised in fee; whereas, he said, the having issue did not make him to have the fee, for the fee either accrued to him by the remainder or never." The same doctrine is found in page 250; *Machell* v. *Clarke*, 2 Ld. Raym., 778. By the statute *de donis*, Westm. 2, 13 Edw. 1, a fee-simple conditional estate at common law, in certain cases, was converted into a fee-tail which, by alienation, the ancestor could not change.

The estate under consideration, it is insisted, is a condi

tional fee-simple; or in other words that the fee vested is liable to be defeated on the failure of heirs as provided in the will. On the other side it is argued that the condition was a precedent one, which must happen before the fee vested. The doctrine above cited seems to favor the first of these positions, as also does the rule in Shelly's case. By that rule, "in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate." This rule had its origin in feudal times, and was, perhaps, in no small degree influenced by considerations which have long since ceased to exist. *The rule, Mr. Preston says, 1 Pres. on Estates, 369, "is of positive institution, and has this circumstance of peculiarity and variance from rules of construction." "Instead of seeking the intention of the parties and aiming at its accomplishment, it interferes in some, at least, if not in all cases, with the presumable, and in many instances, the express intention." "In its very object, the rule was levelled against the views of the parties." [*56

That this effect has been given to the rule by some adjudications is admitted. But there is a rule of construction applicable to all instruments, and especially to wills, that is, the intention of the parties, which should control any arbitrary rule however ancient may be its origin. And of this opinion was Lord Mansfield, in *Perrin* v. *Blake*, 4 Burr., 2579. He says, "the rule is not a general proposition, subject to no control, where the intention is on the other side, and where objections may be answered." And he agreed, as Mr. Preston remarks, with Justices Wilmot and Aston, that "the intention is to govern, and that Shelly's case does not constitute a decisive uncontrollable rule." Mr. Justice Buller, in the case of *Hodgson and wife* v. *Ambrose*, Doug., 337, was of the same opinion, and also Lord Hardwicke, in *Bagshew* and *Spencer*, 2 Atk., 583. Where technical words are used in a deed of conveyance, the legal import of such words must govern. But there is no rule better established, than that in giving a construction to a will, the intention of the testator must prevail. His expressed intention constitutes the law, unless it shall conflict with some established legal principle. Under this rule the nature and extent of the estate devised to Elias Magruder must depend upon the words of the will.

In the first clause of the devise a life-estate is clearly given to him. "I give and bequeath unto my brother, Elias Magruder, during his natural life, 100 acres of land," &c. The second clause of the devise is equally explicit. "In case the said Elias Magruder should have heirs lawfully begotten of

him in wedlock, I then give and bequeath the 100 acres of land aforesaid, to him, his heirs and assigns, for ever." Now the condition of having heirs as above expressed, is clearly a precedent condition and must happen before the estate vests. And if any doubt could arise from the above sentences whether the testator intended to vest in Elias more than a life-estate, that doubt must be dispelled by the succeeding sentence, "but, should he, the said Elias Magruder, die without an heir so begotten, I give, bequeath, devise and desire
*57] that the 100 acres of land, aforesaid, be sold to *the highest bidder, and the money arising from the sale thereof, to be equally divided among my six children."

It would be difficult to convey in more explicit language, than is done in the above sentences, the intention of the testator. He gives a life-estate; and then, on the happening of the contingency named, he gives an estate to the devisee and his heirs in fee-simple; but, should the contingency not happen, he directs the land to be sold and the proceeds distributed among his children. No other conclusion can be arrived at, on this view of the will, than that Elias Magruder took only a life-estate in the land. His conveyance, therefore, could transfer no interest in the land, beyond his own life.

The next question regards the title under the proceedings before the chancellor.

These proceedings were by virtue of "an act of 1875, for enlarging the power of the High Court of Chancery." 1 Maxcy's Laws, ch. 72, sect. 4, which provides, "that if any person hath died or shall die, leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not, by will or other instrument in writing, appoint a person or persons to sell or convey the same property, or if the person or persons appointed for the purpose aforesaid shall neglect or refuse to execute such trust, or if such person or persons, or any of them, shall die before the execution of such trust, so that the sale cannot be made for the purposes intended, in every such case the chancellor shall have full power and authority, upon application or petition from any person or persons interested in the sale of such property, to appoint such trustee or trustees for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended, as the chancellor shall in his discretion think proper."

An objection is made to these proceedings, *in limine*, on the ground that only a part of the heirs interested, united in the application to the chancellor. But this objection is not sustainable. The petition was for the benefit of all the heirs,

and the statute does not require that all shall unite in the petition. "Any person or persons interested" may apply to the chancellor. Whether applicants or not, all the heirs equally participated in the results of the proceedings, and this is a sufficient answer to any technical objection.

But the main point under this head is, whether the sale of the 100 acres now in controversy was of any validity.

That the proceedings before the chancellor constituted a suit is *admitted; and also that they are conformable, at least in part, to the mode of procedure in such cases. The chancellor had jurisdiction of the cause, as presented by the petition; and this being the case, no advantage can be taken of errors, however gross, when the record is used collaterally. If a want of jurisdiction appear on the face of the record, the judgment or decree will be treated as a nullity. But where there was the jurisdiction, the record must be received as conclusive of the rights adjudicated. No fact established by the judgment of the court can be controverted. In the language of this court, in the case of *Voorhees* v. *The Bank of the United States*, 10 Pet., 450, the record imports absolute verity. But when a judgment or decree is given in evidence, its nature and effect can only be ascertained by an examination of the record. Let this test be applied to the proceedings of the chancery court under consideration. [*58

It is admitted, and the fact appears from the record, that at the time these proceedings were instituted, Elias Magruder was living and continued to live for seven years afterwards. And as he had a life estate in the premises in controversy, and the contingency on which the estate was to vest in his heirs, being possible, during his life, the land was not subject to sale under the will. It could only be sold on the devisee's failure to have heirs, which could not occur before his decease.

The petition asks an order to sell the remaining part of the tract called George's Adventure, a part of it having been devised, containing about 356 acres. The sale of the 100 acres, now in contest, was not asked and indeed could not be, as the tract at that time was not liable to be sold. The decree ordered, "that the real estate in the said will directed to be sold should be sold." Now this decree could only apply to the 356 acres named in the petition, for the reason that the sale of that tract only was prayed for, and it was the only tract, at that time, which the will authorized to be sold. In the language of the decree, it was the real estate directed by the will to be sold.

To construe the decree as embracing the 100 acres tract, would go beyond the prayer of the petition and the jurisdic-

tion of the court. One of the trustees named in the will was deceased, and the other, being insolvent, had been removed by the Orphan's Court. The substitution of a new trustee gave
*59] to him no power beyond the special order of the court. Under the statute it seems not to have *been the practice of the court to appoint a trustee generally, to carry into effect the will: but to point out, by a specific decree, what he shall do and the mode of doing it. His duties being limited by the decree, he is made the instrument of the court, having no discretion or power under the will. Consequently, in his decree the chancellor required the trustee to give security, and directed him what notice should be given, and in what manner the sale should be made. This mode of executing the act was clearly within the discretion of the chancellor, specially given to him in the close of the above section. The rule was made and ratified by the chancellor. A deed was executed by the trustee to the purchaser, and nothing further was done until in June, 1812, when the trustee made a second report,that in pursuance of the above decree, after giving public notice, "he had sold to Walter Slicer, the remaining part of the real estate of Zachariah Magruder, deceased, consisting of the 100 acres devised to Elias Magruder."

Now it is clear that this sale was not made in pursuance of the decree. Neither in the petition nor in the decree was the tract of 100 acres named or referred to. This proceeding then, by the trustee, was without authority. It could derive no sanction from the decree. From the record is would seem that there had been no continuance of the cause for six years, and no step taken in it. The second report is then made by the trustee as stated. This report was ratified and confirmed "unless by a given day cause to the contrary should be shown," of which public notice was given. No cause being shown, there was a final ratification of the sale on the 22d of February, 1813. At the time of this sale it is admitted that Elias Magruder was deceased, without heirs, in the language of the will, "lawfully begotten of him in wedlock." And here a question arises whether the above sale can be treated as a nullity.

That the trustee was not authorized to sell by the decree has already been shown. It would seem, however, from the form of his report, that he assumed to act only in virtue of the decree.

Does the ratification of the sale bring it within the rule, which applies to a case where the court has jurisdiction, but has committed errors in its proceedings. Had the court jurisdiction of the tract of land in controversy. At the time the

decree was entered, that tract was no more subject to the power of the court than every other tract in the county. The devisee was in possession, having a life-estate in it subject to become a fee-simple on his having heirs lawfully *begotten by him. He had no notice of the proceeding, and was in no sense a party to it. The petition did not pray for the sale of this land. In fact that proceeding can, in no point of view, be considered as authorizing the sale by the trustee. The validity of the sale then must rest upon the fact of its having been made by the trustee, and sanctioned by the chancellor. There would seem to be no ground for doubt on this point. [*60

The chancellor is authorized to proceed in a summary mode, under the statute, for the sale of land, in the predicament of the above tract, after the decease of the devisee, without heirs. But he can only proceed on the application of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding.[1] There was no case before the court—nothing on which its judgment could rest.

No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice, would be treated as a nullity. And so must a sale of land be treated, which has been made without an order or decree of the court, though it may have ratified the sale. The statute under which the proceeding was had requires a decree; at least such has been its uniform construction.

This view being decisive of the title of the lessor of the plaintiff, it is not necessary to consider the other questions in the case.

The judgment of the Circuit Court is affirmed.

ORDER.

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 now here 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.

[1] APPLIED. *Wills* v. *Chandler*, 1 McCrary, 279.

*JOHN MCCOLLUM, PLAINTIFF IN ERROR, *v.* JENISON EAGER.

In the Circuit Court of the United States for Louisiana, where a party seeks relief which is mainly appropriate to a chancery jurisdiction, chancery practice must be followed.[1]

A writ of error is not the appropriate mode of bringing up for review, a decree in chancery. It should be brought up by an appeal.[2]

An appeal will lie only from a final decree; and not from one dissolving an injunction, where the bill itself is not dismissed.[3]

THIS case was brought up by a writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

The case was this:

On the 27th of July, 1838, Charles Bishop executed the following promissory note:

Donaldsonville, 27*th July*, 1838.

In all the month of May next, 1839, I promise to pay H. Williams and A. F. Rightor or order, the sum of five thousand dollars, value received.

(Signed) CHARLES BISHOP.

Which note was endorsed to Eager, a citizen of Kentucky, by Williams and Rightor, waiving the necessity of a demand of payment on the maker and of protest for non-payment and also of notice to themselves as the endorsers, of the non-payment of the note.

On the 17th of August, 1838, John Hagan senior, of New Orleans, conveyed to Williams and Bishop, six tracts of land for $50,000, payable in one, two, and three years, with interest,

[1] Unless the general principles of equity have been modified by the laws or usages of a particular State, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be the same, when administered by the courts of the United States, in all the States. *Neves* v *Scott*, 13 How., 268.

The abolition, by the legislature of a State, of the distinction between actions at law and suits in equity, by enacting that there shall be but one form of action which shall be called "a civil action," cannot obliterate the distinction between the two sorts of proceedings in the Federal courts. *Bennett* v. *Butterworth*, 11 How., 669; *Thompson* v. *Railroad Cos.*, 6 Wall., 134; *Payne* v. *Hook*, 7 Id., 425; *Walker* v. *Dreville*, 12 Id., 440.

[2] FOLLOWED. *Walker* v. *Dreville*, *supra.*; *Murdock* v. *City of Memphis*, 20 Wall., 622. CITED. *Phillips* v. *Preston*, 5 How., 289. See *Minor* v. *Tillotson*, *post* *392.

But a judgment of a State court of last resort, reversing an order of an inferior court granting a temporary injunction and remanding the cause with directions to dismiss the complaint, is reviewable on error. *Commissioners &c.* v. *Lucas*, 3 Otto, 108.

[3] FOLLOWED. *Verden* v. *Coleman*, 18 How., 86; *Thomas* v. *Woolidge*, 23 Wall., 288. S. P. *Barnard* v. *Gibson*, 7 How., 650; *Buffington* v. *Harvey*, 5 Otto, 99. See also *Humiston* v *Stainthorp*, 2 Wall., 106, 110 *n.*

the notes for which were dated on the 1st of August, 1838, and endorsed by Rightor. It was made a condition of sale that, if any one of the notes should not be punctually paid, the whole of the lands should revert to Hagan.

On the 26th of February, 1839, Bishop sold out all his interest in the above purchase to Williams, Rightor, and Andrew McCollum.

On the 3d of August, 1839, the first note given by Williams and Bishop to Hagan, for $16,666.66, was protested for non-payment.

On the 18th of November, 1839, Eager brought suit by filing a petition in the Circuit Court of the United States, against Williams and Rightor as endorsers upon Bishop's note.

*On the 7th of January, 1840, judgment was entered [*62 in favor of Eager for the amount of the note, with interest from the 1st of June, 1839. In March, 1840, a *fi. fa.* was issued, and in April, levied upon one of the tracts of land above mentioned, together with some personal property.

On the 16th of April, 1840, Hagan filed, in the second District Court of the state of Louisiana, a petition, in the nature of a bill to foreclose a mortgage, reciting that the first note of $16,666.66, given for the purchase of the six tracts of land, remained unpaid, and praying a sale of the whole of the tracts, to pay that and the other two notes of the same amount. A judgment or decree upon this petition was entered by consent, with a stay of execution until 1st of January, 1841.

On the 22d of August, 1840, the execution in favor of Eager, which had been lying over for want of bidders, was finally carried out by a peremptory sale of the property which had been levied upon, on a credit of twelve months; when John McCollum (the plaintiff in error) became the purchaser for the sum of $5,442.41, and gave his bond with five sureties for that amount to Jenison Eager.

On the 6th of January, 1841, the stay of execution upon Hagan's judgment or decree having expired, an execution was issued upon it, and Hagan repurchased the six tracts of land.

On the 24th of July, 1841, John McCollum gave a power of attorney to B. W. Lawes to act for him in every thing relating to the twelve months' bond which he had given to Eager.

On the 23d of August, 1841, execution was issued upon this bond against McCollum and his sureties; the writ directed the money to be made out of the personal estate, except slaves, but if sufficient personal estate, exclusive of slaves, could not be found in the district, then out of the real estate and slaves of McCollum and his sureties.

In September, 1841, Andrew McCollum, claiming to be the

owner of an undivided third part of the property which had been sold by Bishop to Williams, Rightor, and himself, as above stated, filed a petition in the second District Court of Louisiana against John McCollum, averring that John was in possession of the whole of the property, and praying that he might be compelled to deliver up one-third of it and pay damages for its detention.

*63] On the 20th of September, 1841, Rightor intervened in the *said suit, and claimed that the marshal's sale to John McCollum might be set aside for irregularity.

On the 22d of September, 1841, B. W. Lawes, in virtue of the power which had been given to him by John McCollum, filed a petition in the Circuit Court of the United States, in the nature of a bill in equity, stating that McCollum had given his bond for the property purchased at the marshal's sale; that an execution had been issued upon it; that the sale was null and void; that Hagan had evicted McCollum; that the formalities required by law were not observed by the marshal; that Rightor had intervened and sought to annul the sale; that the consideration of the bond had utterly failed, and praying for an injunction to stop the marshal from proceeding further upon it.

On the 1st of October, 1841, an injunction was issued in conformity with the prayer of the petition.

On the 14th of February, 1842, the Circuit Court, Judge McKinley being absent, decreed that the injunction should be dissolved with 20 per cent. damages, 10 per cent. interest, and $300 amount of fees of counsel employed by the plaintiff.

From this decision a writ of error was sued out and the case brought up, in this way, to this court.

Coxe moved to dismiss the case upon two grounds, viz:

1. That the decree was not final, and
2. That the case was brought up in an improper manner.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court for the eastern district of Louisiana.

Under the mode of proceeding in Louisiana, a petition was filed by the defendant in error, in the Circuit Court, against Williams and Rightor, on a promissory note given by them for the payment of $5,000 with interest, &c. And no answer being made, a judgment was entered, by default, against the defendants. An execution was issued, which was levied on a certain tract of land which, on being offered for sale by the marshal a second time, was purchased by John McCollum the

plaintiff in error, on a credit of twelve months. For the payment of the purchase-money at the time stated, McCollum gave bond and security.

At the expiration of twelve months, under the law of Louisiana, *an execution was issued on the bond, which has the effect of a judgment. A levy was made on certain slaves, by the marshal, who returned that after giving notice of sale, all proceedings were stayed on the execution by injunction. [*64

The injunction was obtained by the plaintiff in error on petition, representing that the title to the land purchased by him at marshal's sale, and for which the above bond was given, had failed; and that he had been evicted from the premises. That certain irregularities had taken place in the sale, &c. An injunction was prayed for, and that the bond might be decreed to be cancelled.

On the 14th of February, 1842, "the court ordered, adjudged, and decreed, that the injunction granted in this case be dissolved with 20 per cent. damages, 10 per cent. interest, and $300 amount of fees of counsel employed, to be allowed as special damage, and for costs of this suit."

A motion is made to dismiss the writ of error, on the ground that it does not lie in the case.

The proceeding on the bond may have been authorized under the Louisiana practice, there being no distinction in the courts of that state between a proceeding at law and in chancery. But the relief sought against the bond is mainly appropriate to a chancery jurisdiction, where such a jurisdiction is established. This being the case, the proceeding at law, though conformable to Louisiana practice in the state courts, was wholly irregular. In the federal courts, the jurisdictions of law and chancery, in Louisiana and in all the other states, are distinctly maintained.

If this be viewed as a chancery proceeding, a writ of error does not lie, for a decree in chancery can only be removed to this court, from the Circuit Court, by an appeal. But an appeal will only lie from a final decree; and the decree in this case was not final, as the bill was not dismissed. The writ of error is dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Louisiana, and it appearing to the court that the case is removed here by a writ of error to an inter-

locutory order or decree in chancery, it is, therefore, now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein according to law and justice.

*65] *EX PARTE BARRY.

The original jurisdiction of this court does not extend to the case of a petition by a private individual, for a *habeas corpus* to bring up the body of his infant daughter, alleged to be unlawfully detained from him.[1]

MR. JUSTICE STORY delivered the opinion of the court.

This is a petition filed in this court for a writ of *habeas corpus* to be awarded to bring up the body of the infant daughter of the petitioner, alleged to be now unlawfully debarred from him, and in the custody of Mrs. Mary Mercein, the grandmother of the said child, in the district of New York. The petitioner is a subject of the queen of Great Britain; and the application in effect seeks the exercise of original jurisdiction in the matter upon which it is founded. No application has been made to the Circuit Court of the United States for the district of New York, for relief in the premises, either by a writ of *habeas corpus* or *de homine replegiando*, or otherwise; and, of course, no case is presented for the exercise of the appellate jurisdiction of this court by any review of the final decision and award of the Circuit Court upon any such proceedings. Nor is any case presented for the exercise of the appellate jurisdiction of this court upon a writ of error to the decision of the highest court of law and equity in the state of New York, upon the ground of any question arising under the 25th section of the Judiciary act of 1789, ch. 20.

The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now the Constitution of the United States has not confided any original jurisdiction to this court, except "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party." The present case falls not within either predicament. It is the case of a private indi-

[1] CITED. *In re Kaine*, 14 How., 19; *Ex parte Parks*, 3 Otto, 22.
Nor can a Circuit Court issue the writ for such a purpose. *Ex parte Everts*, 7 Am. L. Reg., 79. See notes to *Duncan* v. *Darst*, 1 How., 301; and compare *United States* v. *Green*, 3 Mason, 482.

vidual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States. Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress *in [*66 such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof.

SPALDING *v.* THE PEOPLE OF THE STATE OF NEW YORK, EX REL. FREDERICK F. BACKUS.

An appeal bond given to the people or to the relator is good, and if forfeited, may be sued upon by either.

Beardsley moved to dismiss the writ of error in this case, because Spalding had given a bond to The People of the State of New York, or Frederick F. Backus.

But Mr. Justice STORY delivered the opinion of the court, and said that the bond was good, and, if forfeited, might be sued upon in the name of the people or of the relator, at the option of the government.

GLENDY BURKE, PLAINTIFF IN ERROR, *v.* ROBERT MCKAY.

By the general law merchant, no protest is required to be made upon the dishonor of any promissory note; but it is exclusively confined to foreign bills of exchange.[1]

Neither is it a necessary part of the official duty of a notary, to give notice to the endorser of the dishonor of a promissory note.

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[1] CITED, *in dissenting opinion. Musson* v. *Lake*, 4 How., 279, 282; S. P. *Bailey* v. *Dozier*, 6 How., 23; *Wanzer* v. *Tupper*, 8 How., 568.

But a state law or general usage may overrule the general law merchant in these respects.

Where a protest is necessary, it is not indispensable that it should be made by a person who is in fact a notary.[2]

Where the endorser has discharged the maker of a note from liability by a release and settlement, a notice of non-payment would be of no use to him, and therefore he is not entitled to it.[3]

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Mississippi. The suit was brought in the court below by the endorsee against the endorser of the following promissory note:

*67] *$2,800. *Clinton, Miss., January 20th*, 1837.

On the 1st day of January, eighteen hundred and forty, we, or either of us, promise to pay Robert Mathews, or order, twenty-eight hundred dollars, for value received.

R. E. STRATTON,
SAML. W. DICKSON,
B. GARLAND.

The note was endorsed thus

I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest if not paid at maturity. ROBERT MATHEWS.
Clinton, 28th April, 1838.

The note was then endorsed by McKay in blank, and passed with two intermediate endorsements, into the hands of Burke, a citizen of Louisiana, the plaintiff below, and also plaintiff in error.

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[2] The notice may be given by the holder, a notary, or any other agent. *Harris* v. *Robinson*, 4 How., 336; *Austen* v. *Miller*, 5 McLean, 153; s. c. 13 How., 218; *Bank of United States* v. *Goddard*, 5 Mason, 366; *Swayze* v. *Britton*, 17 Kan., 625; *Cromer* v. *Platt*, 37 Mich., 132. But see *Sacrider* v. *Brown*, 3 McLean, 481.

[3] But see *Ray* v. *Smith*, 17 Wall., 411.

An indorser who takes *partial indemnity*, after the maturity of the note, is entitled to notice. *Burrows* v. *Hannegan*, 1 McLean, 309.

One who admits his liability at the time of the maturity of the note and offers to "arrange the matter" with the holder and asks for indulgence, is not. *Moyer's Appeal*, 87 Pa. St., 129; and see *Boyd* v. *Toledo Bank*, 32 Ohio St., 526; *Armstrong* v. *Chadwick*, 127 Mass., 156; *Fell* v. *Dial*, 14 So. Car., 247.

A waiver of presentment is also a waiver of notice of dishonor, *Dye* v. *Scott*, 35 Ohio St., 194. And a waiver of notice of dishonor is a waiver of presentment. *Harvey* v. *Nelson*, 31 La. Ann., 434; *Walker* v. *Popper*, 2 Utah T., 96. *Contra*, *Sprague* v. *Fletcher*, 8 Oreg., 367.

The fact that the indorser, before the maturity of the note, becomes the executor of the maker will not dispense with notice of non-payment. *Carolina Bank* v. *Wallace*, 13 So. Car., 347; s. c., 36 Am. Rep., 694.

On the trial, the plaintiff read the note and the endorsements thereon; he also read, by agreement of parties, a statement in writing of S. Humphreys, who was absent and sick, for the purpose of proving a demand and notice of non-payment to the endorser, to wit:

UNITED STATES OF AMERICA,
State of Mississippi, Hinds county.

By this public instrument of protest, be it known that, on this fourth day of January, 1840, at the request of James G. Paul, teller, the holder of the original note, of which a true copy is here endorsed, I, S. W. Humphreys, J. P., residing in the town of Clinton, Hinds county, Mississippi, qualified according to law, went to the house of Richard E. Stratton and presented the said note, and demanded payment, which was refused; I also went to the house of Samuel W. Dickson, and demanded payment, which was refused; I also went to the office of Burr Garland, in the town of Clinton, and there was no person of whom to make a demand.

Whereupon, I, the said S. W. Humphreys, J. P., and *ex officio* notary public, at the request aforesaid, do hereby solemnly and publicly protest the said note, as well against the drawer thereof as against the acceptors, endorsers, and all who are or may be concerned, for all exchanges or re-exchanges, costs, charges, damages, and interests, suffered, or to suffer, for non-payment of said note thus solemnly done and protested.

*Given under my hand and seal, at my office at Clinton, the day and year above written. [*68

S. W. HUMPHREYS, J. P. [SEAL.]
Acting Notary Public.

Notice of protest directed to R. E. Stratton, Mississippi.

Notice of protest directed to Saml. W. Dickson, at Brownsville, Mississippi.

Notice of protest directed to B. Garland, at Clinton, Mississippi.

Notice of protest directed to Robt. McKay, at Holmesville, Pike county, Mississippi.

Notice to Robert Mathews, directed to Carrollton, Carroll county, Mississippi.

Notice to Tho. E. Robins, cashier, directed to Vicksburg, Warren county, Mississippi.

All the above named notices were put in the post-office at Clinton by me, on the 4th day of January, 1840, before 9 o'clock at night. S. W. HUMPHREYS, J. P.

The plaintiff also read in evidence the following admission of the defendant:—

The defendant, Robert McKay, in this case, admits that, at and before the first and fourth of January, 1840, he did reside at Holmesville, Pike county, Mississippi, and that the certificate of protest and sending notices, &c., made and signed by S. W. Humphreys, and filed in this case, shall be received as the evidence of said Humphreys, (who is sick, and cannot attend court,) and that said Humphreys, if present, would swear to all the facts stated in the said certificate.

Defendant also admits that, in a settlement with the makers of the note in the declaration mentioned, of and concerning two judgments defendant had against them upon two other notes of the same amount which fell due 1st and 4th January, 1838 and 1839, this note was included, and defendant has released said makers from all liability to him on said notes; but defendant denies that he has ever received of said makers full payment of said note; and that, upon a compromise of all claims and controversies between them, he released said drawers as aforesaid from any liability to defendant. Defendant agrees that this statement shall be read and received upon the trial of this case by the court and jury.

Nov. 18, 1842. ROBERT MCKAY.

The defendant admitted his residence was at Holmesville, Pike county, at the maturity of the note; and here plaintiff rested his case.

*69] *The court instructed the jury that, in order to charge the endorser of a promissory note, the plaintiff must prove that it was protested, on the day of its maturity, by a notary public, and demand made, and notice of non-payment given by him. That the statement of Humphreys admitted as evidence not proving that fact, they must find for the defendant; whereupon, a verdict for defendant was rendered.

The plaintiff, by attorney, excepted to the charge of the court before the jury left the box; which exceptions were signed and sealed, and ordered to be made a part of the record, which is done accordingly. S. J. GHOLSON. [SEAL.]

J. Henderson, for the plaintiff in error.

This action was brought in the Circuit Court of the United States for Mississippi, by Burke, as endorsee of a promissory note, against McKay, an endorser of the same note.

Due demand of payment of the makers of the note was made by a justice of the peace, acting *ex officio* as notary

public. The note being dishonored, was protested by said justice of the peace, and due notice of both non-payment and protest given to the defendant McKay.

It is agreed by the parties on the record that all these proceedings are regular, if the justice of the peace, officiating as a notary, might lawfully discharge such duties.

It is admitted by the defendant, McKay, that he had also previously settled with the makers of the note, and released them from its payment, though he had not then received payment of the money stipulated on settlement.

With this state of the case in proof before the jury, the court charged:—

"That in order to charge the endorser of a promissory note, the plaintiff must prove it was protested on the day of its maturity, by a notary public, and demand made, and notice of non-payment given by him. That the statement of Humphreys, admitted as evidence, not proving that fact, they (the jury) must find for the defendant."

And which being excepted to, verdict and judgment went according to the charge, and the instruction is now complained of as error.

Three points arise in the case:—

1. From the facts of the case, was the defendant entitled to any notice?

2. Is protest of a promissory note necessary?

*3. If protest be necessary, was it legally made in this case by a justice of the peace officiating as notary? [*70

The charge of the court has omitted any notice of the first point, and has, as we contend, decided erroneously on the second and third points.

We maintain,

1. That the defendant in this case is not, under his confession that he had released the drawers of the note from their responsibility, entitled to demand any notice of dishonor of the note in any form. He discharged every interest which entitled him to any notice whatever.

2. But if protest of notice might be required, then we insist all in this case was legally conformed to such requirement.

By statutes of Mississippi, (How. and Hut., 430, sect. 24,) authorizes justices of the peace to perform duties of the notary public.

3. But our statutes in this respect make no change of the general law merchant, and protest of a note (contrary to the judge's charge) is not necessary. 6 Wheat., 151, 152; Anth. (N. Y.), N. P., 1, and note.

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the district of Mississippi. The plaintiff in error brought an action of assumpsit in that court, against the defendant in error, as endorsee upon a promissory note dated at Clinton, Mississippi, January 20, 1837, whereby R. E. Stratton, Samuel W. Dickson, and B. Garland, or either of them, on the first day of January, 1840, promised to pay Robert Mathews or order, $2,800 for value received. The note was endorsed by Mathews as follows: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest, if not paid at maturity." The note was afterward endorsed by McKay, (the defendant,) as it should seem, in blank, and the plaintiff in error in his declaration made title as immediate endorsee to McKay.

At the trial of the cause upon the general issue, the plaintiff read the note and the endorsement, and also proved that, at the maturity of the note, due demand of payment was made of the makers, by S. W. Humphreys, a justice of the peace of Hinds county, Mississippi, styling himself "acting notary public;" who, upon the non-payment, *made due protest thereof, (the protest being by consent admitted as evidence of the facts,) and gave due notice thereof to the payee of the note and to all the endorsers. The defendant (McKay) also admitted that, in a settlement with the makers of the note, in some other transactions, the present note was included, and the defendant released the makers from all liability thereon, but he denied that he had ever received of the makers full payment of the said note; and that, upon a compromise of all claims and controversies between them, he released the makers from all liability to the defendant; and he agreed that the same statement should be read and received at the trial of the case by the court and the jury. The district judge (who alone sat in the cause) instructed the jury, that, in order to charge the endorser of a promissory note, the plaintiff must prove that it was protested on the day of its maturity by a notary public, and demand made and notice of non-payment given by him; that the statement of Humphreys, admitted as evidence, not proving that fact, they must find for the defendant. Whereupon the jury returned a verdict for the defendant, and judgment passed accordingly. A bill of exceptions was taken by the plaintiff to the instruction of the court at the trial; and the cause now comes before us upon the writ of error to examine the correctness of that instruction.

*71]

And we are all of opinion, that the instruction was incorrect, and not maintainable in point of law. In the first place, by the general law merchant no protest is required to be made upon the dishonor of any promissory note; but it is exclusively confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite the case of *Young* v. *Bryan*, 6 Wheat., 146, where the very point was decided. It is true that it is a very common practice for a notary public to be employed to make demand of payment of promissory notes from the makers, and also to give notice of the dishonor to the endorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognised by law, as binding upon the holder. Unless, therefore, there be some statute in Mississippi, requiring the intervention of a notary in such cases, (as we understand there is not,) or some general usage equally binding, it is clear that the instruction proceeded upon a mistaken ground. In the next place, it is no necessary part of the official duty of a notary (subject to the like exceptions) *to give notice to the endorsers of the dishonor of a [*72 promissory note, although certainly it is a very convenient and useful course in the transaction of such affairs in commercial cities. In the next place, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary. See Howard and Hutchinson's Statutes of Mississippi, ch. 37, sect. 24, p. 430.

In the next place, in the present case, under the circumstances, the endorser (McKay) was not entitled to any notice whatsoever of the dishonor. He had actually discharged the makers from all liability for the payment of the note by his release and settlement with them. Of course the notice could be of no use or value to him; for he would in no event be entitled to any recourse over against them; and, therefore, no notice to him would have been necessary, although it fully appears that he had received due notice of the dishonor.

For these reasons, we are of opinion that the judgment ought to be reversed and a *venire facias de novo* awarded.

ORDER.

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 Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, 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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*73] *BENJAMIN J. KNAPP, PLAINTIFF IN ERROR, *v.* EDMUND BANKS.

Where the plaintiff in the court below claims $2000 or more, and the ruling of the court is for a less sum, he is entitled to a writ of error.[1]

But the defendant is not entitled to such writ where the judgment against him is for a less sum than $2000 at the time of the rendition thereof.[2]

THIS was a case brought up by writ of error from the Circuit Court of the United States for the southern district of New York.

Banks had recovered a judgment in that court, against Knapp, for $1,720.

Ogden moved to dismiss the case for want of jurisdiction, which was opposed by *Benedict* upon the ground that adding interest upon the judgment down to the time when the writ of error was brought, would make it exceed $2000; and he cited 3 Peters, 32, to show that the amount in controversy in this court determined the jurisdiction.

Mr. Justice STORY delivered the opinion of the court.

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[1] See *Western Union Tel. Co.* v. *Rogers*, 3 Otto, 567; *Sizer* v. *Many*, 16 How., 98; *Parker* v. *Latey*, 12 Wall., 390.

The amount in dispute must *exceed*, not merely equal $2,000. *Walker* v. *United States*, 4 Wall., 163. When the sum in controversy is large enough to give the court jurisdiction, such jurisdiction will be retained notwithstanding a subsequent reduction of the sum below the amount requisite. *Cooke* v. *United States*, 2 Wall., 218. Where the matter in controversy was the right to the mayoralty of a city for the term of two years at a salary of $1000 per annum, jurisdiction was assumed notwithstanding the salary was payable monthly. *United States ex rel.* v. *Addison*, 22 How., 174.

[2] FOLLOWED. *Walker* v. *United States*, 4 Wall., 165. CITED. *Thompson* v. *Butler*, 5 Otto, 695; *United States* v. *Watkinds*, 6 Fed. Rep., 157; s. c. 7 Sawy., 99. S. P. *Troy* v. *Evans*, 7 Otto 1.

We entertain no doubt whatsoever upon this question. The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding $2000, and the *ad damnum* exceeds $2000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than $2000, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than $2000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not.

ORDER.

Mr. *Ogden*, of counsel for the defendant in error, moved the court to dismiss this writ of error for the want of jurisdiction, because the matters or sum in controversy, exclusive of costs, did not exceed $2000; which was opposed by Mr. *Benedict*, of counsel for the plaintiff in error, who contended that although the judgment of the Circuit *Court was only [*74
for $1720, yet that the interest on that sum added thereto would make it exceed $2000. To which Mr. *Ogden* rejoined, that the right of the party to a writ of error, was controlled by the amount at the rendition of the judgment and could not be enlarged by time. On consideration whereof, It is the opinion of this court that where the plaintiff in the court below claims $2000 or more, and the ruling of the court is for a less sum, that he is entitled to a writ of error: but that the defendant in the court below is not entitled to such writ where the judgment against him is for a less sum than $2000 at the time of the rendition thereof—that this is the settled practice of this court. Whereupon it is now here ordered and adjudged by this court that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

February 3*d*.

LUCIUS W. STOCKTON AND DANIEL MOORE, PLAINTIFFS IN ERROR, *v.* HARRIET BISHOP, DEFENDANT.

An execution, issued in the court below, after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or this court—these things operating as a stay of execution.[1]

IN the Circuit Court of the United States for the western district of Pennsylvania, Harriet Bishop, the defendant in error and a citizen of the state of Ohio, obtained a judgment against Stockton and Moore for $6500 damages and costs, on the 7th of December, 1843.

On the 15th of December, 1843, Stockton and Moore entered into a bond with Hugh Campbell as surety, for the prosecution of a writ of error to this court, which was approved by the judge, and, on the same day, a writ of error and citation was sued out. On the 16th of December, 1843, the citation was returned served on R. Biddle, Esq., attorney of defendant in error.

On the 11th of January, 1844, the plaintiff below sued out a writ of *fieri facias* and placed it in the hands of the marshal, returnable on the 20th of May.

Coxe moved to quash the writ of *fieri facias*, as having been irregularly issued.

*75] *Mr. Justice STORY delivered the opinion of the court.

Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execu-

[1] DISTINGUISHED. *Hogan* v. *Ross*, 11 How., 296. FOLLOWED. *Slaughterhouse cases*, 10 Wall., 273, 292. CITED. *French* v. *Shoemaker*, 12 Wall., 100. S. P. *United States ex rel.* v. *Addison*, 22 How., 174.

Where an appeal was taken in a common law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error, the writ was sued out too late to stay execution and the court below erred in quashing the execution. *Saltmarsh* v. *Tuthill*, 12 How., 387.

Where the writ is not sealed until eleven days after rendition of judgment, there is no stay, and the same is true where the citation is not served before the return day of the writ. *City of Washington* v. *Dennison*, 6 Wall., 495. So, also, where a copy of the writ is not lodged for the adverse party within ten days, Sundays exclusive, after judgment or decree. *Railroad Co.* v. *Harris*, 7 Wall., 574; *O'Dowd* v. *Russell*, 14 Id., 402.

But under the act of June 1st, 1872, § 11, it is not necessary, in order to make the writ a *supersedeas*, that it be served within ten days, the *supersedeas* bond may be filed and the writ served at any time within sixty days after the rendition of judgment. *Telegraph Co.* v. *Eyser*, 19 Wall., 419. And see *Doyle* v. *Wisconsin*, 4 Otto., 50.

tion, and that a *supersedeas* to the *fieri facias* ought to issue from this court, to supercede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice. The motion is therefore, granted and a *supersedeas* will be issued accordingly.

ORDER.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America

To the Honorable the Judges of the Circuit Court of the United States for the western district of Pennsylvania, and to the Marshal of the United States for the said district, greeting:

WHEREAS, lately in the said Circuit Court, ——— before you, or some of you, in a cause between Harriet Bishop, plaintiff, and Lucius W. Stockton and Daniel Moore, defendants, judgment was rendered by the said Circuit Court on the 7th of December, 1843, in favor of the said plaintiff and against the said defendants, for the sum of $6500 and costs of suit, and on the 15th December, 1843, the aforesaid defendants, with sufficient security, filed their bond in error, which was approved by the judge of the District Court, so as to operate as a *supersedeas*, the defendants having sued out a writ of error in due form and time, and a citation having been regularly taken out, served upon the defendant in error and duly returned, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and forty-four, it is made to appear on affidavit to the said Supreme Court of the United States, that, notwithstanding the premises, the aforesaid plaintiff in the said Circuit Court caused a writ of *fieri facias* to be issued on the 11th day of January, 1844, upon the judgment obtained in said cause, and to be placed in the hands of the aforesaid marshal for service and satisfaction thereof: *On consideration whereof, it is now here ordered by this court that a writ of *supersedeas* be, and the same is hereby awarded to be directed to the aforesaid marshal, commanding and enjoining him and his [*76

deputies, to stay every and all proceedings upon the said writ of *fieri facias*, and that he return the said execution with the writ of *supersedeas* to the said Circuit Court, and that the judges of the said Circuit Court do cause the said writ of execution to be quashed, the same having been unjustly, improvidently, and erroneously issued out of the said court, at the instance of the said plaintiff. You, therefore, the marshal of the United States for the western district of Pennsylvania, are hereby commanded that, from every and all proceedings on the said *fieri facias* or in any wise molesting the said defendants on the account aforesaid, you entirely surcease, as being superseded, and that you do forthwith return the said *fieri facias*, together with this *supersedeas* to the said Circuit Court, as you will answer the contrary at your peril. And you the judges of the said Circuit Court are hereby commanded that such further proceedings be had in the premises, in conformity to the order of this court, and as according to right and justice, and the laws of the United States ought to be had, the said execution notwithstanding.

WITNESS the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the 13th day of March, in the year of our Lord, one thousand eight hundred and forty-four.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

WILLIAM KINNEY AND JAMES J. MECHIE, EXECUTORS AND TRUSTEES OF ROBERT PORTERFIELD, DECEASED, *v.* MERIWETHER L. CLARK, WILLIAM P. CLARK, GEORGE R. H. CLARK, AND JEFFERSON R. CLARK, A MINOR BY THE AFORESAID GEORGE R. H. CLARK, HIS GUARDIAN, HEIRS AND DEVISEES OF WILLIAM CLARK, DECEASED, AND ROBERT O., ANN C., GEORGE W., AND FRANCIS JANE WOOLFOLK, HEIRS OF GEORGE WOOLFOLK, DECEASED, AND OTHERS.

An act of the legislature of Virginia, passed in May, 1779, "establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," contained, amongst other exceptions, the following, viz.: *no entry or location of land shall be admitted within the country and limits of the Cherokee Indians.

*77]

The tract of country lying on the west of the Tennessee river, was not then the country of the Cherokee Indians, and, of course, not within the exception.

A title may be tried in Virginia, Kentucky, and Tennessee, as effectually upon

a *caveat* as in any other mode; and the parties, as also those claiming under them, are estopped by the decision.

The boundaries of the Cherokees, as fixed by treaties, historically examined, and also the nature, limits, and effect of the grant to Henderson and Company.[1]

Whatever lands in Virginia were not within the exceptions of the act of 1779, were subject to appropriation by Treasury warrants.

As the rule is settled, that the decisions of state courts, construing state laws, are to be adopted by this court, and as the courts of Kentucky have decided that an entry was required to give title on a military warrant, in the military district, this court decides that the legislative grant of Virginia to her officers and soldiers, would not, of itself, prevent the statute of limitations of Kentucky from attaching.[2]

The Kentucky act of 1809, applied to the Chickasaw country on the west of the Tennessee river, as far as treaties would permit; and upon the extinguishment of the Indian title, this act, together with all the other laws, was extended over the country.

THIS case was brought up by appeal from the Circuit Court of the United States for the district of Kentucky, sitting as a court of equity, and arose upon the following state of facts:

On the 19th December, 1778, the General Assembly of Virginia passed a joint resolution, declaring that a certain tract of country, to be bounded by the Green river and a south-east course from the head thereof to the Cumberland mountains, with the said mountains to the Carolina line, with the Carolina line to the Cherokee or Tennessee river, with the said river to the Ohio, and with the Ohio to Green river, ought to be reserved for supplying the officers and soldiers of the Virginia line with the respective proportions of land, which have been or may be assigned to them by the General Assembly, saving and reserving the land granted to Richard Henderson and Company, and their legal rights to such persons as have heretofore actually located lands and settled thereon, within the bounds aforesaid.

In May, 1779, every purchase of lands, theretofore made by or on behalf of the crown of Great Britain, from any nation of Indians within the limits of Virginia, was declared to enure to the benefit of that commonwealth, and all sales and deeds made by any Indian, or nation of Indians, to or for the separate use of any person or persons, were pronounced void.

*In May, 1779, also, an act was passed by the General Assembly "for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands." This act contained, amongst other things, the following restrictions:—"No entry or location of land shall be admitted within the country and limits of the [*78

[1] See *Holden* v. *Joy*, 17 Wall., 246. Wall., 537; *Andreae* v. *Redfield*, 8
[2] FOLLOWED. *Hanjer* v. *Abbott*, 6 Otto, 235.

Cherokee Indians, or on the north-west side of the Ohio river, or on the lands reserved by act of Assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson and Company, or in that tract of country reserved by resolution of the General Assembly for the benefit of the troops serving in the present war, and bounded by the Green river and south-east course from the head thereof to the Cumberland mountains, with the said mountains to the Carolina line, with the Carolina line to the Cherokee or Tennessee river, with the said river to the Ohio river, and with the Ohio to the said Green river, until the further order of the General Assembly."

In October, 1779, an act was passed "for more effectually securing to the officers and soldiers of the Virginia line, the lands reserved to them," &c.

The first section imposed a heavy penalty on settlers who should not evacuate the reserved lands.

The second ascertained the proportions or quantity of land to be granted, at the end of the war, to the officers of the Virginia line, on continental or state establishment, or to the officers of the navy; and it was also provided that where any officer, soldier, or sailor, shall have fallen or died in the service, his heirs or legal representatives shall be entitled to, and receive, the same quantity of land as would have been due to such officer, soldier, or sailor, respectively, had he been living.

On the 18th of May, 1780, Colonel George Rogers Clark, (under whom the defendants claim,) upon sundry Treasury warrants, made with the surveyor several entries of land, in all amounting to 74,962 acres, lying in the then state of Virginia, below the Tennessee river; and afterwards, said Clark, in like manner, on the 26th October, 1780, amended his said entries, "to begin on the Ohio at the mouth of the Tennessee river, running down the Ohio, bounded by the drowned lands of the said river and waters of the Mississippi, for the quantity of 74,962 acres, in one or more surveys.

In October, 1780, an act passed "for making good the future pay of the army."

*79] *It allowed a major-general 15,000 acres of land, and a brigadier-general 10,000.

It entitled the legal representative of any officer who may have died in service before the bounty of lands granted by that or any former law, to demand and receive the same in like manner as the officer himself might have done. And as a testimony of the high sense the General Assembly of Virginia entertained of the important services rendered the

United States by Major-General Baron Steuben, it was further enacted that 15,000 acres of land be granted to the said Major-General Baron Steuben, in like manner as is hereinbefore granted to other major-generals.

In November, 1781, an act passed "to adjust and regulate the pay and accounts of the officers and soldiers of the Virginia line," &c.

The eighth section declared "That whereas a considerable part of the tract of country allotted for the officers and soldiers by an act of Assembly, entitled 'An act for establishing a land-office,' &c., hath, upon the extension of the boundary line between this state and North Carolina, fallen into that state, and the intentions of the said act are so far frustrated, Be it therefore enacted, That all that tract of land included within the rivers Mississippi, Ohio, and Tennessee, and the Carolina boundary line, shall be and the same is hereby substituted in lieu of the lands so fallen into the said state of North Carolina, to be in the same manner subject to be claimed by the said officers and soldiers."

The ninth section required the governor, as soon as the circumstances of affairs would admit, to appoint surveyors for the purpose of surveying and apportioning the lands theretofore reserved to the officers and soldiers agreeably to their ranks, in such manner and in such proportions as were allowed by act of Assembly as a bounty for military services.

The officers were authorized to depute and appoint as many of their number as they might think proper, to superintend the laying off the lands, with power to choose the best of the same thus to be allotted, and point out the same to the surveyors who were required to make the surveys, and be subject to the orders of the superintendents throughout the survey.

After the survey, the portions of each rank were to be numbered, and the officers and soldiers were to proceed to draw lots according to their respective ranks, and to locate as soon as they thought proper.

The twelfth section provided "That the bounties of land given *to the officers and soldiers of the Virginia [*80
line in continental service, and the regulations for the surveying and appropriating the same, shall be extended to the state officers.

In May, 1782, an act was passed, entitled "An act for providing more effectual funds for the redemption of certificates granted the officers and soldiers raised by this state."

The seventh section provided that, "Whereas it is necessary that the number of claims to any part of the lands appropriated for the benefit of the said officers and soldiers should be

speedily ascertained: Be it therefore enacted, That all persons having claims as aforesaid, be required, and they are hereby directed, to transmit authenticated vouchers of the same to the war-office, on or before the first of January next," and those without the state were required to do the same on or before the first of June.

The eighth section directed the register of the land-office to grant, to the officers and soldiers, warrants for the lands allotted them, upon producing a certificate of their respective claims from the commissioner of war.

The ninth section enacted "That any officer or soldier who hath not been cashiered or superseded, and who hath served the term of three years successively, shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid."

The tenth section contained this proviso, "Provided always, and it is hereby enacted, that no surveyor shall be permitted to receive any location upon any warrant for lands within the country reserved for the officers and soldiers, until the apportionment and draft for the same, as directed by the act entitled 'An act to adjust and regulate the pay and accounts of the officers and soldiers of the Virginia line.'"

On the 18th of December, 1782, a warrant was issued to Robert Porterfield, (the complainant,) as the heir of Colonel Charles Porterfield, deceased, for 6,000 acres of land; and on the 13th of June, 1783, a warrant was issued to Thomas Quarles for 2666⅔ acres, which warrant was afterwards assigned to Porterfield, the complainant.

In October, 1783, an act was passed, entitled, "An act for surveying the lands given by law to the officers and soldiers of continental and state establishments," &c.

*81] For the better locating and surveying the lands, given by law to *the officers and soldiers on state and continental establishments, it enacted that it should be lawful for the deputation of officers, consisting of Major-General Peter Muhlenberg and others, who are enumerated, to appoint superintendents on behalf of the respective lines, or jointly, for the purpose of regulating the surveying of the lands appropriated by law as bounties for the said officers and soldiers. That the deputations should have power to appoint two principal surveyors; that the holders of land-warrants for military bounties, given by law as aforesaid, should, on or before the 15th of March thereafter, deliver the same to the principal surveyors, &c.

The second section declared that priority of location should be by lot, under the direction and management of the princi-

pal surveyors and superintendents. That the warrants delivered to the principal surveyors before the 10th of March, should be surveyed first, and those subsequently delivered, in the order of priority.

The third section required the location and surveys to be made under the direction of the superintendents.

The fourth section directed where, and how, the lands were to be surveyed. Those lying on the Cumberland and Tennessee were to be surveyed first; and afterwards those on the north-west side of the Ohio river, until the deficiency of all military bounties, in lands, should be fully and amply made up. "Whatever lands may happen to be left," the act declares, "within the tract of country reserved for the army, on this side the Ohio and Mississippi, shall be saved, subject to the order and particular disposition of the legislature of this state." And the governor was required to furnish the superintendents with such military aid as he might judge necessary to carry the act into effect. The aid was to be ordered from the Kentucky country, and was not to exceed a hundred men.

In the spring of 1784, the superintendents repaired to Kentucky. They found the country below the Tennessee in possession of the savages, who threatened resistance. The aid expected from Kentucky was not furnished. The attempt to enter and survey the lands was, consequently, abortive. But the superintendents proceeded to determine the priority of locations by lot; and entries were made on the books of the surveyors, to the extent of some two or three hundred thousand acres.

Porterfield's entries were of the number. They were made under the authority of the two warrants which have been already stated.

In June, 1784, two surveys were made for Clark by the surveyor *of Lincoln county, under the authority [*82 of the warrants already stated as land-office Treasury warrants. One of these surveys was for 36,962 acres, and the other for 37,000 acres.

In August, 1784, Porterfield made his entries.

Caveats were entered against the surveys of Clark, which prevented patents from being issued. These were entered in the District Court of the then district of Kentucky, by the superintendents of the Virginia state line, and were not disposed of until after the separation of Kentucky from Virginia.

In October, 1784, the legislature of Virginia interposed to prevent the military claimants from taking possession of the lands. The preamble to the act stated, "that it had been represented to the present General Assembly that the taking pos-

session of, or surveying the lands in the western territories of this state, which have been granted by law as bounties to the officers and soldiers of the Virginia line, will produce great disturbances;" and the governor, with the advice of council, was authorized to suspend, for such time as he may think the tranquillity of the government may require, the surveying or taking possession of those lands that lie on the north-west side of the river Ohio or below the mouth of the river Tennessee, and which have been reserved, &c.

On the 6th of January, 1785, Governor Henry accordingly issued his proclamation to the effect authorized by this act.

In November, 1785, and January, 1786, three treaties were made with the Indians at Hopewell, by commissioners on the part of the United States; the first, in November, with the Cherokees, and the other two in the following January, with the Choctaws and Chickasaws. That with the Choctaws bears date on the 3d, and that with the Chickasaws on the 10th of January, 1786. By the treaty with the Cherokees the boundary was established as follows: Beginning at the mouth of Duck river, on the Tennessee; thence running north-east to the ridge dividing the waters running into Cumberland from those running into the Tennessee; thence eastwardly along the said ridge to a north-east line to be run which shall strike the river Cumberland forty miles above Nashville; thence along the said line to the river; thence up the said river to the ford where the Kentucky road crosses the river; thence to Campbell's line, near Cumberland gap, &c., &c., &c. The treaty with the Chickasaws established the following boundary: Beginning on the ridge that divides the waters running into the Cumberland from those running into the Tennessee *at a point in a line to be run north-east which shall strike the Tennessee at the mouth of Duck river; thence running westerly along the said ridge till it shall strike the Ohio; thence down the southern bank thereof to the Mississippi; thence down the same to the Choctaw line of Natchez district; thence along the said line, or the line of the district, eastwardly, as far as the Chickasaws claimed, and lived, and hunted on, the twenty-ninth of November, one thousand seven hundred and eighty-two.

*83]

The fourth article of the treaty with the Chickasaws was as follows: "If any citizen of the United States, or other person, not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on, such person shall forfeit the protection of the United States of America; and the Chickasaws may punish him or not, as they please."

In 1793, the *caveat* which had been filed against Clark by the superintendents of the Virginia state line, was dismissed, in Kentucky, pursuant to the opinion of the Court of Appeals of Virginia, given in 1791.

In 1794, the General Assembly of Kentucky passed an act requiring the register of the land-office to receive, and issue grants on, all certificates of survey which were in the register's office of Virginia at the time when the separation took place, and on which grants had not issued.

On the 15th of September, 1795, grants were issued by Kentucky to Clark for the 73,962 acres.

In 1809, the legislature of Kentucky passed an act, the second section of which declares, "That no action at law, bill in equity, or other process, shall be commenced or sued out by any person or persons claiming under, or by, an adverse interfering entry, survey, or patent, whereby to recover the title or possession of such land from him or her who shall hereafter settle on land to which he or she shall, at the time of such settlement made, have a connected title in law or equity, deducible of record from the commonwealth; and when such settler shall have acquired such title or claim after the time of settlement made, the limitation shall begin to run only from the time of acquiring such title or claim, but within seven years next after such settlement made, &c.

In October, 1818, a treaty was made between the United States and the Chickasaws, by which the Chickasaws ceded to the United States all the land between the Tennessee, Ohio, and Mississippi *rivers and a line therein described on the south, which session included the lands in controversy. [*84

On the 22d of December, 1818, the legislature of Kentucky passed an act prohibiting any entry or survey from being made "on any portion of the land lying within the late Chickasaw Indian boundary."

In July, 1819, William Clark, the assignee of George Rogers Clark, the patentee, took possession of the land and placed tenants upon it.

On the 14th February, 1820, the legislature of Kentucky passed an act providing for the appointment of a superintendent to survey the lands west of the Tennessee river.

On the 26th of December, 1820, the military surveyor was permitted to survey the entries that had been made prior to the year 1792, when Kentucky became an independent state. Porterfield's surveys were commenced and continued from time to time until 1824 and 1825. Five surveys were made at different times during this period, and five patents were

issued in conformity with them, which bear date in the last-mentioned years. In May, 1824, Porterfield took possession, by his tenants, of several of the tracts patented to him, and leased them for five years.

In October, 1825, these tenants were turned out of possession by writs of forcible entry and detainer.

Some conveyances and legal proceedings occurred, during the period of which we have spoken; but, as they have no bearing upon the questions before the court in the present case, they have not been mentioned in the statement.

In July, 1836, Porterfield filed his bill in the Circuit Court of the United States for the district of Kentucky, sitting as a court of equity, which, together with two amended bills and a bill of revivor, after having brought into court various parties who were supposed to have an interest in the matter, presented the following claim, charges, and prayer.

The bill, after setting forth the title of the complainant, as founded upon the patents of 1824, 1825, and 1826, and alleging that the possession of the country by the Indians was the cause of the delay between the entries and surveys, charged that the defendant, Clark, had no right to make an entry or location on any lands west of the Tennessee river, or on the lands included between the rivers Ohio, Tennessee and Mississippi, and the North Carolina line, on land-office Treas-
*85] ury-warrant certificates; that, by law, he, Clark, was expressly *prohibited from making the said entry or location on land within the country and limits of the Cherokee Indians, or the lands reserved by the Virginia Assembly for any particular nation or tribe of Indians, or in that tract of country reserved by resolution of the General Assembly of the state of Virginia for the benefit of the troops serving in the then existing war between Great Britain and the United States of America. The bill avers that the entry of George Rogers Clark was made on lands reserved by resolution of the Assembly of Virginia for the troops then in the service of the United States; that it was made on lands reserved by law for the Indian tribes, and upon lands within the country and limits of the Cherokee Indians. The bill further charges that the said warrants were, by law, prohibited from being located on any lands that were not waste and unappropriated; that, at the time of the entries, the Indian title to said lands west of the Tennessee river and included within the rivers Ohio, Mississippi, Tennessee, and the North Carolina boundary-line, was not extinguished. The bill further charges that the entry of Clark is not precise and special, but vague, uncertain, and void; because it called to begin on the Ohio at the mouth of

the Tennessee river, running down the Ohio, bounded by the drowned lands of said river and waters of the Mississippi for the quantity of 74,962 acres in one or more surveys; and moreover that the person who in fact made such survey was not an authorized and legally appointed surveyor. It then charges that the titles of Clark, and all who claim under him, are void, and prays for a decree compelling them to release their claims to the complainant, and account to him for the rents and profits of the land.

A supplemental bill and answer were afterwards filed, but the matters therein stated are not before the court in the consideration of this case; the charges made in the bill being denied in the answer, and no proof being offered to sustain them.

The defendants all answered; but as they all rely on the same matters of defence, it is not material to notice any of the answers but that of William Clark. He contests, throughout, the right of Porterfield to relief; denies that any part of the land in contest was possessed by Porterfield at the time of filing his bill; on the contrary, he alleges, that by his tenants, he had for more than seven years next before the filing of the bill, been in full and exclusive possession of all the land in contest, claiming and holding the same under the title derived from George Rogers Clark, and he therefore pleads and *relies upon his possession and the statute of Kentucky, [*86 limiting the time of bringing suits in such cases to seven years, in bar of the relief sought by Porterfield. He insists that at the date of Clark's entries, there was no law prohibiting the location of Treasury warrants below the Tennessee river, and that the entries were made on land subject to appropriation, and in conformity with law; that they possess the certainty and precision of valid entries, and were afterwards legally surveyed in conformity with law, upon which surveys patents finally issued according to law; and that his title is not only elder in date, but superior in law and equity to that of Porterfield.

Amongst the other matters given in evidence in this case, were copies of some original papers found in the State Paper Office, in London, relating to the boundary-lines adopted at various times between the white people and the Indians, the substance of which is as follows:

1. Deed (or treaty) with the Cherokees, dated on the 13th of June, 1767, which recited that a previous treaty had been made on the 20th of October, 1765, directing the line to be run from where the South Carolina line terminated, a north course into the mountains, whence a straight line should run

to the lead mines of Colonel Chiswell, (on the Great Kenhawa river,) and that the commissioners had found themselves unable to run the line further than the top of a mountain called Tryon mountain, on the head waters of Pacolet creek and White Oak creek, therefore the present treaty established the following:—Running from the top of Tryon mountain aforesaid, beginning at the marked trees thereon, by a direct line to Chiswell's mines in Virginia.

2. Treaty between John Stuart, on behalf of his majesty, the king of England, and the upper and lower Cherokee nations, concluded at Hard Labor, on the 13th October, 1768, establishing the following boundary:—From a place called Towahihie, on the northern bank of Savannah river, a north fifty degrees east course in a straight line to a place called Demesses Corner, or Yellow Water; from Demesses Corner or Yellow Water, a north fifty degrees east course, in a straight line to the southern bank of Reedy river, at a place called Waughoe, or Elm Tree, where the line behind South Carolina terminates; from a place called Waughoe, or Elm Tree, on the southern bank of Reedy river, a north course in a straight line to a mountain called Tryon mountain, where the great ridge of mountains becomes impervious; from Tryon
*87] mountain, in a straight line to Chiswell's mine, on the eastern bank of the Great Conhoway *(Kenhawa) river, about a N. by E. course; and from Chiswell's mine, on the eastern bank of the Great Conhoway, in a straight line, about a north course, to the confluence of the Great Conhoway with the Ohio.

3. Treaty with the Six Nations, concluded at Fort Stanwix, on the 5th of November, 1768, in which the sachems and chiefs assert the ownership of, and by which they sold to King George III., all the land bounded by the following line:—Beginning at the mouth of the Cherokee, or Hogohege (Tennessee) river, where it empties into the river Ohio, and running from thence upwards along the south side of the said river Ohio, to Kittanning, which is above Fort Pitt; from thence by a direct line to the nearest fork of the west branch of the Susquehanna, &c., &c., &c., and extended eastward from every part of the said line, &c., &c.

4. Instructions from Lord Botetourt to Col. Lewis and Dr. Walker, dated Williamsburg, Dec. 20th, 1768; directing them to proceed to Mr. Stuart, superintendent of the southern district, and represent to him that the line from Chiswell's mine to the mouth of the Great Kenhaway, contracts the limits of the colony too much, and saying that "if Virginia had been consulted upon this line, there would have been an opportu-

nity of showing that the Cherokees had no just title to the lands between the supposed line and the mouth of the Cherokee river, which in fact were claimed, and have been sold to his majesty, by the northern nations at the late treaty at Fort Stanwix."

5. Report of Lewis and Walker, saying that they had met with a portion of the Cherokee chiefs, who would use their influence to obtain a new boundary.

6. A memorial, from the House of Burgesses of Virginia to the governor, praying that a new boundary-line may be adopted, and suggesting one from the western termination of the North Carolina line, in a due west direction to the river Ohio. This memorial was sent to England by the governor, on the 18th December, 1769.

7. An address from the House of Burgesses to the governor, and his answer upon the same subject.

8. Resolutions of the House of Burgesses, 16th June, 1770, requesting that a treaty be made with the Cherokees for the lands lying within a line to be run from the place where the North Carolina line terminates, in a due western direction, till it intersects Holstein river, and from thence to the mouth of the Great Kenhawa.

*9. Letter from Lord Hillsborough to Lord Botetourt, dated at White Hall, State Paper Office, October 3, 1770, saying, "I am convinced, from the fullest consideration, that the extension of the boundary-line, as proposed by the address of the House of Burgesses in December last, would never have been consented to by the Cherokees." [*88

10. Treaty with the Cherokees, made at Lochaber, in the province of South Carolina, on the 18th October, 1770, adopting as a boundary a line, beginning where the boundary-line between the province of North Carolina and the Cherokee hunting-grounds terminates, and running thence in a west course to a point six miles east of Long Island, in Holstein's river, and thence in a course to the confluence of the Great Conhawa and Ohio rivers.

11. Letter from Lord Dunmore to the Earl of Hillsborough, dated at Williamsburg, March, 1772, saying that the boundary line between the colony and the hunting grounds of the Cherokee Indians had been run by Mr. Donelson and others; but that it had not been run exactly according to instructions, taking in a larger tract of country than by those instructions they had permission to include; that the commissioners had continued, from the point on Holstein river, where it is intersected by the division line of Virginia and North Carolina, down that river a small distance, to a place from whence they

had an easier access than anywhere else to be found, to the head of Louisa (or Kentucky) river.

There were also given in evidence, sundry papers from the state department, verified, as copies, by the certificate of Fletcher Webster, Esq., acting secretary of state, the substance of which was as follows :—

1. A protection for the Great Warrior of Chote, dated on the 13th of May, 1771, at Toguch, and signed by Alexander Cameron, deputy superintendent. It states, that he intends to hunt from thence to Long Island and thereabouts, until the arrival of the Virginia commissioners, who are appointed by that government to run the boundary-line; and expresses a hope, that if he should meet with any hunting-parties, they would remove from the lands which were reserved for the Cherokees.

2. A talk from Alexander Cameron, dated at Lochaber, 5th February, 1772, saying to the Indians that he had informed the governor of Virginia that the course of the boundary-line to where they left it on the Cedar river was approved
*89] by all the chiefs, and that he had *reminded Colonel Donelson of his promise of sending a few presents to the Long Island, upon Holston, in the spring.

3. A letter from John Stuart to Ouconestotah, great war-chief of the Cherokee nation, saying that he sent him therewith a copy of the boundary agreed upon, and that persons were appointed to mark it immediately.

4. A treaty of cession to his majesty by the Creeks and Cherokee Indians, of certain lands to the south, dated on the 1st of June, 1773, at Augusta; and a talk to the Cherokees dated at Augusta, on the 3d of June, 1773, reminding them that in 1771 they had marked a line, dividing their hunting-grounds from what they gave up to his majesty in the province of Virginia, and which fell in upon the head or source of Louisa (now Kentucky) river, and down the stream thereof to its confluence with the Ohio, and relinquished all claims or pretensions to any lands to the north-eastward of said line; and informing them that his majesty had erected a new province whose boundaries were—beginning on the south side of the river Ohio, opposite the mouth of Sciota, thence, southerly, through the pass in the Anasiota mountains, to the south side of the said mountains; thence along the south side of the said mountains, north-eastwardly to the fork of the Great Kenhawa, made by the junction of Greenbriar river and the New river; thence along the Greenbriar river, on the easterly side of the same, unto the head or termination of its north-easterly branch thereof; thence easterly to the Alle-

ghany mountains; thence by various courses to the southern and western boundary-line of Pennsylvania, and along the western boundary-line until it shall strike the Ohio river, and thence down the said river Ohio to the place of beginning.

5. Talk from Lord Dunmore to the Little Carpenter and chiefs of the Cherokee nations of Indians, dated at Williamsburg, on the 23d day of March, 1775, warning them not to grant land to Henderson or any other white people.

6. A letter from William Preston to the chiefs of the Cherokee nation, dated at Fincastle county, on the 12th of April, 1775, saying that he was commanded by Lord Dunmore to send the letter by a special messenger, who was to read it to the council. The letter remonstrates against the sale which they had lately made of that great tract of land on the Ohio, without the advice or consent of the king, and says that, by various treaties, the land had been the property of the king for upwards of thirty years.

*7. A letter from Patrick Henry, junior, to Oconostotah, dated on the 3d of March, 1777, assuring the [*90 Cherokees of the protection of Virginia, and expressing an expectation that he, and his warriors and head men, will not fail to meet Colonel Christian, Colonel Preston, and Colonel Shelby, at the fort near the Great Island, to confirm the peace.

8. Articles of peace made at Fort Henry, near the Great Island, on Holston's river, on the 20th July, 1777, between the commissioners from the commonwealth of Virginia, of the one part, and the chiefs of that part of the Cherokee nation called the Overhill Indians, of the other part.

The fifth article recites that, as many white people have settled on lands below the boundary between Virginia and the Cherokees, commonly called Donelson's line, it is necessary to fix and extend a new boundary and purchase the lands within it. The new line begins at the lower corner of Donelson's line on the north side of the river Holston, and runs down that river according to the meanders thereof and bending thereon, including the Great Island, to the mouth of Claud's creek, being the second creek below the warrior's ford at the mouth of Carter's valley; thence running a straight line to a high point on Cumberland mountain, between three and five miles below or westward of the great gap which leads to the settlement of the Kentucky. This last-mentioned line is to be considered as the boundary between Virginia and the Cherokees.

9. A letter from Patrick Henry, dated at Williamsburg, on the 15th of November, 1777, to Ouconastotah, saying that

his heart and the hearts of all the Virginians are still good towards the Cherokees.

10. A letter from Patrick Henry to the Cherokees, saying that he is informed that the line which was run was not convenient to the Cherokees; that they wanted it to come higher up the river Holston, and that he has given orders to have it altered a few miles, to take in the fording-place into their land.

There was also given in evidence, the deposition of Peter Force, an inhabitant of the city of Washington, who had been for many years engaged in collecting authentic papers connected with the history of the United States, from the settlement of the several colonies (including Virginia,) to the adoption of the federal constitution, under a contract with the Secretary of state, made by authority of an act of Congress. Mr. Force gave it as his opinion, after an examination of books, maps, treaties, and other authentic papers, that the *country between the Tennessee, Ohio and Mississippi rivers, and the boundary line between what is now the state of Kentucky and Tennessee, belonged to the Cherokees, previous to the year 1799; that all the maps which he had found designated the Cherokee country as being north of the Chickasaws, extending westward to the Mississippi and northward to the Ohio; and that in no instance had he found the lands above described to be marked upon any map as belonging to any other tribe of Indians than the Cherokees. Mr. Force annexed to his deposition copies of sundry papers relating to a treaty made in 1730, between the Lords Commissioners for trade and plantations, and the Cherokees,—together with the treaty itself, which was executed in England by some of the chiefs who had gone there.

*91]

Exceptions were filed to the deposition of Peter Force, but they were overruled, and at a subsequent stage of the cause these exceptions were withdrawn.

On the 13th November, 1841, after hearing an argument for three successive days, the Circuit Court dismissed the bill with costs, and the complainant appealed to this court.

Before the cause was argued, the following paper was filed:—

On the question, whether the lands in controversy were regarded as Chickasaw or Cherokee lands, the counsel for the appellants hope they will be at liberty to refer to an original official letter from Governor Thomas Jefferson to Gen. Clark, dated the 29th January, 1780, and now on the files of the Chancery Court at Richmond, in a suit there depending between the administrator of Gen. George Rogers Clark and the commonwealth, for the settlement of their accounts. This

letter is wholly upon the subject of the public service, and, amongst other things, upon the subject of erecting a fort near the mouth of the Ohio. It contains the following passages:—

"From the best information I have, I take for granted, that our line will pass below the mouth of Ohio. Our purchases of the Cherokees hitherto, have not extended southward or westward of the *Tanissee*. Of course the little tract of country between the Mississippi, Ohio, *Tanissee*, and Carolina line, on which your fort will be, is still to be purchased from them, before you can begin your work. To effect this, I have written to Major Martin, our Cherokee agent, of which letter I enclose you a copy."—(This extract is from the first page of the letter.)

"I must also refer to you, whether it will be best to build the fort *at the mouth of Ohio, before you begin your campaign, or after you shall have ended it. Perhaps, indeed, the delays of obtaining leave from the Cherokees, or of making a purchase from them, may oblige you to postpone it till the fall."—(This extract is from the sixth page of the letter.) [*92

It is proper to state, that this letter mentions the Chickasaws as a hostile tribe.—(See the letter, bottom of page 4 and top of p. 5.

Morehead and *Chapman Johnson*, for the appellants and complainants below.

Crittenden, for the defendants.

[The notes of Mr. *Morehead's* argument, as taken by the reporter, not being within his control when this part of the volume was put to press, the argument is necessarily and reluctantly omitted.]

Crittenden, for defendant, stated the nature of the two conflicting titles, and then referred to the claim of Porterfield as asserting the superiority of his title, both at law and in equity. If these allegations are true, then the complainant has the legal title and cannot sue in equity. His remedy at law is complete, and this court has no jurisdiction. If the elder patent of Clark be a nullity and void on its face, it would be no bar to an action of ejectment and the recovery of the land. 6 Pet., 666.

But if the original evidence of title exhibited by the parties, be referred to as the proper test of the nature of the case, and of the jurisdiction of a court of equity, then it will appear that the present is nothing more than the ordinary case

of a junior patentee, seeking, in the familiar and appropriate mode of a bill in equity, to coerce a surrender and conveyance of the legal title of an elder patentee.

In this view of the case he argued,

1. That the complainant had no such claim as could prevail in a court of equity against the elder legal title of the defendant.

2. That if he had shown such right, then that the defendant's title was prior in time and better in equity.

3. That however perfect the complainant's title, and however imperfect the defendant's, the latter is protected and the former barred by the statute of seven years' limitation.

1. Porterfield asserts a military claim under the reservations made in the Virginia acts of 1779, (1 Litt., 406,) and 1781, (1 Litt., 432,) and in virtue of the entries made on the military warrants, together *with the patents issued in 1825 and 1826 under an act of the Kentucky legislature of 1820. From these sources the complainant derives title, if any he has, and insists,

*93]

1. That the acts of the Virginia legislature operate as a legislative grant of the legal title to the troops alluded to in them, and that his locations were required only to discriminate, as between him and his fellow-soldiers, his portion.

2. That his entries, if such were necessary as original appropriations, are valid and good under the said act of 1779.

The act of 1779 required that entries should be made so specially as to enable subsequent locators to locate the adjacent *residuum* with safety. To do this and to make a valid entry, it must so describe the land as to identify it by notorious objects. Decisions without number might be cited to establish this as the settled rule of law in such cases. *Speed* v. *Lewis*, Hard. (Ky.), 477; *Johnson* v. *Pannel's heirs*, 2 Wheat., 206.

Tested by this rule, the entry of the complainant cannot be maintained. There is no evidence, nor attempt to prove the identity or notoriety of the objects on which these entries depend; and this fatal defect is obvious.

Are the acts of Virginia legislative grants? The acts of 1779 and 1781 are acts of reservation, not of grant. They reserved districts of country from other appropriation, that they might therewith satisfy the military claimants. This is manifestly the character of the acts themselves, and though in other and subsequent acts, words and expressions may be found that would give color to the argument that the lands had been "given," "appropriated," &c., yet these must be understood with a reference to the principal acts, which had

not given, but reserved them "to be given or granted," as might thereafter be directed. In confirmation of this, the 11th section of the act of May, 1782, indicates that the portion or bounty-land of each military claimant was thereafter to be granted to him by patent. Revised Code, 395.

But if, by these acts, Virginia had divested herself and granted the title, to whom did she grant the land? Certainly not to Porterfield, so as to enable him, individually, to maintain an action at law or suit in equity. He would almost have as good a right to sue in the character of a citizen of the commonwealth, and in virtue of the right which, as such, he had.

If these acts can, in any sense, be regarded as a grant, out of *which the complainant's title was to [*94
spring, such title could only vest in him to any specific parcel, when the legal means for its investiture had been performed. Was that to be done by entry? If so, that entry should be so special as at least to identify, if not to make notorious, the land intended to be selected. The common rule requires notoriety, but if we dispense with that, identity is indispensable. This entry does not identify the land. If the entry is neither required by law, or being required, is inoperative for want of specialty, it confers no right, either legal or equitable. What, then, has the complainant done to make this particular land his property? It is not by survey; for, admitting that would have been a sufficient appropriation under the laws of Virginia, no such survey was made. The only survey made was in 1824–5, long after the date of Clark's patent and under a law of Kentucky, which authorized surveys to be made upon entries only, and required those surveys to conform to the entry. According to that law, the survey was not recognized as an act of appropriation, but only as a means of perfecting and carrying into grant such entries as were valid by their special description of the land. So that, in any way in which it can be viewed, the right of the complainant must resolve itself into the validity and specialty of his entry.

If it were admitted that a survey was a sufficient appropriation, the survey must contain such a description as would identify the land by the corresponding objects proved to have existed on the land. Up to the time, therefore, of the separation of Kentucky, the complainant had no title derivable from any location or survey; and he must rest for any such title upon the acts of the Virginia Assembly alone. They gave him no individual right to the specific land in question; they gave him no right in it. If any, it must be what the complainant contends it is, viz., a perfect legal title. And if so,

his bill in chancery cannot be maintained. That these acts granted no such right *per se*, is necessarily implied in the decisions of the Kentucky Court of Appeals in the cases of *Jasper, &c.* v. *Quarles*, Hard. (Ky.), 464, and *McIlhenney's heirs* v. *Biggerstaff*, 3 Litt. (Ky.), 155. For if such rights had been granted, neither Jasper nor Biggerstaff could have succeeded in equity against the title granted before the claims originated.

Upon general principles, courts of chancery will not, except in favor of an equity clearly made out, disturb the holder of the legal title, however, or by whatever means, obtained; and this is the settled * doctrine of the courts in Kentucky in reference to cases like the present, of conflicting land claims. Hard., 103, 112, 469; 2 Bibb, 168; *Ward, &c.* v. *Lee*, 1 Id., 33, 229; *Garnet* v. *Jenkins*, 8 Pet., 75.

*95]

The Virginia acts in question bear no resemblance to the acts referred to in the case of *Green's heirs*, 2 Wheat., 196; here are no words of present donation or grant, no individual appropriation. These acts were not so understood by either Virginia or Kentucky, as is shown by their compact, 1 Litt. Laws of Kentucky, p. 19, sect. 10, and by the subsequent acts of Kentucky in disposing of those lands as her own, and by the act for surveying the military claims.

In 1779, Virginia only reserved these lands "until her further order." The Kentucky decision in *Rollins* v. *Clark*, 8 Dana, 19, expressly repudiates the idea of a legislative grant, and the cases of *Bledsoe's heirs* v. *Wells*, 4 Bibb, 329, and *McIlhenney's heirs* v. *Biggerstaff*, 3 Litt., 161, do so by necessary implication. In the case of *Wilcox* v. *Jackson*, 14 Pet., 516, it is said that where lands are granted by act of Congress, it must be done "by words of present grant." Virginia thought that something more would be necessary, because she included these military warrants within the act opening a land-office, the 11th section of which (Rev. Code, 395, act of 1782) requires the officers to receive paper-money for fees for issuing grants on military warrants. It is brought in, incidentally, it is true, but nevertheless explains the meaning of prior laws.

Having thus examined the title of Porterfield, and the time when it accrued, let us look at the second head of the argument.

2. That Clark's title is prior in time and better in equity. His final amended entry was made on the 26th October, 1780, in virtue of Virginia Treasury warrants; was surveyed, as to 36,962 acres, on the 7th June, 1784, and patented under the Kentucky act of 1794, on the 15th of September, 1795. The entry calls to "begin on the Ohio river, at the mouth of the

Tennessee," &c. In its terms, it contains all the precision and certainty required by the act of 1779, and is a good and valid entry. It includes the land in controversy, as does also the survey and patent founded upon it. The only grounds on which the claim is attempted to be impeached are two:

1. That it is within the military reserve.

2. That it is within the country and limits of the Cherokees.

As to the first, it is sufficient to say that the entry of Clark was made prior to the military reservation; and the acts of reservation *could never have been intended to [*96 deprive or affect the existing lawful rights of prior locations; (see case of *Grundy*, 2 Wheat., 203;) whatever may have been the title transferred by these acts in the unappropriated lands of the reserved district. And all this, as well as the lawfulness and validity of Clark's entry was solemnly adjudged by the Virginia Court of Appeals, as early as the year 1793, in the case of *Marshall, &c., superintendents of the Virginia State Line* v. *George Rogers Clark*, Hughes, (Ky.), 39.

That decision settled every question as to the lawfulness and validity of the entry in question, except only whether it was within the "Cherokee country or limits;" and this court ascribed such effect to that decision in the case of *Clark's heirs* v. *Smith*, 13 Pet., 195.

Supposing Clark's entry to be within the Cherokee country, his entry and survey might have been void, but his patent would not. It was granted in obedience to the express provisions of the Kentucky act of 1794, and after the *caveat* of the superintendents to prevent it had been dismissed. 8 Dana, 15. In that case, the Court of Appeals of Kentucky say that, upon the fact supposed, the patent would not be void; it would confer the legal title on the patentee. The case of *Bledsoe's devisees* v. *Wells*, 4 Bibb, 329, is in principle to the same effect. Such patents convey the legal title, and the party in possession of it, by whatever means acquired, can only be disturbed by one holding a clear equity. *Rucker* v. *Howard*, 2 Bibb, 165; Hard., 103, 112; *Ward, &c.* v. *Lee*, 1 Bibb, 33, 229; Hard., 15, 105, 469; 8 Pet., 75.

But was Clark's entry within the "Cherokee country and limits?" It is incumbent upon the complainant to prove that it was, and he has not done it. The Cherokee settlements were far remote on the head waters of the Tennessee.

The Natchez and Chickasaw tribes lived directly west of them, and between them and the Mississippi and much nearer the mouth of the Tennessee river.

The ancient maps produced are no evidence, and are admissible by no rule of law that I know of. If they were admis-

sible, they prove nothing but the ignorance of their authors, and destroy each other by their contradictoriness; and if they do not thus destroy each other, they do not show that the Cherokees claimed or owned the lands below the mouth of the Tennessee river.

*97] The testimony of Mr. Force and the royal authentication of *those maps may prove that they are true copies, but they cannot convert fables into facts, or prove that the originals were correct.

It is insisted upon by the other side, that this was the Cherokee country alluded to and intended by the legislature, because, as they attempt to show, all the other lands of the Cherokees within the limits of Virginia had been before ceded to her. If the facts justified such a conclusion, then, as all these cessions were matters of treaty and history, the court should have taken judicial notice of them and decided differently the case in Hughes (Ky.), 39. Exclusive of such lawful grounds of judgment, there is no more evidence in this, than in that case, that the country in question belonged to the Cherokees.

There is nothing more excusable than ignorance, even in the Virginia legislature, of the "limits of the Cherokee country:" the limits of roving bands of savages who had no occupancy but of their huts, and were sparingly dotted about in that great western region.

No treaty made with the Indians ever did recognize the lands in question as Cherokee lands. Such a construction of any of the treaties made with those Indians, would have entitled the superintendents to a judgment in the case in Hughes, 39. No treaty prior to 1779, did more than settle their eastern boundary by a line of division between them and the whites.

The first agreement or settlement of their western boundary was in 1785, by the treaty of Hopewell, which was by a line from the Cumberland to the Tennessee river, forty miles above Nashville, leaving out and at a great distance the lands in question.

And by a treaty with the Chicasaws in 1786, these lands were recognized as theirs, or "assigned to them for their hunting grounds."

But the great fact from which the complainant draws all his arguments, namely, that the Cherokees had not, in 1779, any other lands but those below the mouth of the Tennessee, is not true. From their western line, striking the Cumberland forty miles above Nashville, they did own the lands on that river, and between that and the line dividing North Carolina from Virginia, and they owned lands between that river and the Cumberland mountains; all of which were finally purchased from

them by the treaty of Tellico, in 1805, and becoming thereby the property of the state of Kentucky, were disposed of by her. See the treaties of 1791, 1798, and 1805, recognizing and purchasing these lands as Cherokee lands, in vol. of Indian treaties, 34, 80, 121, and Statute Law of Kentucky, 2 vol. pages 921, 1009.

[*98 *To pronounce this to be Cherokee land upon the construction of any treaty, or upon historical evidence, would be to contradict the judicial decisions of Virginia and Kentucky. Hughes, 39; 8 Dana, 15. The deposition of General Jackson contributes strongly to prove that it was not Cherokee land; and a further proof that it was not is found in the recitals of the deed from the Cherokees to Henderson and Company, in which they declare the Tennessee river to be their boundary, and claim nothing below or westward of its mouth.

If this was not Cherokee country, the basis fails of all the arguments designed to establish the nullity of Clark's patent.

But suppose it was Cherokee country, is Clark's patent therefore void?

The distinction in the Kentucky courts is this: If no cause of invalidity appear on the face of the patent, it is conclusive at law, and no evidence of any extrinsic fact is admissible to invalidate it. *Bledsoe's heirs* v. *Wells*, 4 Bibb, 329; 4 Mon., 51; 5 Id., 213; 1 Munf., 134; but that such evidence is admissible when the statute which forbids the appropriation declares, also, that the patent shall be void.

3. However perfect the complainant's title, and imperfect the defendant's, the latter is protected and the former barred by the statute of seven years' limitation.

It has been shown that the patent is not void upon its face, that it was sanctioned by the Kentucky act of 1794, and that it has been recognized by judicial decisions in 8 Dana, 15, and 13 Pet., 195. That this is sufficient to admit the operation of the statute, was decided in 2 Marsh., 387, *Skiles' heirs* v. *King's heirs*.

The statute requires that he should have a "connected title in law or equity, deducible of record from the commonwealth." The original defendants are connected by regular derivation of title, with the original title of Clark, and his is deduced from the commonwealth by all the appointed evidences of title, viz.: an entry, survey, and patent, all of record. The case is thus brought as to title, as well as possession and settlement, within the plain meaning of the statute. See in addition to the authority just cited, *White* v. *Bates*, 7 J. J. Marsh., 542; *Gains, &c.* v. *Buford*, 1 Dana, 481; and 6 J. J. Marsh., 452. According to the decision of the court in *Skiles'*

heirs, 2 Marsh., 387, the statute was intended to help and protect "invalid titles," to protect settlers under patents which
*99] in fact passed no title either in law or equity, being for land granted *before the origin of the settlers' claim; that the words of the statute, "a connected title in law or equity, deducible of record from the commonwealth," "does and must mean such title when tested by its own face, and not tried by the title of others." The test is, would it be good against the commonwealth, "supposing no other to exist on the ground."

Tried by these rules, can there be a doubt that the claim of the defendants is within the protection of the statute?

But all this is attempted to be evaded upon the ground that the claim was within the Cherokee country, and therefore void. The fact of its being within the Cherokee limits has been already noticed; and the consequence does not follow, that, if so, it is void and beyond the reach of the statute. *Bledsoe's devisees* v. *Wells*, 4 Bibb, 329; *Rollins* v. *Clark*, 8 Dana (Ky.), 15; *Ray* v. *Baker's heirs*, 1 B. Mon. (Ky.), 364; *Gray* v. *Gray*, 2 Id., 200; *Jennings* v. *Whittaker*, 4 T. B. Mon. (Ky.), 51; *Pearson* v. *Baker*, 4 Dana (Ky.), 322; *Cain* v. *Flynn*, Id., 501; *Finley* v. *Williams*, 9 Cranch, 164; *Boulden and wife* v. *Massie*, 7 Wheat., 122; *Stringer* v. *Lessee of Young*, 3 Pet., 337; *Bagnell* v. *Broderick*, 13 Id., 436.

If this party is to be deprived of the benefit of the statute, because an adversary claimant can show that his title originated in a forbidden and unlawful entry, or other act of appropriation, it must equally apply to all settlers under junior titles, and a claimant, showing his elder and better appropriation, annuls the junior title and sweeps away with it the statute of limitations. Because, as all our laws confirmed the holders of warrants or certificates, &c., to waste and unappropriated lands, they violated the law in locating lands that were appropriated, and their entries, surveys, and patents must therefore be void. Why not apply the same reasoning to surveys and patents founded on entries void for uncertainty and vagueness on their face? The statutes require and command that they shall be special and certain in their description.

If this reasoning prevails, the statute of limitations is in effect repealed, or left in existence in reference alone to cases which do not require its assistance.

Chapman Johnson, for appellants, examined the three following points:

1. Whether, upon the merits, the plaintiff or defendants have the better right.

*2. Whether the case is proper for the jurisdiction of a court of equity.

3. Whether the plaintiff's claim is barred by the statute of limitations.

1. He drew a distinction between Treasury warrants and military warrants, as resting upon different grounds, although the law must govern the interpretation of both; but the military warrants are of a higher order. The title of the complainant is perfect, unless it be overruled by an elder or better one. In examining Clark's title, he passed by, for the moment, the question whether the survey was made by the proper surveyor or conformed to the entry; but inquired whether the land taken up was "waste and unappropriated land." But first it would be necessary to disembarrass the case of the allegation that it had been already settled by judicial decisions. The present plaintiffs were not parties to any prior case. The first was in 4 Call (Va.), 268, where the question arose whether the reserved lands were subject to entry or not. It went up to the Court of Appeals for their opinion, who said that, whether the land was Cherokee land or not, was a question of fact depending upon proof, and said also that he who affirmed it would have the burden of proof upon him. It is admitted that where there is a general law with exceptions, he who wishes to bring himself within the exceptions must show it. It is also true that the act of 1781 could not divest Clark of any title which had vested in him. The legislature of Virginia could not effect it under the constitution of the state.

In the case of *Rawlins* v. *Clarke*, 8 Dana (Ky.), 15, by the compact between Virginia and Kentucky, the Virginia law was the guide, and the decision is nothing more than the opinion of a state court upon general law, which may be decided in different ways in different states. The Kentucky court was in the same situation as the Virginia court, and had no further evidence of the fact of this being Cherokee country. The latter decision is entitled to less weight, because the preceding decision in Virginia was looked to as authority, and the attention of the court was drawn chiefly to the question of fact. In the case in 13 Pet., the construction of the resolutions of Virginia was not argued, and the state of facts before the court now is not the same as it was then. The court cannot *ex officio* take notice of treaties which are not read and have never been published. This court once and again followed the courts of Tennessee in deciding a question of local law; but on the third time, they reversed *their opinion, [*101 because the courts of Tennessee had done so too. There is now, as then, a different state of information before the court.

If Virginia ever put Indian land into the market before the title was extinguished, it was not done designedly, but ignorantly and by construction. This court has said so in the case of *Johnson* v. *McIntosh*, and ought now to relieve Virginia from the imputation.

What is the true construction of the act of 1779 upon this point? Before the Revolution, Great Britain stood in the light of a protector for the Indians against the intrusion of the whites, claiming that no title should be acquired from them except by purchase; but as long as the title was unextinguished, the Indians were protected in the possession according to their own mode of enjoyment. The right only was claimed to transfer the occupancy when the title should be purchased. It now appears that the title to the land in controversy had not been extinguished in 1779. At that time we had, by the treaties of Hard Labor and Lochaber extinguished all title to land except to that west and south of the ridge which divides the Cumberland from the Tennessee. It must be remembered also that Virginia thought she had Indian land within her limits. Up to 1779, the Chickasaws had never been recognized by the diplomacy of Virginia, who thought all the Indian land was Cherokee. There was a claim presented from 1775 to 1778, respecting Henderson's purchase, and committees were appointed every year, who reported that a compensation should be given for his expenses and a law passed giving him about 250,000 acres. In the same year, 1778, a resolution was passed appropriating land to military claimants, covering Henderson's grant, but excepting it, together with the rights of settlers. The whole of the residue was allotted to soldiers. In 1776, the county of Kentucky had been established. Henderson disclaimed all legal title and put his claim on the ground of a reasonable appropriation. This was the state of things in 1779, when the law passed: but it did not pass alone. It was preceded by an act to establish a land-office. As early as 1776, a joint resolution was passed complaining of the difficulty of land-titles and making provision to meet it. Virginia intended to sell only the lands that were marketable, but none west of the Tennessee. In 1781, when a change was made, and that land superseded the land which had fallen into North Carolina, there was no saving whatever of any rights. Did she believe there were any legal rights then? If so, she would have saved them. She *102] afterwards asserted her authority *over the Indian lands, but only claimed a pre-emptive right. In 1784, when the governor was authorized to suspend proceedings, she did

not think there were any Treasury warrants located there, because military aid was promised to remove incumbents.

What then is the construction of the act of 1779?

It does not put into the market any land to which the Indian title was not extinguished. Although she might have sold the land, subject to the Indian title, there must be strong proof of it, because good faith to the Indians required her not to do it. Where is the law authorizing it? Where are the words in the act? There are none there to justify it. It would be a violent interpretation to make her do the same thing with both kinds of lands. For her own lands she asked forty pounds in depreciated paper per hundred acres. Was the same price asked for a reversion only? But the letter of the law tells us what kind of land was meant, not waste lands only, but unappropriated lands. Can such be called so, to which the Indian title had not been extinguished? She only claimed a reversion, and in the mean time it was solemnly appropriated to the Indians, by every guard by which she could do it. It was inaccessible to whites; the public faith was pledged to protect it for an indefinite period of time. Was not this appropriated? and is the question decided by the court of Virginia or Kentucky, or was it before them? How can they be unappropriated? Is it said that Virginia violated her faith by pledging these lands to the soldiers, and authorizing them to take the lands. She never meant to relinquish her right of eminent domain, and suppose that, for self-preservation, she agreed to give them to the soldiers, would it follow that she also intended to sell them for money? The motives in the two cases are entirely different. But if we say that she intended only to pledge the land to the soldiers, subject to the Indian title, it is not the spirit of her legislation, for all the lands between Tennessee and Green River were free from Indian title, and she offered that or a claim to the reservation in the Indian land. The boon, therefore, was immediate. There is no evidence that she intended to force the Indian land upon the soldiers; but permitted them to wait, if they chose, or take the other lands. There is nothing unjust to the soldier or to the Indian in this. When the Indians objected to the survey, instead of enforcing her right, Virginia suspended her proceedings. Why did not Virginia reserve all Indian lands instead of Cherokee lands? Because the terms are synonymous. There were *no [*103 Indians there except Cherokees. From 1729 to 1779 she had made all her treaties, and established boundaries with Cherokees. Where are any with Chickasaws? She thought then that she excepted the whole Indian land. It is said that

mentioning Cherokees implies that more were there. There were no Indians on this side of the Blue Ridge. They excepted all the Indian country they knew of. If they had thought their allies, the Chickasaws, had not been protected, would they not have done it? Can any construction be sustained, which would seize upon friendly Indians' lands, and protect those of a hostile tribe? If you believe that she never intended to open the Chickasaw lands, can you say that she did it ignorantly? The great rule of all contracts, from the most humble parol one to treaties, is the intent of the parties. Look at the injustice and inconsistency which would be charged to Virginia. But suppose I am wrong in all this, and the Cherokees were alone excepted; commissioners were appointed at that or the previous session, by Virginia, to purchase this very land. What was the object of Virginia? to protect the Cherokees as such? for their personal benefit? or to describe a tract of country to be free from Treasury warrant? Suppose Virginia was mistaken, and it turned out to be Chickasaw country? Was not the intention clear? to reserve this land? A mistake in the description would not vitiate the act. Calling the country by a wrong name would not destroy the reservation. The whole analogy of law is against it. A devise would not fail if you can find a person answering the description, although the name be wrong. If the Cherokees had no land there, we must find out the true persons intended to be protected. An interpretation must be adopted which will further and fulfil the spirit of the act. If it can be shown that these lands were not intended to be protected, the cause will be surrendered. They were never intended to be put into the market. It would not be fair to do so to the purchaser, to say nothing of the Indian.

Suppose I am wrong in all this, and the exception is not in favor of the country but personal, can it not be shown to have belonged to the Cherokees? Our argument was not to prove actual *alibi*, but where Virginia supposed the Cherokees to live. Virginia had made four or five land-offices, and it is proved what they did not mean to protect, and there would have been no necessity for protecting the Cherokees, unless they had supposed them to live on the west side of the Tennessee river. Between the Green and Tennessee
*104] the *country was thrown open. What then did they mean to protect? What was not included within the military reservation was not north or east of the Tennessee. It must have been west and south of it. The argument goes to show the intention of the legislature.

But to the point whether this was not actually Cherokee

country. In examining this fact, what sort of evidence will be required? Is it the evidence of a law, or treaty with the United States? Must we show only *prima facie* evidence? or produce a treaty with the United States? The question is one of *meum* and *tuum*. Is the treaty of Hopewell conclusive: The establishment of the boundary will decide whether Porterfield or Clark is the owner of this property, and this is a judicial question. The question of boundary may be a political question generally, and courts cannot decide between sovereign powers, but they are bound to decide a question of property. Neither the executive nor the legislature can act upon it. If a law were passed giving the property to Porterfield, I would think it an insult to the court to offer it here. If this were a question between the Cherokees and the United States, it might be doubtful how far it could be considered. But if the treaty had not settled the point, and abstained from doing so, the court would then take it up, as they did in *Arredondo's* case.

The case in 11 Pet., 186, was correctly decided, because where two sovereign powers agree as to their boundaries, it declares that their jurisdictions come up to the line and bind the citizens of each. But if a claim to property had been made in the part transferred, would the court say that the right to the soil had also passed with the change of jurisdiction? In case of cession, rights would be adjudged by the laws which prevailed before it took place, and it is only the jurisdiction and sovereignty which passes over. But in this case, there is no question of sovereignty involved. The treaty of Hopewell never intended to settle questions of property. All it intended was to fix the boundary as to the jurisdiction of the parties. The same remarks apply to the case in 14 Pet. North Carolina, in 1783, marked out a line, and in 1784, extended it towards the Indians, giving the surveyors power to open offices, and protecting the Indians, as to the rest, and it was doubted whether the act of 1784 did not repeal the protection of 1783.

The title arose between 1794 and 1797 when the line was run, and it was necessary to inquire at what time the line was adopted. The question of title depended upon the fact whether the property *was in the Indian territory [*105 or not; and this could be settled only by the contracting parties. But that case is not analogous to this. The question is not whether or not Virginia had a right to legislate over it, or a political question at all. The Chickasaws or Cherokees have no interest at all in it.

From 1729 to 1779, the Cherokees were recognized as own-

ing land in the west, but the Chickasaws were not. In 1763, the proclamation of the king prohibited any person from acquiring land west of the mountains, and this had not been changed by Virginia, but recognized in 1776. Chap. 1, page 350 of Revised Code.

George Walton and others say in their petition that the proclamation prevented them from completing their title. Journal of the House of Delegates of Virginia, for 1778, pages 64, 97.

Treaties had been made with the Cherokees at Hard Labor, Lockaber, Fort Stanwix. Henderson had purchased up to the ridge which divides the Tennessee from the Cumberland. The purchase was assumed by Virginia and Henderson compensated. Inquiry was made of the chiefs as to the nature of the purchase, and commissioners appointed to take testimony. For these proceedings see journal of May, 1777, pages 44, 49, 56, 65, 70, 20, 41, 48, 136; and May, 1778, pages 30, 36, 70, and Nov. 1778, pages 79, 91.

As soon as the act passed for Henderson, the resolution was passed appropriating lands for the soldiers. In the act there is a reference to the proclamation of 1763; in the act of 1779 for settling titles, no claims are recognized in opposition to the proclamation, all others are.

What was in fact the Cherokee country in 1779?

The treaty of Hopewell does not touch this point. It intended to act for the future and not for the past. The lines described in two clauses do not touch each other but leave a gap. It would have been impossible to trace the line between the Cherokees and Chickasaws by a surveyor, for it would depend upon the fact where they lived; and they might have had joint occupancy. No one ever treated with the Chickasaws until 1785.

But is there nothing to show that this was Cherokee country in 1779?

There is the evidence of Mr. Force, a disinterested witness, an *ex parte*. He produces fourteen maps from 1755 to 1778, made by French and English authority, which put the Chickasaws south of latitude 35, and the Cherokees north of them.

*106] The river Tennessee is called in these old maps the river of the Cherokees, and they are placed *as far west as the Mississippi. By the treaty of Fort Stanwix the Tennessee river is the south boundary of the Six Nations, and the Cherokees are over it.

The Cherokees were recognized as owners by Virginia in 1769, because she wanted to purchase from them all north of 36.30, to extend the boundary with North Carolina to the

Mississippi. (See address of the House of Delegates.) Lord Hillsborough replied that the Cherokees would not consent to it. So, at Lochaber, in 1770, they were recognized as being within the limits of the province of Virginia, because she treated with them and assigned to them the west side of the line therein described, to the whole extent of Virginia. So in the letter of Lord Dunmore in 1772. In the articles of peace between Virginia and the Cherokees in 1777, a line is agreed upon, and no white man is to go below the said boundary. Virginia could not have intended that this land should be taken up in 1779.

What is Porterfield's title?

[Mr. *Johnson* here went into a minute examination of it, and traced its history.]

But it is said that we are barred by the statute of limitation. This statute is intended to protect him who can trace a title from the commonwealth, and is a special law. There is another and general act of limitations, and where this is the case the special law must be construed strictly. Clark's title cannot be tried, as is alleged, by itself, because a part of the grant has been sold, as appears from the record, and it is nowhere shown what part. The title professes to be from a land-office Treasury warrant, and upon land south of the Tennessee; it is, therefore, void upon its face, and not within the fair construction of the act, the third section of which says it shall not apply to cases of conflicting titles. The preamble of the law shows it was intended to apply only to a particular class of cases and not those within the military district.

Mr. Justice CATRON delivered the opinion of the court.

For the principal facts, we refer to the statement of the reporter.

The first question in order presented by the bill depends on the validity of the complainant's title. But as that of the defendants is the elder, and Clark's entries not objected to on the ground that they are void for want of specialty, and the survey and patent founded on them being in conformity to the locations, we will at once proceed *to the main [*107
question presented by the bill; that is, whether Clark's entries were made in the Cherokee country or limits, and therefore void for this reason as against Porterfield's subsequent entries: The first being on Treasury warrants, and the last on military warrants. The act of 1779, by virtue of which Clark's entries were made, excepted the Cherokee lands from location; and if the land in dispute, (in October, 1780,) was such, then Clark's entries are void, if not, they are valid; and this fact

being found either way, will end the controversy. We are called on to find the fact; and as it has been agitated in regard to this title, for nearly sixty years, uncommon care has been bestowed on the question, and a second argument been ordered.

The defendant's title came before this court in *Clark* v. *Smith*, 13 Pet., 200, when the entries of Clark were pronounced special; and the survey and patent declared to conform to the entries: And in which case it was also held, that it was immaterial whether the entry was made on the lands claimed by the Chickasaws or not; it could only be obnoxious to the provisions of the statute of 1779, if made on lands reserved from location by that act; and the land of the Chickasaws were not thus reserved. So it had been decided by the Court of Appeals of Virginia in *Marshal and others* v. *George R. Clark* in 1791, Hughes, 40, and which was affirmed in *Rollins* v. *Clark*, by the Court of Appeals of Kentucky, in 1839, 8 Dana (Ky.), 26.

The reservation is, "No entry or location of land, shall be admitted within the country and limits of the Cherokee Indians." The bill alleges the entry of Clark to be within the excepted lands.

The first inquiry we will make is, how far the contest stands affected by former decisions, made by the Court of Appeals of Virginia, by this court, and by the Court of Appeals of Kentucky.

As to patents made by Kentucky, on warrants issued by that state after the Chickasaw title was extinguished, for lands west of Tennessee river, the case of *Clark* v. *Smith* as an adjudication is direct to the point, that Clark's patent is superior to such titles. This may be true, and yet Clark's entry be void; as Kentucky in 1794, "not only authorized, but made it the imperative duty of the register to issue a patent on the certificate of survey, as he seems to have done in obedience to the act. We cannot admit that a patent thus issued pursuant to the authority, and mandate of the law, can be deemed *108] void, merely because the entry of the patentee was invalid." We *use the language of the Court of Appeals of Kentucky, in the case of *Rollins* v. *Clark*, 8 Dana (Ky.), 28.

If Clark's entry was made, however, on lands reserved from location by the act of 1779, then it is void, because the act did not open the land office for such purpose, nor extend to the excepted lands: and whether the exception reserving the Cherokee country, included the lands west of Tennessee river, was in 1779, and is now, a matter of fact, as already

stated, for the court to ascertain. This fact is not concluded by the case of *Clark* v. *Smith*, although materially influenced by it. That adjudication, so far as this question was involved in it, is founded mainly on the case of *Thomas Marshall, George Mater, and others, superintendents of the Virginia state line*, v. *George Rogers Clark*, Hughes, 39, in a suit by *caveat*, to restrain Clark from obtaining a patent on the survey founded on his entries; two entries having been included in it. The cause was tried before the Court of Appeals of Virginia in 1791, on the *caveat*, filed in 1786. The first fact agreed by the parties, and submitted to the court, was whether the locations of Clark could be made west of the Tennessee river on Treasury warrants; or, in other words, whether that country was reserved from location, as being the country and limits of the Cherokee Indians. The court held, "the solution of the question to depend on a matter of fact to be decided on evidence; and none such appearing, or being supplied by any law, charter, or treaty, produced or suggested, which ascertained what the country or limits of the Cherokees was in 1779, no solution of the question could be given, except that it was the opinion of the court, that the party whose interest it was to extend the exception to the land in dispute, must prove the land to be within the description of that exception." All the other questions were also decided against the caveators, and the *caveat* ordered to be dismissed. The judgment, in effect, ordered that a patent should issue to Clark on his survey; and, in fact, adjudged the better right to be in him. A suit by *caveat* was the ordinary mode of trying titles in Virginia, before a patent issued, and was equally conclusive on the parties, as if it had been by bill in equity; this is the settled doctrine of Kentucky, and also Tennessee; and must be so from the nature of the suit. The power and jurisdiction of the courts to try titles in this manner, are conferred by statutes, which are very similar in the states named; the practice as to the mode of proceeding, and the effect of the judgment being the same in each. For evidence of this, we refer to the many *cases reported by Hughes; and to the case, of [*109
Peck v. *Eddington*, 2 Tenn., 331; *Bugg* v. *Norris*, 4 Yerg. (Tenn.), 326, and *Peeler* and *Campbell* v. *Norris*, 4 Id., 331. "The powers of the courts, (it is said in *Bugg* v. *Norris*,) will be found co-extensive with any conflicting rights two claimants may have, where the defendant is attempting to perfect his entry into a grant by survey." Each party had the privilege in the case of the superintendents against Clark to submit such facts as were material to sustain his right; if not agreed, an issue could be asked, and a jury empannelled, to

find on the contested facts. They were all agreed. On these the court pronounced on the law of the case, and determined who had the better claim to the land, and awarded to him the patent.

The plaintiff or defendant may introduce more or less evidence to sustain his claim; but if he fail, he cannot be heard to say, in a second suit, his principal evidence of title was not introduced in the first, and therefore he will try the same issue again in another form of proceeding on different and better evidence. 4 Yerg. (Tenn.), 337–8; *Outram* v. *Morewood*, 3 East, 357.

The patent being awarded to Clark, it was adjudged that he should take the land in fee; and the whole legal estate and seisin of the commonwealth in the lands. Had the judgment been, that no patent issue to George Rogers Clark, then he would have been estopped to controvert the superior right of the superintendents: If he would have been estopped, so were the superintendents, on the judgment being the other way. 4 Yerg. (Tenn.), 333. Estoppels are mutual. 4 Com. Dig. Estoppel, B. They run with the land, into whose hands soever the land comes; by which the parties and all claiming under them, as well as the courts are bound; were it otherwise, litigation would be endless. Such is the established rule. *Trevinan* v. *Lawrence*, 1 Salk., 276, reported also by Ld. Raymond.

The superintendents were therefore estopped by the judgment of the Court of Appeals of Virginia from averring that Clark's entry lay within the Cherokee country: and how was Porterfield affected by that judgment?

By the act of November, 1787, opening the military lands to location; those west of Tennessee river inclusive, the officers were authorized to appoint so many of their number superintendents as they might deem proper to locate (after selections by survey had been made) all the claims of the officers and soldiers. For this purpose they were given *110] authority to select the lands and distribute them among *the claimants according to their respective ranks. The act of December, 1782, makes more distinct, and further provision, and gives increased power to the superintendents. The entire country reserved to the uses of the military claimants was surrendered to the possession of the superintendents, as trustees, from which they might select any lands, to comply with the purposes of the trust; as such trustees in possession, they had the right to file the *caveat* against Clark, after they had selected the land, or any part of it, (located by him,) for the use of the officers and soldiers.

When selected and surveyed, then the surveys were to be drawn for and allotted as chance might determine; after which, the party thus entitled was authorized to enter of record by an ordinary location, the number he drew in the lottery. Porterfield drew the lands set forth in the bill; to protect his entries the *caveat* was filed, as well as to protect others set forth in the record adjoining Porterfield's; and also to maintain the general right of all the claimants entitled exclusively to locate in the reserved lands.

As Clark would have been estopped to deny the right of the superintendents, (had they been successful,) to appropriate the land in dispute, it is difficult to say, that Porterfield, for whose benefit especially the *caveat* suit was prosecuted by those acting for his use, is not also estopped, on the principle of mutuality. It is hardly possible to separate the right of those acting as trustees, from that of the *cestui que trust:* still, as the proceedings and judgment in the suit by *caveat* are not set up as a defence in any manner, we can only look to them as furnishing cogent reasons that it could not be proved, during the time the *caveat* was pending that the lands west of the Tennessee river were part of the Cherokee country, in 1779.

In the case of *Clark* v. *Smith*, no evidence was produced to the court, other than that furnished by the treaties with the Cherokees and Chickasaws, together with the history of the country, and which were existing and open to the Court of Appeals of Virginia in 1791, except the treaties made since that time; and these we thought had no material influence on the question; and therefore on the evidence then before us, it was declared, that Clark's title was not open to controversy on the ground (then, as now) assumed, that the land when located lay within the country of the Cherokee Indians.

Does the record before us and the other matters adduced, furnish additional evidence to change the result of that conclusion? As it does not appear in the cases referred to, what the existing treaties, *contracts, and intercourse with the Cherokees had been in 1791, a reference will be made to them, so far as they may affect this controversy. During the British colonial government of Virginia, by different treaties, previous to 1777, the eastern limits of the Cherokees commenced six miles above the Long Island in Holston river, (now in the county of Sullivan, Tennessee,) from thence to Cumberland gap; then to the head of the Kentucky river, and down the same to the Ohio. This line ran down the Cumberland mountain from Holston river to the gap, and included in part the great road from Virginia to Kentucky passing through Cumberland gap. The citizens of Virginia [*111

settled on the road, and west of the line; irritation on part of the Cherokees was the consequence. In July, 1777, the Long Island treaty was made, at Fort Henry, standing at the island. By that treaty the Indian line was removed further west; commencing six miles above the island, and running with the river to the mouth of Cloud's creek; being the second creek below Rogersville, in Hawking county, Tennessee, and a few miles below that place; thence to a high point of Cumberland mountain a few miles below the gap; here the line stops, and it was the only one between Virginia and the Cherokees existing in 1779, (when the land law was passed,) except the boundaries established by the grant to Richard Henderson and Company, dated in March, 1776; the extent and effect of which, will be presently seen. As the treaty of 1777 has a most important bearing on the facts hereafter stated, its material parts are given.

"Article 3d. That no white man shall be suffered to reside in or pass through the Overhill farms without a proper certificate, signed by three magistrates in the county of Washington, in Virginia, or in the county of Wataugo, in North Carolina, to be produced to, and approved by the agents at Chota. Any person failing or neglecting to comply herewith, is to be apprehended by the Cherokees and delivered to the said agent, who they are to assist in conducting to the commanding officer at Fort Henry; and the said Cherokees may apply to their own use all the effects such persons may be in possession of at the time they are taken in the nation. And should any runaway negroes get into the Overhill farms, the Cherokees are to secure them until the agent can give notice to the owner, who, on receiving them are to pay such a reward as the agent may judge reasonable.

"Article 4th. That all white men residing in or passing *112] through the Overhill country, properly authorized or certified as aforesaid, *are to be protected in their persons and property, and to be at liberty to remove in safety when they desire it. If any white man shall murder an Indian, he shall be delivered up to a magistrate in Washington county, to be tried and put to death according to the laws of the state. And if any Indian shall murder a white man, the said Indian shall be put to death by the Cherokees, in the presence of the agent at Chota, or two magistrates in the county of Washington.

"Article 5th. That as many white people have settled on lands below the boundary between Virginia and the Cherokees, commonly called Donelson's line, which lands they have respectively claimed in the course of this treaty, and which

makes it necessary to fix and extend a new boundary, and to make a just and equitable purchase of the lands contained therein, it is therefore agreed by and between the said commissioners in behalf of the commonwealth of Virginia, of the one part, and the subscribing chiefs in behalf of the said Cherokees, on the other part, in free and open treaty without restraint, fear, reserve or compulsion of either party, that a boundary-line between the people of Virginia and the Cherokees be established, and the lands within the same be sold and made over to the said commonwealth; which line is to begin at the lower corner of Donelson's line on the north side of the river Holston, and to run thence down that river according to the meanders thereof, and binding thereon, including the great island to the mouth of Cloud's creek, being the second creek below the warrior's ford at the mouth of Carter's valley; thence running a straight line to a high point on Cumberland mountain, between three and five miles below or westward of the great gap which leads to the settlement of the Kentucky.

"This last mentioned line is to be considered as the boundary between Virginia and the Cherokees. And all the lands between the said line and that run by Col. Donelson, and between the said river and Cumberland mountain, as low as the new boundary, is to be the present purchase.

"For which tract of land, or so much thereof as may be within the limits of Virginia when the boundary between the states of Virginia and North Carolina is extended, the said commissioners agree, in behalf of the commonwealth, to give to the said Cherokees two hundred cows and one hundred sheep, to be delivered at the great island when the said line shall be run from the river to Cumberland mountain, to which the said Cherokees promised to send deputies *and [*113 twenty young men, on due notice of the time being given them.

"And for and in consideration of the said stocks of cattle and sheep, the said chiefs do, for themselves and their nation, sell, make over, and convey to the said commonwealth, all the lands contained within the above described boundary, and do hereby forever quit and relinquish all right, title, claim or interest in and to the said lands or any part thereof; and they agree, that the same may be held, enjoyed and occupied by the purchasers, and, that they have a just right, and are fully able to sell and convey the said lands in as full, clear and ample a manner as any lands can possibly be, or ever have been sold, made over or conveyed by any Indians whatever.

"Article 6th. And to prevent as far as possible any cause or pretence, on either side, to break and infringe on the peace so happily established between Virginia and the Cherokees, it

is agreed by the commissioners aforesaid and Indian chiefs, that no white man on any pretence whatsoever shall build, plant, improve, settle, hunt, or drive any stock below the said boundary, on pain of being drove off by the Indians, and his property of every kind being taken from him. But all persons who are or may hereafter settle above the said line, are quietly and peaceably to reside thereon without being molested, disturbed or hindered, by any Cherokee Indian or Indians; and should the stocks of those who settle near above the line, range over the same into the Indian land, they are not to be claimed by any Indians, nor the owner, or any persons for him, be prevented from hunting them, provided such person do not carry a gun; otherwise the gun and stock are both forfeited to the Indians, or any other person who on due proof can make it appear. Nor is any Indian to hunt or to carry a gun within the said purchase, without license first obtained from two justices; nor to travel from any of the towns over the hills, to any part within the said boundary, without a pass from the agent. This article shall be in full force until a proper law is made to prevent encroachment on the Indian lands, and no longer."

This treaty fully explains why the Cherokee country was excepted from the land-law of 1779, and locations on it prohibited; no reasons could add force to its stipulations.

In November, 1785, the next treaty was made at Hopewell, *114] with the Cherokees by the United States, and a new boundary was *established, beginning at the mouth of Duck river on the Tennessee; thence north-east, to the Ridge dividing the waters running into Cumberland river, and the Tennessee; thence eastwardly along said ridge to a point from which a north-east line would strike Cumberland river forty miles above Nashville. The first corner from the beginning on the ridge is about one hundred miles from the mouth of Tennessee river.

In January, 1786, the same commissioners who treated with the Cherokees, also made a treaty at Hopewell with the Chickasaws: beginning at the Cherokee corner on the ridge, dividing the waters of the Cumberland and Tennessee rivers, and running westerly with said ridge to the Ohio river, and then down the same.

All lands west of this line were guarantied to the Chickasaws. The treaty was not one of cession on part of these Indians; but the establishment of existing boundaries: the one from the Cherokee corner, to the Ohio, being the only line dividing territory claimed by the United States, to which the Indian title had been extinguished contained in the treaty,

our inquiries need extend no further for the purposes of the present controversy. That it was deemed the ancient boundary of the Chickasaws, by themselves, will appear hereafter: as it will also appear, that the Cherokees in no instance, so far as our researches have extended, asserted to the contrary; but that they admitted the fact, on different occasions in a manner free from exception; and which admissions were well calculated to remove any doubt on this point.

That the lands west of the line on the ridge belonged to the Chickasaws, and not to the Cherokees in 1779, is rendered almost certain by the deed the Cherokees made to Richard Henderson, Thomas Hart, Nathaniel Hart, John Williams, John Luttrell, William Johnston, James Hogg, David Hart, and Leonard Hendly Bullock, on the 17th day of March, 1775. The first part of the deed recites "That the Cherokee nation, or tribe of Indians, being the aborigines and sole owners by occupancy from the beginning of time of the lands, on the waters of the Ohio river, from the mouth of the Tennessee river, up the said Ohio, to the mouth of the Great Canaway, or New River, and so across by a southward line to the Virginia line, by a direction that shall strike or hit Holston river six English miles above, or eastward of the Long Island therein; and other territories and lands thereunto adjoining;" do grant, by Oconestoto, chief warrior, and first representative of the Cherokee nation, (acting *with other warriors named,) on part of said nation, to Richard Henderson [*115 and the others, part of said lands, for the sum and consideration of ten thousand pounds lawful money of Great Britain, to said Cherokee nation in hand paid; the receipt of which is acknowledged for and on behalf of the nation, by the warriors making the treaty; the lands granted lying on the Ohio river; beginning on the said river Ohio, at the mouth of the Kentucky, Chenoca, or what by the English is called Louisa river; from thence running up the said river and the most northwardly branch of the same to the head spring thereof; thence a southeast course to the top ridge of Powel's mountain; thence westwardly along the ridge of said mountain unto a point from which a north-west course will hit, or strike, the head spring of the most southwardly branch of the Cumberland river; thence down the said river, including all its waters, to the Ohio river; thence up the said river as it meanders to the beginning."

Various covenants are contained in the deed, and among others, that the grantees, their heirs and assigns, shall and may from time to time, and at all times thereafter peaceably and quietly, have, hold, occupy, possess, and enjoy the premises

granted without the trouble, let, hindrance, molestation, or interruption of the Cherokee nation or any one claiming under the Cherokees. And Joseph Martin and John Farrer were appointed by the grantors to put the grantees in possession.

They did take the possession, and founded "The colony of Transylvania," on their grant; and on the 23d day of May, 1775, the first legislative assembly of said colony was held therein, and regulations adopted for the future government of the same. Col. Richard Henderson, acting for himself and the other proprietors, communicated with the Assembly, by an address delivered to it; the proprietors exhibited their deed to the soil of Transylvania from the aborigines: Col. Henderson, in person, and John Farrer, as attorney in fact for the Cherokees, attended the convention, when Farrer, in the name of the head warriors, chiefs, and Cherokee Indians, in presence of the convention, made livery and cession, of all the lands in the deed of feoffment above recited; which deed was there again produced. A copy of it, and of the proceedings, appear in Butler's History of Kentucky, 566. The same deed is set forth in Haywood's History of Tennessee.

This deed and the proceedings under it make up the most
*116] prominent historical transaction in the early history of Kentucky; and it *has been relied on by both sides without objection. And as a historical fact, it was quite as prominent in Virginia in 1791, when the *caveat* suit was decided; and also in 1779 when the first land-law under consideration was passed. By the act of October, 1778, c. 3, and the resolution of the convention that formed the first constitution of Virginia in 1776, (2 Rev. Code, 350, 353,) and the reservation for Henderson & Co. of 200,000 acres at the mouth of Green river, this manifestly appears. The land reserved to Henderson & Co. is declared in full compensation to them and their heirs for the consideration paid to the Cherokees, and for the expense and trouble in acquiring the country and aiding in its settlement.

The act of October, 1778, c. 3, recites, "Whereas it appears to the General Assembly that Richard Henderson & Company have been at very great expenses, in making a purchase of the Cherokee Indians; and although the same has been declared void, yet as this commonwealth is likely to receive great advantage therefrom, by increasing its inhabitants, and establishing barriers against the Indians, it is therefore just and reasonable the said Richard Henderson & Company be made a compensation for their trouble and expense:" and by the second section the land at the mouth of Green River is granted as the compensation proposed.

The act of May, 1779, c. 6, declares that the commonwealth has the exclusive right of pre-emption from the Indians of all lands within the limits of its territory, as described in the constitution of government in the year 1776; that no person had a right to purchase any lands from any Indian nation within the commonwealth, except persons duly authorized on public account for the use and benefit of the commonwealth.

That every purchase of lands made by or on behalf of the crown of Great Britain from any Indian nation in the beforementioned limits, doth and ought to enure for ever to and for the use and benefit of this commonwealth, and that all sales and deeds which have been made by any Indian or Indians; or by any Indian nation for lands within said limits, for the separate use of any person, or persons, whatsoever shall be, and the same are hereby declared utterly void and of no effect.

The construction of the acts of 1778 and 1779, has been that the deed to Henderson & Company was void, as against the commonwealth; but valid as against the Cherokees, and therefore the title to the lands conveyed passed to the commonwealth. This assumption has *been maintained [*117 from the time the convention sat in May, 1776; as the resolutions of the convention show: And it received the sanction of the United States at the treaty of Hopewell with the Cherokees in 1785. The Indians disavowed it when the treaty commenced. On the 22d of November, before the Chickasaws had arrived at the treaty-ground, the commissioners called on the Cherokees for their boundary; the Indians postponed it. On the 24th, they were again called on, and then said, give them a pencil and paper, and leave them to themselves, and they would draw a map of their country. November 26, the map, and a description of the boundary claimed was presented to the commissioners by Tassel, who spoke on behalf of the Indians. It began on the Ohio above the mouth of the Kentucky river; ran to the Cumberland river where the Kentucky road crossed it; thence to the Chimney-top mountain in North Carolina, and southward.

Tassel said, on presenting the map: "I know Richard Henderson says he purchased the lands of Kentucky and as far south as the Cumberland, but he is a rogue and a liar, and if he was here I would tell him so. He requested us to let him have a little land on Kentucky river for his cattle and horses to feed on, and we consented, but told him at the same time he would be much exposed to the depredations of the northern Indians, which he appeared not to regard, provided we gave him our consent. If Attacullaculla signed his deed, we are not informed of it; but we know Oconestoto did not,

and yet his name is to it; Henderson put it there, and he is a rogue."

To which the commissioners replied: "You know Colonel Henderson, Attacullaculla, and Oconestoto are all dead; what you say may be true; but here is one of Henderson's deeds, which points out the line, as you have done, nearly till it strikes Cumberland, thence it runs down the waters of the same to the Ohio, thence up said river as it meanders to the beginning. Your memory may fail you; this is on record, and will remain for ever. The parties being dead, and so much time elapsed since the date of the deed, and the country being settled, on the faith of the deed, puts it out of our power to do any thing respecting it; you must therefore be content with it, as if you had actually sold it, and proceed to point out your claim exclusive of this land."

Tassel answered: "I know they are dead, and I am sorry for it, and suppose it is now too late to recover it. If Henderson were living I *should have the pleasure of telling him he was a liar; but you told us to give you our bounds, and therefore we marked the line; but we will begin at Cumberland, and say nothing more about Kentucky, although it is justly ours."

*118]

On the 2d of December, 1785, the commissioners reported to the secretary at war amongst other things, "That in establishing the boundary, (with the Cherokees,) which is the chief cause of complaint with the Indians, we were desirous of accommodating the southern states and their western citizens, in any thing consistent with the duty we owed to the United States.

"We establish the line from forty miles above Nashville on the Cumberland, agreeable to the deed of sale to Richard Henderson and Co. as far as the Kentucky ford; thence to the mountain six miles south of Nollchuckey, agreeable to the treaty in 1777, &c., with Virginia, and North Carolina." The latter treaty is that of Long Island, above set out.

The sale to Henderson and Company, therefore stands on the same grounds as if it had been made by the authority of the crown of Great Britain, so far as boundary and Indian rights stand affected.

Its southern line from the top of Powell's mountain ran westwardly on the top of the mountain, to a point from which a north-west course would strike the head spring of the most southwardly branch of Cumberland river, thence down said river, including all its waters, to the Ohio river; thence up that river. The most southwardly branch of the Cumberland, is the south fork running into the Cumberland about 170

miles above Nashville. At Hopewell, the Cumberland river was treated as the southern boundary referred to, by the deed to Henderson and Company: this, however, may have been inaccurate; the top of the ridge dividing the waters of the Tennessee and Cumberland rivers was the western boundary claimed by the Cherokees; and it is not probable that they intended to retain the narrow strip of land between the top of the ridge and the Cumberland river. That this ridge was the true western boundary before 1779, appears from the following facts:—

When the map was furnished at Hopewell, the sale to Henderson was disregarded and the original western boundary given, "from the beginning of time," within the expression used in the deed to Henderson and Co. It was returned to the war-office of the United States, a copy of which is found, and was produced on behalf of the complainant, in the American State Papers, (vol. i. page 40,) published *by [*119 the authority of Congress, edited by the secretary of the Senate and clerk of the House of Representatives, and published in 1832. On this map the Cherokees laid down their western limits, beginning at the mouth of Duck river, then to the ridge between the Cumberland and Tennessee rivers; then down said ridge to the Ohio, and up the same. At the treaty, Tassel, on behalf of the Cherokees, said—"We will mark a line for the white people; we will begin at the ridge between the Tennessee and Cumberland, on the Ohio, and run along the same, till we get round the white people as you think proper. We will mark a line from the mouth of Duck river to the said line, and leave the remainder of the lands to the south and west of the lines to the Chickasaws." And according to this the Chickasaw limits to the east were recognized by the parties to the Cherokee treaty, in the absence of the Chickasaws. 1 State Papers, 43.

In January, 1786, the Chickasaws made their appearance at the treaty-ground at Hopewell. They agreed on the lines, from the mouth of Duck river to the ridge; and then with it to the Ohio, as the boundary between themselves and the whites, (1 State Papers, 57;) and to which, the treaty made with them, on the 10th of January, 1786, corresponded. It does not appear any of the Cherokees were present.

In August, 1792, Wm. Blount, governor of the south-western territory, and superintendent of Indian affairs, for the southern district, and General Pickens, met the Chickasaws, Choctaws, and Cherokees, represented by chiefs, at Nashville, by order of the United States, for the purpose of securing friendly relations with these tribes. Every Chickasaw chief

was there except three. John Thompson, interpreter, and two chiefs attended on part of the Cherokees. 1 State Papers, 284. General Pickens had been one of the commissioners on part of the United States at Hopewell; and Gov. Blount the agent at said treaty for North Carolina, and a witness to it. Piomingo for the Chickasaws handed a letter from President Washington, which he had received by Mr. Doty, and a map of the country made at Hopewell, showing the line established by the treaty; the map being opened and explained, Wolf's friend said the line between the Chickasaw and the United States was right. The map being worn and old, a copy was made, and furnished to the Indians.

Piomingo then said,—"I will describe the boundaries of our land; it begins on the Ohio, at the ridge which divides
*120] the waters of Tennessee and Cumberland, and extends with that ridge, eastwardly as *far as the most eastern waters of Elk river; then south, &c., crossing the Tennessee river at the Chickasaw old field." This is opposite the heads of Elk.

Piomingo then addressed the Cherokees, and said: "At the treaty of Holston, (1791,) I am told the Cherokees claimed all Duck river. I want to know if it is so?"

Nontuaka, for the Cherokees, replied: "It is true. I told the President so, and coming from him, told my nation so. I never knew before the present, that our people divided land and made lines like the white people."

Piomingo replied: "I am the man who laid off the boundary on that map; and to save my own land, I made it plain: I know the fondness of the Cherokees to sell land." Nontuaka replied: "As to the boundary I do not look at it. The President advised us to let one line serve for the four nations; he would never ask for any more land south of it, nor suffer others; and all the hunting ground within said boundary should be for the four nations."

To this the Chickasaw chief replied: "By marking my boundary, I did not mean to exclude other nations from the benefit of hunting on my lands. I knew the Cherokees had often pretended to take the whites by the hand, but instead of doing it in good faith, they are always sharpening their knives against them. I feared the whites, in retaliation, would fall on the Cherokees, and they might take my land, supposing it belonged to the Cherokees: for this reason I have marked it." The Chickasaws then promised to furnish the Cherokees with a copy of their map; and this was afterwards done.

John Thompson then said: "We, (the Cherokees,) do not find fault with the line between the white people and the

Chickasaws, nor with the place where the Chickasaw's line crosses the Tennessee; but I have not before been so fully informed of the claim of the Chickasaws." 1 State Papers, 286.

In regard to the line on the ridge, from the Cherokee corner north, to the Ohio, in our opinion, it may be safely affirmed, that so far as the contracts, treaties, and admissions of the Cherokees furnish evidence as part of the history of the country, the lands west of that line belonged to the Chickasaws in 1779, when the Virginia land-law was passed; and that this is confirmed in a remarkable degree, by the treaty of Hopewell with the Chickasaws, and the intercourse had with them respecting that line, then, and afterwards.

That Virginia so understood it, can hardly be doubted. In the *winter of 1779–80, Walker's line was run, [*121 establishing the boundary between Virginia and North Carolina; it was marked to the Tennessee river, and the latitude of 36.30 north taken on the Mississippi river: the history of it will be seen in the case of *Fleeger* v. *Pool*, 11 Pet., 185. This led to the discovery that the southern boundary of Virginia ran much further north than she had apprehended. The officers and soldiers had had assigned to their exclusive appropriation the lands south of Green river acquired by the deed of Henderson and Company; a great portion of the best part supposed to belong to Virginia before Walker's line was run, having fallen south of that line, the act of 1781, after reciting the fact, declared: that all that tract of land included within the rivers Mississippi, Ohio, Tennessee, and the Carolina boundary-line, shall be and the same is hereby substituted in lieu of such lands so fallen into the said state of North Carolina, to be claimed in the same manner by the officers and soldiers as the lands south of Green river: and the act prescribes the mode of locating them. By virtue of this law Porterfield's entries were made. Four years before the act of 1781 was passed, the Long Island treaty of 1777 had been made with the Cherokees by Virginia; it was in full force in 1781, when the military claimants were let in to locate on the country. When we consider the strong terms of protection imposed on Virginia by the treaty; the integrity and elevation of character of its people; the danger of resentment on part of the Indians; it is hardly possible to believe that so gross an infraction of the treaty was intended, as the appropriation of the country in question necessarily involved.

With the Chickasaws, at that day, Virginia had not had any intercourse; these lands lay far off from the residence of the Chickasaws, and were mere hunting-grounds. Virginia might not have known, and we suppose did not know to any degree

of certainty, that they belonged to this tribe, or what Indians claimed them, either in 1779 or 1781. But we repeat: one thing is certain, that Virginia treated the lands as subject to appropriation in 1781; which she could not have done without forfeiting her honor, and breaking her treaty, had they been Cherokee lands; and we feel great confidence she intended to do neither. The treaty of 1777 was equally in force in 1781, as in 1779.

The opinion of the Court of Appeals in 1791 is conclusive to the point—that if the land in dispute was not Cherokee country, it was not within the exception of the land-law of 1779; and that Clark's *title is good, as all the lands in the commonwealth not excepted, were subject to appropriation on Treasury warrants, although claimed by Indians whose lands were not protected from location by statute.

*122]

It is next insisted, that as there was no other country in Virginia belonging to any tribe of Indians in the west, the reservation must have referred to that west of Tennessee river. However imposing this argument may seem, it is easily explained, when we recollect that in 1779 it was unknown where the southern boundary of Virginia was. The question is, what limits did she assume as hers at that time? The Long Island treaty-line of 1777 ran down the Holston to the mouth of Cloud's creek, and then to a point below Cumberland gap. Up to these boundaries the Virginians had settled; and west of it they were prohibited from going; the country for half a degree south of Walker's line was in the possession of Virginia; she had Fort Henry there, and governed it. Lands were located and enjoyed under her laws south of Walker's line, east of the line running from the mouth of Cloud's creek to the mountain; and had the Cherokee country west of the line not been excepted from location, her people would have broken the treaty and obtruded on the Cherokees. After the deed of Henderson and Company had been treated as a valid cession to the state, this was the only definite and established line left between the parties; and the protection of which excited great anxiety on the part of the Indians, as plainly appears by the treaty; it is therefore manifest, the exception in the land-law had reference mainly to this line, in support of the treaty as the standing law between the parties to it.

The argument is founded on the fact, that the entire line from the Holston to Cumberland gap, fell to North Carolina; as Walker's line runs through the gap, and north of the high point at which the line terminates; but for the reasons stated, it proves nothing, when explained by the mistake under which Virginia labored in regard to her southern boundary, before

Walker's line was run. Had the legislature declared no location should be made west of the Cherokee line, then there would be no difficulty in saying what line was meant; as there was then no recognized Cherokee line in the assumed limits of Virginia but the one from Holston river to the mountain. It is therefore almost as certain this was the line alluded to in the exception of the act of 1779, as if the legislature had said so.

To prove that the Cherokees did own the country west of Tennessee river near its mouth, the deposition of Peter Force is introduced *on part of the complainant. The [*123 witness expresses it as his opinion that the land in dispute in 1779 belonged to the Cherokees: This opinion is founded on books, maps, treaties, and other papers, in his possession, and supposed by him to be authentic, which for many years he had been collecting as connected with the history of the United States, from the settlement of the colonies to the adoption of the federal constitution; pursuant to a contract made in 1833 with the secretary of state, under the authority of an act of Congress for the publication of these papers. A portion of them are given; and among the number different maps of the country west of the Alleghany mountains, including the country on the rivers Ohio, Tennessee, and Mississippi, from about the thirty-fourth degree to about the thirty-eighth of north latitude.

Most of these maps have statements on them that the country west of Tennessee river was Cherokee land—"country of the Cherokees," &c., being marked on the maps. They were published at different periods previous to the Revolution; the most respectable of them, that of Mitchell, in 1755. The physical geography of the country was obviously little understood, as the maps are very imperfect, and no authority for this purpose at the present day, where any degree of accuracy is required. The only documentary evidence produced by Mr. Force to show the residence of the Cherokees is found in the report in the proceedings to the British government, of Sir Alexander Cuming, who visited the Cherokees in the spring of 1730, obtained their submission to the crown, and took to England some of their chiefs, to ratify a treaty there with the lords commissioners of trade and plantations. This treaty describes no boundaries, but is one of amity, and contains stipulations that the Cherokees in future shall be subject to the sovereignty of the British crown. Sir Alexander visited the Indian towns on the Keowee where the treaty of Hopewell was made, and went north to Tellico where the king Moytoy resided, and got his submission, and the surrender of his crown.

This town Tellico was near the Tennessee river, where it first takes the name; and is in what is now Monroe county, Tennessee, more than 300 miles from the land in dispute. It continued to be an Indian town until the treaty of 1819, when the Cherokees extinguished their title to the country there.

In January, 1793, Governor Blount, the superintendent of Indian affairs, in a letter to the Secretary of war gives an *124] account of the places of residence of the Cherokees at the beginning, and previous *to the Revolution. He says they lived in towns either on the head waters of the Savannah river, (Keowee and Tugelo,) or on the Tennessee above the mouth of Holston. He then proceeds to prove that the lands sold to Henderson and Company did not belong to the Cherokees; and also, that the lands formerly sold by them to Henderson and Company, lying on the Cumberland, belonged to the Chickasaws, that the Cherokees had only sold their right to them as a common hunting-ground, and that Virginia had previously purchased them from the northern Indians. And if he is not mistaken, in his representation of the facts and admissions of the Cherokees, stated in his letters of November, 1792, and January, 1793, he does prove, that to the lands sold to Henderson and Company, north of Cumberland river, the Cherokees had no title when they made the deed, and that they so admitted; and that the lands ceded by them south of that river by the treaty of Hopewell belonged to the Chickasaws; or at least that this tribe had a better founded claim to them than the Cherokees. Copies of the letters are found in the State Papers, vol. i., pp. 325, 431.

We think that not much reliance can be placed on any thing contained in Mr. Force's deposition: And that the conclusion Governor Blount formed, is contrary to what Virginia admitted by the treaties of Hard Labor, and Lochaber, and by taking title under the deed of Henderson and Company: this deed is in conformity to the foregoing British treaties made with the Cherokees previous to the Revolution, and especially that of 1770, of Lochaber; according to which, the eastern Cherokee line in Virginia was established from a point six miles above the Long Island in Holston; thence through Cumberland gap, to the head of Kentucky river, and down the same to the Ohio. Virginia never set up any assumptions to the contrary of this being the true line as run by Col. Donelson, by whose name it was known. Nor could the United States be heard to disavow the Cherokee title recognized by the treaty of Hopewell to the lands lying south of Cumberland river, and recognized as theirs by that treaty.

And in this connection, we take occasion to say, nothing

short of the clearest proof would induce this court, after the lapse of nearly sixty years, to hold otherwise, than that the Chickasaw line, established by the treaty of Hopewell, from the Cherokee corner to the Ohio river, was conclusive, that it was the true line of that people, anterior to any date, known to Virginia as a commonwealth. As to *the [*125 United States it was assuredly conclusive, the treaty not being one of cession: And as to the Cherokees, acquiescence from 1785 to 1819, when the United States acquired the Chickasaw title, it ought to conclude them, unless their superior title was plainly and conclusively proved; and the delay in not asserting it accounted for in a satisfactory manner: The same proof is required of the complainant; in which we think he has altogether failed.

The defendants proved themselves to have been more than seven years in possession under Clark's patent before the suit was brought, and therefore rely on the statute of limitations of Kentucky as a defence.

The statute, in terms, bars suits in equity as well as actions at law where seven years adverse possession has been held. This court pronounced it no violation of the compact between Virginia and Kentucky in the case of *Hawkins* v. *Barney*, 5 Pet., 458. And so Kentucky has often held. It applies to suits where the plaintiff claims under a patent, survey, or entry, against an adverse title set up under another patent, survey, or entry. The defendant's title must be connected, and deducible of record from the commonwealth; which means a connected title when tested by its own derivation. On this the bar may be founded, although it be the younger, and void, when contrasted with the plaintiff's elder patent. *Skyles* v. *King*, 2 Marsh. (Ky.), 387. But the statute does not bar a legislative grant, 3 Mon. (Ky.), 161, and it is insisted for the complainant the acts of Virginia vested in the officers and soldiers an equitable title, which was anterior to Porterfield's entries and patents, and independent of them, on which the bill can be sustained, and therefore no bar can be interposed. The rule in this court is settled, that each state has the right to construe its own statutes; and especially those barring titles. In the case of *Green* v. *Neal*, 6 Pet., 291, it was held that this court uniformly adopted the decisions of the state tribunals, respectively, in construing their statutes; that this was done as a matter of principle, in all cases where the decisions of the state court had become a rule of property. This rule was adopted in *Harpending* v. *The Dutch Church*, and has been in many other cases, 16 Pet., 439, and cannot be departed from. The land-laws of Virginia are just as much

the laws of Kentucky, as they were the laws of Virginia in that country before the separation. By the decisions of the Court of Appeals of Kentucky it is settled, and has not been *126] open to question for many years, that an entry was required to *give title on a military warrant in the military district; and that all the specialty, &c., to give it validity, was imposed on the enterer, as if it had been made on a Treasury warrant; each being governed by the provisions of the act of 1779. *McIlhenney* v. *Biggerstaff*, 3 Litt. (Ky.), 161. This form was pursued by Porterfield, and was the only means by which he could acquire an individual title that could be enforced in a court of justice; although he had a common interest in the lands pledged for the satisfaction of his claim, that could be made available through the medium of the land-office. His claim, as set forth in the bill, was, therefore, subject to be barred: By the proof it is barred; and for this reason also the bill must be dismissed.

As it was urged on part of the complainant with much earnestness that the act of 1809, was never intended to apply to the land in dispute, then covered by the Chickasaw title, and protected by the treaty of Hopewell, it is deemed proper to express briefly our opinion on the ground assumed. George R. Clark had mortgaged the land long before the treaty of 1819 was made; therefore it was subject to sale before the Indian title to occupancy was extinguished; so the *caveat* suit was decided first in Virginia in 1791, and ultimately in Kentucky in 1793, after the treaty of Hopewell, therefore the title could be litigated. In 1795, a patent issued to Clark pursuant to a statute of Kentucky of the previous year, general in its terms: It follows the land-laws extended to the country, so far as the inhibitions of the treaty would permit, or the patent could not have issued.

Kentucky legislated for her entire territory, subject to the restrictions imposed by the treaty; which that state recognized as the paramount law until its restrictions were removed by the treaty of cession; when the act of 1809, and all the other laws of Kentucky had effect west of Tennessee river, and operated alike in all parts of the state.

For the foregoing reasons the decree of the Circuit Court dismissing the bill, is ordered to be affirmed.

ORDER.

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 now here 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.

FRANCOIS FENELON VIDAL, JOHN F. GIRARD, AND OTHERS, CITIZENS AND SUBJECTS OF THE MONARCHY OF FRANCE, AND HENRY STUMP, COMPLAINANTS AND APPELLANTS, *v.* THE MAYOR, ALDERMEN AND CITIZENS OF PHILADELPHIA, THE EXECUTORS OF STEPHEN GIRARD, AND OTHERS, DEFENDANTS.

The corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise, inasmuch as the act of 32 and 34 Henry 8, which excepts corporations from taking by devise, is not in force in Pennsylvania.[1]

Where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do: if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.[2]

Neither is there any positive objection in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.[3]

Under the general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness," the corporation may execute any trust germane to those objects.[4]

The charter of the city invests the corporation with powers and rights to take property upon trust, for charitable purposes, which are not otherwise obnoxious to legal animadversion.[5]

The two acts of March and April, 1832, passed by the legislature of Pennsylvania, are a legislative interpretation of the charter of Philadelphia, and would be sufficient hereafter to estop the legislature from contesting the competency of the corporation to take the property and execute the trusts.

If the trusts were in themselves valid, but the corporation incompetent to execute them, the heirs of the devisor could not take advantage of such ina-

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[1] In New York a devise to a corporation is invalid unless the corporation is the creature of the State and authorized by its charter to take by devise. *United States* v. *Fox*, 4 Otto, 315. And the right so to take is subject to the general laws of the State passed after the incorporation. *Kerr* v. *Dougherty*, 79 N. Y., 327. If the incorporation is effected after the testator's death, but before the money is payable, the devise is good. *Philson* v. *Moore*, 23 Hun (N. Y.), 152.

[2] CITED. *Planters' Bank* v. *Sharp*, 6 How., 322. S. P. *Mason* v. *M. E. Church*, 12 C. E. Gr. (N. J.), 47.

[3] FOLLOWED, *in dissenting opinion*, *United States* v. *R. R. Co.*, 17 Wall., 334.

[4] CITED. *Perin* v. *Carey*, 24 How., 505.

[5] Compare *McDonogh* v. *Murdock*, 15 How., 367.

bility; it could only be done by the State in its sovereign capacity, by a *quo warranto*, or other proper judicial proceeding.[6]

The trusts mentioned in the will of Stephen Girard are of an eleemosynary nature, and charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law.[7]

The decision of the Supreme Court of Pennsylvania in the case of *Zimmerman* v. *Andres*, (January term, 1844,) recognized and confirmed, viz.: "That the conservative provisions of the statute of 43 Elizabeth, chap. 4, have been in force in Pennsylvania by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it."[8]

*128] *The present case distinguished from the case of the *Trustees of the Philadelphia Baptist Association* v. *Hart's executors*, 4 Wheat., 1, upon two grounds, viz.:

1. That the case in Wheaton arose under the law of Virginia, in which state the statute of 43 Elizabeth, chap. 4, had been expressly and entirely abolished by the legislature, so that no aid whatever could be derived from its provisions to sustain the bequest.
2. That the donees were an unincorporated association which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.

The decisions and *dicta* of English judges, and the recent publication of the Record Commissioners in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth.[9]

This part of the common law was in force in Pennsylvania, although no court having equity powers now exists or has existed, capable of enforcing such trusts.

The exclusion of all ecclesiastics, missionaries, and ministers of any sort from holding or exercising any station or duty in a college, or even visiting the same; or the limitation of the instruction to be given to the scholars, to pure morality, general benevolence, a love of truth, sobriety, and industry; are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void, according to the constitution and laws of Pennsylvania.[10]

THIS case came up by appeal from the Circuit Court of the United States, sitting as a court of equity, for the eastern district of Pennsylvania.

The object of the bill filed in the court below was to set

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[6] REVIEWED. *Girard* v. *Philadelphia*, 7 Wall., 14.

[7] CITED. *Piper* v. *Moulton*, 72 Me., 159. S. P. *Taylor* v. *Mawr College Trustees*, 7 Stew., (N. J.), 101.

Towns or cities may hold in trust funds given for educational purposes. *Piper* v. *Moulton*, 72 Me., 155.

A county can take a devise of a permanent fund for the education of a described class of children in the county. *Craig* v. *Secrist*, 54 Ind., 419. Compare *Commr's of Lagrange* v. *Rogers*, 55 Ind., 297; *Clement* v. *Hyde*, 50 Vt., 716. S. P. *Griffith* v. *State*, 2 Del. Ch., 421; *State* v. *Griffith*, Id., 392.

[8] CITED. *Wheeler* v. *Smith*, 9 How., 80; *Kain* v. *Gibboney*, 11 Otto, 366; s. c. 3 Hughes, 397. See *Fontain* v. *Ravenal*, 17 How., 397.

[9] See *Ould* v. *Washington Hospital*, 5 Otto, 309.

[10] CITED. *Manners* v. *Library Co.*, 93 Pa. St., 172; s. c. 39 Am. Rep., 741, where a trust in favor of a public library was held not void because of a direction to the trustees not to exclude books because of their containing unconventional doctrines on the subjects of theology, morals and medicine; or because of a direction to publish such works.

aside a part of the will of the late Stephen Girard, under the following circumstances:—

Girard, a native of France, was born about the middle of the last century. Shortly before the declaration of independence he came to the United States, and before the peace of 1783 was a resident of the city of Philadelphia, where he died in December, 1831, a widower and without issue. Besides some real estate of small value near Bordeaux, he was, at his death, the owner of real estate in this country which had cost him upwards of $1,700,000, and of personal property worth not less than $5,000,000. His nearest collateral relations were, a brother, one of the original complainants, a niece, the other complainant, who was the only issue of a deceased sister, and three nieces who were defendants, the daughters of a deceased brother.

The will of Mr. Girard, with two codicils, was proved at Philadelphia on 31st of December, 1831.

*After sundry legacies and devises of real property [*129 to various persons and corporations, the will proceeds thus:—

XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds: and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate, (the real estate in Pennsylvania charged aforesaid,) unto "the Mayor, Aldermen, and Citizens of Philadelphia," their successors and assigns, in trust, to and for the several uses, intents, and purposes herein after mentioned and declared of and concerning the same, that is to say: so far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen, and citizens of Philadelphia, or their successors, but the same shall for ever thereafter be let from time to time, to good tenants, at yearly, or other rents, and

upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and liberties of Philadelphia constantly in good repair, (parts elsewhere situate to be kept in repair by the tenants thereof respectively,) and towards improving the same, whenever necessary, by erecting new buildings, and that the net residue (after paying the several annuities herein-before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: and so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply
*130] the proceeds of such sale to the same uses and purposes as are *herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practicably may be, in the center of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia, (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, for ever,) a permanent college, with suitable outbuildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design.

The said college shall be constructed with the most durable materials, and in the most permament manner, avoiding needless ornament, and attending chiefly to the strength, convenience, and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles. It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice. It shall be fire-proof inside and outside. The floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows, and shutters. Cellars shall be made under the whole

building, solely for the purposes of the institution, &c., &c., &c., (and then follows a long and exceedingly minute description of the manner in which the building shall be erected.)

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution, the income, issues, and profits of so much of the said sum of two million of dollars as shall remain unexpended, shall be applied to maintain the said college according to my directions.

1. The institution shall be organized as soon as practicable, and to accomplish that purpose more effectually, due public notice of the *intended opening of the college [*131 shall be given, so that there may be an opportunity to make selections of competent instructors and other agents, and those who may have the charge of orphans may be aware of the provisions intended for them.

2. A competent number of instructors, teachers, assistants, and other necessary agents, shall be selected, and when needful, their places from time to time supplied. They shall receive adequate compensation for their services; but no person shall be employed who shall not be of tried skill in his or her proper department, of established moral character, and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars useful to be known of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian or other competent authority shall have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors, or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring

—and at all future times, priority of application shall entitle the applicant to preference in admission, all other things concurring; but if there shall be, at any time, more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given—first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York, (that being the first port on the continent of North America at which I arrived;) and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part-owner of a vessel and cargo.

*132] *7. The orphans admitted into the college shall be there fed with plain but wholesome food, clothed with plain but decent apparel, (no distinctive dress ever to be worn,) and lodged in a plain but safe manner: due regard shall he paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Greek and Latin languages,)—and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans admitted into the college shall, from mal-conduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the mayor, aldermen, and citizens of Philadelphia, or under their direction, to suitable occupations—as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively, consulting, as far as prudence shall justify it, the

inclinations of the several scholars, as to the occupation, art, or trade to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the mayor, aldermen, and citizens of Philadelphia, and their successors; and I do so with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow-citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their city councils, and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which *my bequest for said college is made [*133 and to be enjoyed, namely:—First, I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of or pledged to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively: Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

If the income arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and outbuildings, shall, owing

to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund, hereinafter expressly referred to, for the purpose, comprehending the income of my real estate in the city and county of Phila-
*134] delphia, and the dividends of my stock in the Schuylkill Navigation Company—my *design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say—(then follows an enumeration of the objects to which the income of the fund is to be applied, being the improvement of the eastern part of the city.)

XXIII. I give and bequeath to the commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purpose of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified, namely: 1. Laws, to cause Delaware Avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing, to be abated and removed, and to prohibit the creation of any such obstructions to the eastward of said Delaware Avenue; 2. Laws, to cause all wooden buildings, as above described, to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. Laws, providing for the gradual widening, regulating, paving, and curbing Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water and pumps, as before specified—all which objects may, I persuade myself, be accomplished on principles at once just in relation to individuals, and highly beneficial

to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interests and income thereof from time to time, so that the whole shall form a permanent fund, and to apply the income of the said fund:

1st. To the further improvement and maintenance of the aforesaid college, as directed in the last paragraph of the XXIst clause of this will.

*2d. To enable the corporation of the city of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited to the purpose; and to this end, I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station, patrole together. [*135

3d. To enable the said corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are least able to bear it.

To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever, after providing for the college as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues, and profits of my real estate in the city and county of Philadelphia, which shall for ever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XXIst clause of this will: And if the commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to the mayor, aldermen, and citizens of Philadelphia, are made upon the following express conditions, that is to say: First, That none of the moneys, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever, than those herein mentioned and appointed. Second, That separate accounts, distinct from the other *136] *accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college, and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature, as hereinafter mentioned, that my intentions had been fully complied with. Third, That the said corporation render a detailed account annually, in duplicate, to the legislature of the commonwealth of Pennsylvania, at the commencement of the session, one copy for the Senate, and the other for the House of Representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said college, and shall submit all their books, papers, and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required.

Fourth, The said corporation shall also cause to be published in the month of January, annually, in two or more newspapers, printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

(The 25th section related to the winding up of the Girard Bank, and the 26th appointed Timothy Paxon, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, Executors. Then followed the execution of the will, in regular form, on the 16th day of February, 1830.)

Whereas, I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February, eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate

that I may hereafter purchase, it is my wish and intention to pass by the said will: Now, I do hereby republish the foregoing last will and testament, dated February 16, 1830, and do confirm the same in all particulars.

In witness, I, the said Stephen Girard, set my hand and seal hereunto, the twenty-fifth day of December, eighteen hundred and thirty. STEPHEN GIRARD. [L. S.]

*Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator and of each other, December 25th, 1830. [*137

JOHN H. IRWIN,
SAMUEL ARTHUR,
JNO. THOMSON.

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16th, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township: Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate, so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes, as are declared in section twenty of my will, it being my intention, that the said square of ground shall be built upon, and improved in such a manner, as to secure a safe and permanent income for the purposes stated in said twentieth section.

In witness whereof, I, the said Stephen Girard, set my hand and seal hereunto, the twentieth day of June, eighteen hundred and thirty-one. STEPHEN GIRARD. [L. S.]

Signed, sealed, published, and declared by the said Stephen
*138] Girard, as and for a republication of his last will and testament, and a *further direction in relation to the real estate therein mentioned, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and of each other, June 20, 1831.

S. H. CARPENTER,
L. BARDIN,
SAMUEL ARTHUR.

The executors named in the will, duly proved the same with the codicils before the register of wills for the city and county of Philadelphia, obtained letters testamentary thereon, and took upon themselves the burden of the execution thereof. Inventories and supplementary inventories of the estate were filed, debts and legacies paid, and large sums of money paid to the residuary legatees. The accounts of the executors were filed in the office of the register of wills, from which they passed, in due course of legal proceedings to the Orphan's Court, for the city and county of Philadelphia.

An act of the legislature of Pennsylvania, of 24th March, 1832, "To enable the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements, and to execute certain trusts," recites the bequest of $500,000, in Stephen Girard's will, sect. 22, to the mayor, aldermen and citizens of Philadelphia, in trust, &c., and "for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia, aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws." Sections 1 to 9 contain enactments stipulated by the testator in sect. 23 of the will, as the condition on which $300,000 was bequeathed to the commonwealth of Pennsylvania.

"And forasmuch as in the course of time it may appear that powers are not vested in the said, the mayor, aldermen and citizens of Philadelphia, which may be yet required, to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has

in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

"Sect. 10. Be it further, &c., That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and *things whatsoever as may be [*139 necessary and convenient for the full and entire acceptance, execution and prosecution, of any and all the devises and bequests, trusts and provisions, contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

"Sect. 11. And be it further, &c., That no road or street shall be laid out or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved of by a majority of the Select and Common Councils of the city of Philadelphia."

By another act, passed on the 4th of April, 1832, entitled "A supplement to the act entitled 'An act to enable the Mayor, Aldermen, and Citizens of Philadelphia, to carry into effect certain improvements, and to execute certain trusts'" the Select and Common Council of the city of Philadelphia, are authorized to provide by ordinance, or otherwise, for the election or appointment of such officers or agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

In October, 1836, some of the heirs of Stephen Girard filed a bill upon the equity side of the Circuit Court of the United States for the eastern district of Pennsylvania, against the corporation of Philadelphia, the executors, and some of the nieces of Girard, who were made co-defendants. The claim, as presented in the original bill, amended bill, and bill of revivor, (in which Henry Stump is made a party as the administrator of one of the deceased complainants,) is as follows:—

"Your orator and oratrix further show, that amongst other things in their original bill, they have alleged and charged that the testator, Stephen Girard, by a supposed devise in his last will and testament, has in the first place appropriated two millions of dollars to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of a college, for the maintenance and education of a class of orphans, attempted to be described by the said testator in his will.

"And your orator and oratrix further state, that in their
*140] original bill, they set out that the said testator, in and by his will, after appropriating *the two millions of dollars as aforesaid, by another supposed devise, dedicated the whole of the residuum of his real and personal estate, with certain exceptions mentioned in the said original bill, to the mayor, aldermen, and citizens of Philadelphia, in trust, for the progressive enlargement of said college, and that there are no other limitations to the number of orphans to be ultimately admitted into the said college, nor to the cost nor extent of the establishment, but the number and extent of the collegiate buildings and their appendages, that may from time to time be erected within the entire area of forty-five acres and some perches of land, being a country-seat called Peel Hall; so that in effect there is no devise over of any part of the said residuum of the real and personal estate of the testator, to any other use, purpose or object, after deducting the appropriations that are accepted in the original bill, than the charity connected with the establishment of said college, except it be contingently, in case the said college establishment be not made, as it is contemplated to be, capable of absorbing the whole of the said residuum of the real and personal estate, intended to be devised in trust as aforesaid, as by a reference to the said original bill and exhibits, which your complainants pray may be taken as part of this bill, will more fully appear.

"Your complainants suggest and insist to be available, that it will be decided, from a true exposition and construction of said will, which is submitted to the court, that it was the intention of the testator to dedicate the whole of the rents, issues, and profits of his real estate in the city and county of Philadelphia, in trust, exclusively to the uses and purposes of the charity connected with said college, and not that the said real estate, or the rents, issues, and profits thereof are to be contingently applied to any other use or purpose, unless it be to the payment of a ratable proportion of certain annuities charged on the real estate of the testator, in the state of Pennsylvania, by the eighteenth clause in his will.

"And your orator and oratrix further aver and expressly charge, that the charity connected with the college, if the establishment is erected and managed according to the directions of the testator, and the necessary buildings constructed so as to fill up and improve the whole area of forty-five acres and some perches of land, will require and consume the whole of the residuum of his real and personal estate, attempted to be devised as aforesaid for the purposes of erecting, progressively enlarging, and perpetually maintaining said collegiate estab-

lishment, for the support and education of as great a number *of orphans as the testator directs to be admitted therein, so that there will be no surplus of said residuum of his real and personal estate supposed to be devised in trust as aforesaid, to be appropriated to any other objects or purposes designated by the testator in his will. And your orator and oratrix aver, that there is no devise over for any other purpose, upon any contingency, of the said two millions of dollars, supposed to be devised to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of said college, and that no part of said two millions of dollars, according to the will of the testator, can be applied in any event to any other use, purpose or object, except to the charitable objects depending upon the erection, endowment and perpetual support of said college. And your orator and oratrix aver and insist to be available, that the said supposed devise of two millions of dollars to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of said college, for the benefits of uncertain objects of charity, supposed to be intended by the testator, is void.

"And your complainants maintain, that the mayor, aldermen, and citizens of Philadelphia, were at the death of the testator, incapable of executing any such trust, or of taking and holding a legal estate for the benefit of others; and that whatever may be the capacity of said mayor, aldermen, and citizens of Philadelphia, to hold property for the use of others, or to execute a trust, the object for whose benefit the said devise in trust is supposed to have been made, are indefinite, vague, and uncertain, as will appear from an examination of said will; so that no trust is created that is capable of being executed, or is cognizable either at law or in equity, and no estate passed by said supposed devise, that can vest in any existing or ascertainable *cestuis que trust;* that if the objects or persons for whose benefit the said devise is supposed to have been made, were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession, so that the said two millions of dollars, for want of a good and effectual devise, has descended by operation of the law governing descents in the state of Pennsylvania, and the treaty stipulations between France and the United States, to the heirs at law of Stephen Gerard the testator, according as such laws and treaty stipulations affect the rights of such of the heirs as are aliens and such as are citizens of the United States.

"Your orator and oratrix expressly charge in their original bill, that *the said supposed devise to the [*142

mayor, aldermen, and citizens of Philadelphia, in trust, of the whole of the *residuum* of the real and personal estate of the testator, for the erection, progressive enlargement, and perpetual support of said college, is void, and that your complainants were heirs at law of said testator, and each entitled to one-third part of the estate of the testator, undisposed of or ineffectually disposed of by his last will, according to the law governing descents in the state of Pennsylvania, and the treaty stipulations between France and the United States; and that the testator at the time of his death left certain other heirs, namely, Maria Antoinetta, wife of John Hemphill, Henrietta, wife of John Y. Clark, and Caroline, wife of John Haslam, which said Maria, Henrietta, and Caroline, are nieces of the said testator, and daughters of John Girard, late of Philadelphia, deceased, and they and their husbands, except the husband of said Caroline, are all made defendants to said bill, together with Mark Richards, who is the trustee of Caroline, all of which said defendants are citizens of the state of Pennsylvania. And your orator and oratrix further allege that the last named heirs are the only persons entitled besides your complainants to any part of the real or personal estate of which the said testator died seised or possessed, and which remained undisposed of or ineffectually devised by his will.

"And your complainants, as they are informed, verily believe and expressly charge, that notwithstanding the invalidity of said supposed devise or devises in trust, the said mayor, aldermen, and citizens of Philadelphia, soon after the death of the testator, entered upon and possessed themselves of the two millions of dollars, supposed to be devised to them in trust for the erection and support of said college, and also of the whole of the *residuum* of the real and personal estate of the testator, supposed to be devised to them for the same purposes, and have ever since continued to hold and manage the same according to the terms of said supposed trust, or under the pretext of applying the said two millions of dollars, and the said *residuum* of the real and personal estate of the testator, to the supposed objects and purposes of said trust; that they have altogether refused to account to your complainants or to pay over to them any part of their distributive shares, either of the said two millions of dollars or of the *residuum* of the real and personal estate, to which they are entitled, but intending artfully and fraudulently to evade and baffle the reasonable and just claims of your complainants, and the relief prayed for in the *original bill, they have neglected to answer fully, either as to the amount or value of the real or personal estate they have entered upon

*143]

or received from the estate of the testator, under color of said trust; and your complainants pray that in order to obtain the relief and equity prayed for, the said mayor, aldermen, and citizens of Philadelphia, be compelled to answer and discover," &c. &c.

[The bill then prayed a general discovery and account from all parties.]

The defendants all answered, and the executors filed full accounts of all their transactions. A commission to take testimony was issued to France, in order to establish the relationship existing between the complainants and the deceased.

Under the act of 1832, the corporation of Philadelphia passed an ordinance providing for the building of the college, and the board of trustees created thereby was organized in March, 1833. The building was commenced and carried on from year to year under the direction of the authorities appointed in this ordinance.

On the 28th of April, 1841, the cause came on for hearing in the Circuit Court upon the bill, amended bill, and bill of revivor, answers, replications, depositions and exhibits, when, after argument of counsel, it was ordered, and adjudged, and decreed, that the complainants' bill be dismissed with costs.

The complainants appealed to this court.

Jones and *Webster*, for the appellants, who were also the complainants below.

Binney and *Sargeant*, for the defendants.

Jones made the three following points:

1. That the bequest of the college fund is to this amount void, by reason of the uncertainty of the designation of the beneficiaries or *cestuis que trust* of the legacy.

2. That the corporation of the city of Philadelphia is not authorized by its charter to administer the trusts of this legacy, and that the intentions of the testator would be defeated by the substitution of any other trustee.

3. That if otherwise capable of taking effect, the trust would be void, because the plan of education proposed is anti-christian, and therefore repugnant to the law of Pennsylvania, and is also opposed to the provision of Art. IX. sect. iii. of the Constitution of Pennsylvania, *that "no human authority can in any case whatever control or interfere with the rights of conscience." [*144

If the first point should be established and the second not, the corporation would become trustees for the complainants.

8 Pet., 326; *King* v. *Mitchell*, 1 Meriv., 336; 2 N. C., 557 2 Dev. (N. C.), 309; 10 Ves., 535.

The city of Philadelphia claims as a residuary legatee, even if the trust should be declared void, but there are two answers to this, first, that a trust bars the residuary interest, and, second, that the *residuum* is divided into parts. Amb., 580; 1 Johns. (N. Y.), 571.

In real estate, the residuary devisee never had a lapsed devise.

The bequest of the college fund is void by reason of the uncertainty of the *cestuis que trust.*

At common law and prior to the statute 43 Elizabeth, such devises were void, and that statute is not in force in Pennsylvania. Duke, 125; Delford on Mortmain, 43.

The statute 5 Elizabeth, reviving a statute of Henry 8, says, henceforth it shall be lawful, &c., implying that it was not lawful before.

In England, formerly, all charities were under the care of the ecclesiastical courts. At the Reformation they were withdrawn from the church, and paupers thrown upon the public. Henry 8 was glad to find some other way of supporting them, and Elizabeth encouraged private persons to found charities with the same view. But since her day, the source of the power which chancery has exercised over charities in England has been the prerogative of the crown, and this prerogative law never could have been introduced into the colonies. Jurisdiction over the three subjects of lunatics, infants, and charities has always gone together, and been claimed because the king is said to be *parens patriæ.* 1 Bl. Com., 303; 3 Id., 47.

The king, in his judicial capacity, through the chancellor, and exercising an extraordinary jurisdiction, takes control of these things. 3 Bl. Com., 427; 1 Fonbl., 57, note; 2 Id., 207, 235; Shepherd on Wills, 208; Chitty's Prerogative Law, 155, 161; 2 Atk., 553, where Lord Hardwicke says it is a personal authority of the chancellor.

The jurisdiction over charities is not within the ordinary powers of equity, but falls back upon the king's prerogative. Sir Francis More, 188; Hob., 138; 13 Ves., 248.

*145] It must be an extra-judicial function to set aside a will. How *could this power have passed over to a revolutionized and republican state? In England, if the chancellor could not entertain jurisdiction, he referred the case to the king, who acted under his sign manual, but to whom can an American chancellor refer it? In an elective republic it is impossible to have such a person. These vague

charities cannot be sustained unless by virtue of some peculiar law, and it is an alarming event that two millions of property are put into perpetual mortmain for the benefit of persons not even incorporated, not even a religious or mechanical society.

The municipal law of Pennsylvania consists of the law of nations, the common law of England, and some of the British statutes. The report of the judges made to the legislature in 1808, (3 Binn. (Pa.), 620,) says that parts of the statutes 7 Edward 1; 13 Edward 1; 15 Richard 2; and 23 Henry 8, commonly called statutes of mortmain, are in force in the state. 1 Dall., 67, 70, 444, 114.

The old remedy of assize was revived because the statute of Edward was considered to be in force in consequence of the report. 17 Serg. & R. (Va.), 174. The preface to the report says it was necessary to examine the whole code. But the statute of Elizabeth is not included amongst those in force. How then can it get in, unless by some act of the legislature, which is not contended?

If the statute was in affirmance of the common law, the judges would have reported it as being in operation, because the common law was itself in force. 9 Serg. & R. (Pa.), 348, 349.

The first Constitution of Pennsylvania, art. 7; art. 3, sect. 3, and 24 sect. (1 Dallas's Laws, appendix,) show that there is no power provided to carry out the king's prerogative.

[Mr. *Jones* then went into a minute and critical examination of the colonial records of Pennsylvania, to show that from the proceedings of the governor and assembly it was not believed that a power existed to sustain these religious charities, referring amongst other matters to the charter of the Presbyterian church in 1772.]

After the Revolution, the first case that occurred to test these principles was 17 Serg. & R. (Pa.), 88, *Witman* v. *Lex;* but the bequests in this case were good by the common law without the aid of the statute of Elizabeth, which was decided not to be in force.

2. As to the capacity of the trustee to take.

The powers of the corporation are limited, and a trust beyond those powers cannot be executed. 4 Wheat., 636; 9 Watts (Pa.), 551; 6 Conn., 304; 1 Ves., Sr., 534.

*If the city of Philadelphia is the trustee, the estate [*146 is in one body and the execution of the trust in another, for all the people are a part of the corporation. The head of the corporation cannot be separated from the body.

In ordinary cases, where there is no trustee, the court may appoint one; but this cannot be done here, because the trus-

tee, being a corporation, has perpetuity, and a similar one must be selected. 4 Wheat., 28; 1 Ves., Sr., 534; Duke, 245.

A part of this devise would make it a curse to any civilized land; it is a cruel experiment upon poor orphan boys to shut them up and make them the victims of a philosophical speculation. By the laws of Pennsylvania it is blasphemy to attack the Christian religion, but in this case nothing is to be taught but the doctrines of a pure morality, and all the advantages of early impressions upon the youthful mind are entirely abrogated.

Binney, for the defendants,

(Argued that under the true construction of the will, the heirs of Girard could not take even if the devise for the college should be set aside; because the city of Philadelphia would come in as residuary legatee; the income of the fund being applied, in such case, to "diminishing the burden of taxation," and other public objects specifically pointed out. This part of the argument is omitted, because the decision of the court is placed upon other grounds. Mr. Binney then proceeded to comment on the objections to the devise, which had been made by the counsel on the other side.)

The objection made by the counsel on the other side is twofold: first, that the city is incapable of taking a legal estate by devise; and second, that the trust is void, because the beneficiaries are too uncertain. The first point was not pressed, and is considered as abandoned. As to the second, this charity is as precise as any which has ever been established. The trust is to build upon a place specially marked out; the children are to be poor, born in Philadelphia, then New York, then New Orleans. The description is specific and limited. In England, a charity, however general, always succeeds; there is no case in which it has failed. The only question there is about its administration; whether by the chancellor in his ordinary jurisdiction, or under the sign manual of the crown. The statute 32, 34 Henry 8, which forbade devises to corporations in mortmain, never was in force in Pennsylvania. The settlers agreed in England upon the laws which should govern them.

*147] *White & Brockden's History of Laws, Appendix 1, says that wills, &c., in writing and attested should have the same force as to land that conveyances had. This was on 5th May, 1682. The same rule was established on the 7th December, 1682, if the will were proved in forty days. Same book, Appendix 4, chapter 45.

On the 1st January, 1693, this law was in force. The legislature requested the governor to declare what laws were in force, who complied and declared that this was, amongst others. Same book, Appendix 7, 8.

In 1683, a law restrained the testator, if he had a wife and child, from willing away more than one-third; but in 1693, the full power was restored. Same book, Appendix 9.

After a slight alteration, (see Appendix 12,) the statute of wills was passed in 1705, which was in force until Girard's death. It declares that wills in writing, and attested, shall be good as conveyances. The power to make a will is general, and to devise to any one. If corporations, therefore, can take by deed, they can by devise.

The corporation has power to take. If the statutes of mortmain are in force, they do not intercept the grant on its way to the corporation; there must be an office found to escheat the property to the state. 7 Serg. & R. (Pa.), 313; 14 Pet., 122; Shelford, 8.

The policy of the mortmain statutes of England has not been adopted in Pennsylvania. The act of 1791 (Purdon, 182, 183) forbids corporations from holding property "exceeding £500 in income," but permits them to hold any quantity of unproductive land.

The statutes of mortmain do not extend to Pennsylvania. If they do, it is contrary to the English decisions about their colonies. 2 Meriv., 143; 2 Madd. Ch. Pr., 61, note 62; 8 Wheat., 476.

If they had been considered as being in force, there would have been escheats under them; but none are found.

The rule prescribed by the court in 3 Binn. (Pa.), 597, was that where there was a Pennsylvania statute on the same subject with an English statute, the latter was not in force. But this could not be carried out universally, for the statute 4 Anne and the Pennsylvania law of 1714 were declared both to be in operation.

The city of Philadelphia has an unlimited power to acquire land. The charters of 1701 and 1789 both give it. 2 Smith's Laws, 462. The power is to hold to them and their successors for ever, or they can alienate it as a natural person can.

Has the city power to take in trust?

*The old doctrine was that a corporation could not be [*148 seised to a use. Sugden on Uses, 10.

But it has been since settled that a corporation may be a trustee. If it receives a deed, the legal estate will pass, provided the statutes of mortmain do not prohibit it. If the trust is void, equity will decree a reconveyance; but this can-

not be necessary, unless the legal estate had passed. And if a corporation is incapable of executing the trust, equity will appoint some person who is not. 1 Saunders on Uses, 346, 349; Willes on Trustees, 31; Levin on Trusts, 10, 11; 2 Thomas's Co. Litt., 706, note; 1 Cruise Dig., 403, tit. 12, Trust, chap. 1, sect. 89.

Also, that a corporation may be a trustee. 2 Vern., 411; 2 Bro. P. C., 370; 7 Id., 235.

Where a corporation abused a trust and was dismissed, see 3 Bro. Ch. Cas., 171, 371; 4 Ves., 453; 2 Id., 46; 1 Id.. 467; 14 Id., 253; 12 Mass., 547; 17 Serg. & R. (Pa.), 89; 3 Rawle (Pa.), 170.

The cases in 12 Mass., 547 and 17 Serg. & R. (Pa.), 89, may not appear at first to sustain the doctrine, but the cases are right. That of 3 Rawle (Pa.), 170, is very much like the present, and establishes the doctrine, that if the trust is for the welfare of the corporation, it may take it.

The acts of the legislature of Pennsylvania of 24th March and 4th April, 1832, are strong indications of what the law is in that state. That of March (sect. 10, 11,) gives the corporation power to carry out the trust; enacts that no road shall pass through the land, and gives power to appoint officers. Both acts acknowledge and assist the trust, and imply that the corporation had power to take it. This is evidence of an existing power. 4 Pet., 503.

The charter of Philadelphia (page 73 of city ordinances), in the 16th section, grants a general power to make laws for the welfare of the people.

The case in 1 Ves., 534, does not warrant the inference drawn from it by the counsel on the opposite side. See as to this case Boyle on Charitable Uses, 84.

As to the uncertainty of the beneficiaries:—

It is an error to suppose that a trustee must take for beneficiaries known and established. Suppose a marriage settlement for life with power to devise. Where is the estate beyond the life until the power is executed? It vests in no one.
*149] A charitable use is only a power *of appointment, and the children, in this case, when named, have a good right to the use. So it is in churches. When a minister is elected, he takes the estate according to the foundation; and so also with schoolmasters, who have sometimes a freehold. Shelford, 762, 763, 765, 767, 730.

If the trustee will not nominate, chancery will. 3 P. Wms., 146; 3 Atk., 164.

The tenure of the *cestui que use* is fixed; the boys of merit are to remain in the college until they are from fourteen to

eighteen years of age. They are easily ascertainable. It is true that no one has a claim until the appointment is made. But this is the case with many trusts of private property where the estate is uncertain until certain issue are born. Where there is a power to name some one of kin to take, a remote relation may be selected. 1 Atk., 469; 4 Russ., 292. A power to appoint amongst "poor relations" may be either a charity in the legal sense of the term, or an ordinary provision of kindness. 7 Ves., 436; 2 Atk., 328; 17 Ves., 371; 1 Sh. & L, 111; Boyle on Charities, 31—34. The only difference between the two is that in the first case, it will last longer than in the other. A power of appointment is sometimes vested in particular persons from special confidence, and sometimes it passes to heirs. Charities are kept up forever.

Uncertainty is indispensable to all charities. If any one has a right to claim by law, it ceases to be a charity.

Where did the favor with which charities are regarded, and the motive by which they are established, spring from? The doctrine is traced up to the civil law. But where did Justinian get these ideas? They came from Constantine, the first Christian emperor, and they can be traced up to a higher source than that—the Bible. The Anglo-Saxons received all their principles from the same authority. Orphan-houses were exempted from taxation. Originally the injunction of the Bible was to "honor thy father and thy mother;" but the domestic affections are selfish, and it was reserved for Christianity to enjoin the duty of "loving thy neighbor as thyself." The Jewish lawyer asked who his neighbor was, and it was hard to convince him that a Samaritan could be so. There was the same difficulty as now respecting the uncertainty of the beneficiary. The lesson of charity is taught too in the case of the woman who, in her humility, claimed only the crumbs that fell from the table, and in the beautiful parable of visiting the sick and the prisoner: "Inasmuch as ye have *done it to the least of these, ye have done it unto [*150 me." Even in the old Jewish records, we find the same lesson of philanthropy taught where the sheaf is left for the unknown and unacknowledged stranger. It is the uncertainty of the person upon whom the benefit may fall that gives merit to the action. A legacy to a friend is no charity. The first trustee for a charity was St. Paul. The sick are always uncertain; and to all hospitals, the objection now made would apply. 2 Domat., 169, title 2, sect. 3; 2 Ves., 273; 1 Vern., 248; 7 Ves., 65; 17 Id., 371, that it becomes a charity as soon as uncertainty begins. Amb., 422; 5 Rawle (Pa.), 151; manu-

script case from Pennsylvania, not yet reported, that beneficial societies are not charities.

[Mr. *Binney* then proceeded with his own argument, and stated the following points:]

1. That such uses as those in Mr. Girard's will are good at the common law, in England, which is the common law of Pennsylvania.

2. That the city being in possession of the trust, nothing more is necessary for them, as they want no remedy whether there would be one at common law or not.

3. That such trusts are entitled to protection in equity, upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.

4. That they in fact enjoyed this protection in chancery before the 43 Eliz. by the originial jurisdiction of that court, and have had it ever since.

5. That 43 Eliz. is only an ancillary remedy, long disused in England from its inconvenience, and is supplied by chancery, not as an usurper on the statute, but as the rightful original tribunal for such trusts.

6. That whatever the 43 Eliz. imparted to the law of Charles, except the mere remedy by commission from the lord chancellor, is thoroughly adopted in Pennsylvania, together with the great body of the equity code of that kingdom.

7. That the law in Pennsylvania is the same as the law in all the other states except Virginia and Maryland.

1. Such uses were good at common law.

They can be traced up to an early period, anterior to Richard 2, and the principle upon which they are founded even up to the time of the Conquest. 4 Reeves, 80; Moo., 122. The
*151] principle of these charities is also engrafted upon the old English tenures. Co. Litt., 94 b; *Littleton, §§ 132, 136, where provision was made that the soul of the donor should be prayed for. Co. Litt., 96 a.

The tenure was called "frankalmoign." There was another instance where 100 pence were to be distributed to 100 poor men on a certain day. Co. Litt., 96 b; 2 Inst., 456, 406. There were perpetual charities in trust. 6 Co., 2; Co. Litt., 149 a; Brooke's Abr. part 2, Tenure, 53. Some of the early statutes recognized them.

The stat. 17 Edward 2, chap. 12, passed in 1334, related to the Knight Templars; at the dissolution of the order, the lands were assigned to the Knights of St. John for the same godly uses to which they had been applied, viz.: relieving the poor, &c.

There arose a contest between religious houses and the king

about mortmain, and afterwards about superstitious uses. Monastic houses were the conservators of public records and the sources of instruction.

15 Richard 2, chap. 5, was the last of the statutes of mortmain. Chap. 6 allowed spiritual corporations to hold the property of the church and the glebe, subject to making donations for the poor.

Henry 4, chap. 2, allowed the vicar to be endowed, &c.

2 Henry 5, chap. 5, recited that abuses existed in charities and ordered a commission of inquiry to reform them.

23 Henry 8, chap. 7, (see 4 Pickering, 239,) called the statute of mortmain, aimed a blow at these charities. It was passed in 1531, and the king was married to Anna Boleyn in 1532.

27 Henry 8, chap. 25, was the first poor law of England.

1 Edward 6, chap. 14, (5 Pickering, 267,) endeavored to preserve some of the charities from destruction. Boyle, 263, note, refers to this statute, which required commissioners to execute charities for the benefit of the poor. See also stat. 2 Edward 6, (5 Pickering, 299;) stat. 1 and 2 Philip and Mary, chap. 8, (6 Pickering, 234.) The monasteries were by this time put down and the charities destroyed.

Then came the statute 39 Elizabeth, chap. 5, from which the Pennsylvania act of 1791 is taken; this statute was continued in force until repealed by 9 George 2. From the circumstance that the charities were put down by the destruction of the monasteries arose the necessity of the 39 and 43 of Elizabeth, which intended to lessen the evil of pauperism by hunting up charities, but which established no new principle in the laws of England. 4 Inst., 66.

2 Gibson's Codex, 1155, where the statute of 39 Elizabeth is *found. This last law is a general one, [*152 and covers a larger extent of ground than the 43 Elizabeth, chap. 4. Chapters 2 and 3 show the character of chap. 4. Chap. 2 is a poor-law, and so is chap. 3, for mariners. The 43 Elizabeth enumerates twenty-one charities, but the 39th comprehends all lawful ones. Hospitals were included in the latter but not in the former. The stat. 7 Jac., 1, chap 3, has for its object to bind out poor boys. In Girard's case the boys must not only be poor, but orphans, a double merit.

There is a *dictum* of Lord Roslyn in 3 Ves., 726, in relation to a will being an appointment at common law; but the point decided in that case has nothing to do with the present.

But there is not a single case where the validity of a charitable use has been directly questioned at law; wherever the question came up, it was always incidentally.

The Year-Book of 38 Edward 3 forms the basis of Co. Litt., § 383. There was a condition subsequent, which, if violated, gave the heir a right to enter. What was then called a condition is now called a trust. Sugden on Powers, 121; Perk., 563; And., 43, 108; 3 Dyer, 255 d, same in Jenk., 6.

The last case mentioned occurred in the 8 and 9 Elizabeth, and is the Trinity College case. The question was, whether a devise to the college, which was not a spiritual corporation, was good, and it was ruled to be so.

The Skinner's case occurred in 24 and 25 Elizabeth, (Moo., 129,) where the use was to pray for the soul of the donor. So much of the use as was esteemed superstitious was set aside, and the rest confirmed. See also Moo., 594, (or same case in Poph., 6,) where the heir of the executor who had a trust-estate recovered from the heir of the donor.

In Porter's case, 1 Co., 22, (92), the question was not raised whether a charitable use was good at common law.

We see from these cases what the condition of England was about the time of 34 Elizabeth. The statute 23 Henry 8 did not go into effect for twenty years. Duke, 360; 4 Co., 116; 8 Id., 130.

All these cases sustained charities for the poor and were anterior to 39 Elizabeth.

This court has affirmed the validity of charities at common law. A dedication to pious uses is sustainable only upon that ground. 6 Pet., 498, 431; 12 Wheat., 582; 10 Pet., 712; 2 Id., 256; 9 Cranch, 212; 4 Pet., 487; 4 Serg. & R. (Pa.), 212.

*153] *The common law of England is in force in Pennsylvania. In the case of the Bush Hill estate it was ruled that the burden of proof is on him who affirms that any particular part of the common law is not so in force. 9 Serg. & R. (Pa.), 307.

2. The city is in possession, and wants no remedy. If the use is good, the owner of the legal estate cannot recover. 2 Dowl. & Ry., 523; 5 Madd., 529, (429.)

But it is said that the use is not good because the proposed college is unchristian. The bill filed in the cause makes no such objection. If zeal for the promotion of religion were the motive of the complainants, it would have been better to have joined with us in asking the state to cut off the obnoxious clause than to use the plea in stealing away the bread of orphans. We are not here to defend Mr. Girard's religious belief, whatever it was. During his life he exhibited his philanthropy at a perilous moment. When the yellow fever burst upon Philadelphia in 1794, almost every one fled,

regardless of his property. Girard walked the wards of hospitals, not subdued by the groans of the dying or deterred by the fear of death to himself. All that he had was freely given to alleviate the wretched sufferers. More charitable even than the good Samaritan, he had not only poured oil upon their wounds, but stood by them to the last. The difficulties that surrounded his plan of a college were great. His desire was to include the orphan poor of all sects, Jews as well as Christians, and those who had no religion at all. He might have placed it under the protection of some one religious denomination, but then it would have become a religious establishment, and met with opposition from other quarters. If all sects were to be admitted, what could he do other than what he did? If any clergyman was to be admitted, he would of course teach the doctrines of his own church. No two sects would agree. Some would adopt one part of the Bible, some another. If they agreed as to what was to be left out as apocryphal, they would differ about the translation of the rest. The Protestant would not receive the Douay Bible. See the difficulties that exist in New York about the introduction of the Bible as a school-book. Girard did what was in conformity with law, and often done practically. He had to abandon his scheme or prevent discord by adopting the plan which he followed. The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith—the Bible. It is therefore affirmatively recommended, [*154 *and in such a way as to preserve the sacred rights of conscience. No one can say that Girard was a deist. He has not said a word against Christianity. In the Blucher school in Liverpool there are no preachers. There is no chaplain in the University of Virginia. By excluding preachers, Girard did not mean to reflect upon Christianity. It is true they cannot hold office. But the Constitution of New York excludes clergymen from offices, civil or military. If the situation of a schoolmaster is an office, then a clergyman cannot be a public teacher. Girard only says that laymen must be instructors, and why cannot they teach religion as well as science? Sunday-schools are not prohibited. It is said by the opposite counsel that these poor victims are cast into a prison and shut up for the sake of an experiment. But there is no prohibition against their going out to church—to as many churches as their friends choose to take them to. All that is done by the will is to secure the college from controversy. It is optional with the friends of the orphans whether to permit them to go there or not. Cannot the trustees erect a hospital without the

walls where the sick can be sent and have the services of clergymen when necessary? But religion can be taught in the college itself. What, for example, is there to prevent "Paley's Evidences" from being used as a school-book?

The law of Pennsylvania is not infringed.

In the case of Updegraff, (11 Serg. & R. (Pa.), 400), the court said that Christianity was part of the law. But it was Christianity with liberty of conscience to all men. This is exactly what Girard thought.

By the 3 sect. of the 3 art. of the Constitution of Pennsylvania, "all men have a right to worship according to their conscience." If worship were prohibited in the college, (which it is not,) it would not be against law. The Constitution says that no man is disqualified who acknowledges the existence of God and believes in a future state of rewards and punishments. Christianity is a part of the law, so that blasphemy can be punished, but not for the purpose of invading the conscience of other persons. But, at all events, the college is not yet built nor the regulation enforced. It is too soon now to set it aside. The city is in possession of the property, and so it must remain. The administration of the charity is a matter for the courts of Pennsylvania exclusively.

3. That such trusts are entitled to protection in equity upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.

*155] *In England the power of the king as *parens patriæ* is delegated to the Court of Chancery. Where there are no trustees or objects of the charity, it is then administered according to the pleasure of the king. See this investigated in Story's Equity, 404. The ancient rule, says Coke, is good; the authority of chancery is plentiful, and the court will not let a trust fail for want of a trustee. Co. Litt., 290, note 1; Co. Litt., 113; Wilmot's Notes, 21–24; 2 Eq. Cas. Abr., 198; 1 Ves., 475; 2 Story on Equity, 320.

The court did not derive this power from the statute, but from its jurisdiction over trusts. 2 Story, 430; 2 Milne & K., 581.

Equity is a part of the law of Pennsylvania, and this is a branch of equity powers. The Supreme Court has the powers of a court of chancery. 1 Dall., 211, 213, 214; 1 Binn. (Pa.), 217.

In Pennsylvania, specific performance is obtained at law by cautionary verdicts. 3 Serg. & R. (Pa.), 484; And., 392.

4. Such trusts in fact enjoyed protection in chancery before the 43 Elizabeth, by the original jurisdiction of that court, and have had it ever since. Duke, 135, 154, 242, 380, 519,

644; 2 Gibson's Codex, 1158, note 7; 1 Ch. Cas., 157; 2 Lev., 167; 2 P. Wms., 119; 2 Vern., 342; 3 Atk., 165; 2 Ves., 327, 425; Wilmot's Notes, 24; 1 Blythe, 312, 334, 342, 346, 347, 357, 358, 67, 61.

There is a dictum of Lord Rosslyn that it did not appear that chancery had such jurisdiction before the statute of Elizabeth; but he has been misreported, or if he said so, he is not sustained by the old authorities. Tothill, 58; Choice Cases in Chancery, 155, in 34th of Elizabeth; Duke, 163.

There was a decree made in 24 of Elizabeth before the statute and upon the judicial power of chancery. It related to a deed of bargain and sale, which was not enrolled and did not pass the land. Duke, 131, 138, 359–361; 1 Milne & R., 376.

The book lately published in England by the Record Commissioners, furnishes numerous instances of the exercise of this chancery jurisdiction anterior to the statute of Elizabeth.*

*SCHEDULE OF CASES FROM CHANCERY PROCEEDINGS IN TIME OF ELIZABETH.

[Proceedings in chancery, Vol. 1.]

Record Commission.

Babington v. *Gull, clerk.* Bill complaining that plaintiff's mother had placed 600 marks in the hands of defendant, for the purpose of founding a chantry in the church of St. Peter of Haworth, in Nottinghamshire, which he had neglected to do.

Answer of William Gull, that he had received the money mentioned in the bill, for the purpose therein; but adding that if the endowment of the chantry were not completed within four years, which are not expired, the money was to be applied in finding three priests to sing daily in the said church; and that he is willing to pay the said money according to the direction of the court.

The prayer is, the plaintiff being without remedy of common law, to issue subpœnas, and to call defendant before him to be examined, and to do and receive according as faith, reason, and good conscience require; and this for the love of God, and in way of charity.

Wakering v. *Bayle.* (Henry VI.) Bill to compel defendant, who is feoffee in trust to make an estate in certain lands in Tottenham and Hornsey, to the hospital of St. Bartholomew, in West Smithfield, for the endowment of a chapel there; "because great multitudes of Christian people of all parts of England and other nations for sickness, poverty, and misery, continually of custom resort to the said hospital, and there relieved; and finally have their Christian sepulture round about the said chapel."

Praying a subpœna, and as in the preceding case, as shall be thought unto your good lordship best, right of conscience to be had and done at the reverence of God, and in way of charity.

Pledges of prosecution. { ROB. PALMER, WELLS BALLE, } Of London, gentlemen.

Parker et al. in behalf of themselves et al., the inhabitants of the town of Brentwood, Essex, v. *Wistan Browne.* (Eliz. B. 6, 12, 13.) Bill to establish donations. A chapel of ease to the parish church of Southwilde, in which parish the town of Brentwood is situated, and a free school and alms-house there, the said chapel being within the manor of Corbedhall, granted to Sir Anthony Browne, knight, deceased, by letters-patent from Edw. VI.

*If this part of the common law be not in force in Pennsylvania, the complainants must prove it. If they think so, why do they not resort to the civil courts? It can be shown, however, that Pennsylvania has actually adopted the laws that govern charitable uses.

Town of Bury St. Edmunds, by Robert Goldeny et al., Governers of Free Grammar School of King Edward VI., in Bury St. Edmunds, v. *Goodney et al.* (Eliz.) Bill to quiet possession of lands held by complainants in right of grammar school.

Buggs et al., foeffees in trust for the parish of Harlon, v. *Sompner et al.* (Eliz. B. 6, 17, 18.) Bill to establish charitable uses, in a tenement called the Old Pole, and lands thereto belonging, in Harlon, conveyed and settled *tempore* Henry VIII. by John Swerder, to feoffees in trust for poor of the said parish of Harlon.

Bullatt and Purcas, church-wardens, v. *Fitche.* (Eliz. B. 6, 18.) Bill for performance of charitable institutions. Land called Church Pightle, held from time immemorial for repairing the parish church of Lyndsell.

Blenkinsopper v. *Awnderson.* (Eliz. B. 6, 19.) Bill to establish a charitable donation. An annuity of £8 for certain paupers and a schoolmaster, in the parish of Burgh under Stainsmore, devised by Sir Cuthbert Buckle, knight, late Lord Mayor of London, to be charged on his messuage called the Spittle or Stainsmore, and lands thereto belonging.

Fytch and Goodwin, church-wardens, and Wyndell et al., overseers of the parish of Borking, v. *Robinson et al.* (Eliz. B. 6, 29.) Bill to recover a legacy to charitable uses. The sum of £400 bequeathed by Joan Smyth, widow, to be invested for producing a yearly fund for the relief of the poor of Bocking.

Thomas Tychmer et al., church-wardens of the parish church of Barrington, and Shevyn Reynolds, the elder, and several others co-feoffors of lands in trust, v. *Lancaster.* (Eliz. B. 6, 31.) Bill for injunction in support of a charity. A tenement and lands in Barrington, lately held of the master and fellows of Michael House in Cambridge, as of their manor of Barrington, devised by the will of Thomas Lames to charitable uses for the poor of Barrington.

George Carlton on behalf of himself et al., inhabitants of Elm, v. *John Blyth et al.* (Eliz. C. c. 6.) Bill to recover charitable donations. A legacy of £13 13*s.* 4*d.* bequeathed by the will of John Allen, deceased, to be invested at interest for the benefit of the poor of the parish of Elm.

Robert Perot and others, inhabitants and parishioners of the parish of Cornworthy v. *Steven Cruse.* (Eliz. C. c. 6.) Bill to appoint new trustees for a charity. A tenement called the church-house in the parish of Cornworthy, conveyed by Sir Pearce Edgecombe, knight, or some of his ancestors, to feoffees in trust for the benefit of the parish of Cornworthy.

John Irish and others, tenants of the manor of Congresbury, v. *Thomas Ashe and others.* (Eliz. C. c. 22.) Bill for performance of will for charitable uses. The manor or lordship of Congresbury, and lands in Congresbury and Lawrence Wille, devised by the will of John Carr to the defendants upon sundry trusts.

The Mayor and Citizens of Chester v. *Brooke and Offley.* (Eliz. C. c. 23.) Bill to establish a charity.—Legacies left by the will of Robert Offley of London, haberdasher, for the benefit of apprentices and other inhabitants of the city of Chester.

The Vicar and Church-wardens of the parish of Christ Church within Newgate, v. *The Vicar and Church-wardens of the parish of All Saints, Barking.* (Eliz. C. c, 24.] Claim of donation to charitable uses. A legacy of £4 per annum bequeathed by the will of Jane Watson, and claimed by both these parishes.

The Mayor, Bailiffs, and Burgesses of Dartmouth v. *Nicholas Ball.* (Eliz. D. d. 2.) Bill for appointing new trustees for charitable uses. Lands in Clifton Dartmouth Hardness, and in Stokeflemyer, &c., conveyed by Nicholas James to feoffees in trust for the benefit of the poor of said borough, and for repairing the church and harbor.

*To begin with the charter. "The laws for governing property are the same as those of England." 5 Smith, app. 407, sects. 5, 6; Amended Charter, 1701, app. 413; Act of 1718, 1 Smith, 105; Act of 1777, 1 Smith 429, sect. 2; 1

The Church-wardens, Parishioners, and Inhabitants of the town and parish of Danburye, v. *Thomas Emery and others.* (Eliz. D. d. 7.) Bill to regulate charitable donations of land—lands in Burleigh purchased by certain well-disposed persons in trust for the poor of Danburye.

The Mayor, Bailiffs, and Burgesses of Clifton Dartmouth Hardness, v. *Furseman et al.* (Eliz. D. d. 11.) Bill for performance of charitable trusts—lands in Clifton Dartmouth Hardness, conveyed by William James to feoffees in trust for the poor of Dartmouth and other charitable purposes.

Blacknall et al. on behalf of the Inhabitants of Elksley v. *Spiry et al.* (Eliz. E. e. 4.) To establish a charitable donation. A parcel of ground in the parish of Elksley, called Normanton Field, containing 500 acres, which was of ancient time given and conveyed to certain feoffees in trust for the said parish.

George Carleton, Esq., for himself and the rest of the Inhabitants of the parish of Elm, v. *John Blythe et al.* (Eliz. E. e. 5.) For charitable purposes a legacy or sum of £13, 13*s.* 4*d.* bequeathed by the will of John Allen, deceased, for the use of the parish of Elm.

Walter Jenkins et al., tenants and inhabitants of the manor and parish of Fairford, v. *Oldesworth.* (Eliz. F. f. 3.) To establish right of copyholders and charitable donation. The manor of Fairford, late the estate of Roger Lygor, Esq., and Katherine his wife.

The Mayor, Jurats, and Commonalty of the town of Feversham, v. *Lady Hannots et al.* (Eliz. F. f. 7.) To establish a devise to a corporation. A messuage, garden and lands in Feversham and all other his lands, &c., in the Isle of Hartye, &c., all which after the decease of his said wife, he devised to the said mayor, jurats, and commonalty in fee—for the benefit of the said corporation repairing the harbor and highways thereof.

Richard Estmond et al., inhabitants of the town of Gillingham, v. *E. Lawrence.* (Eliz. G. g. 12.) Bill of revivor to establish certain charitable uses. Divers messuages, lands and tenements, parcel of the copyholds of the Queen's manor of Gillingham, which the bill states to have been held time immemorial for the support of a charity-school, and other charitable purposes in Gillingham.

Goodson et al. v. *Monday et al.* (Eliz. G. g. 12.) For performance of a trust for charitable uses. Divers messuages and lands in Ailesbury, &c., some time the estate of John Bedford, who by a feoffment dated 10th July, 1494, conveyed the same to certain foeffees in trust, among other things for the repair of the highways about Ailesbury and Hartwell.

Sir Arthur Havenyngham and other inhabitants of Havenygham, v. *Th. Tye et al.* (Eliz. H. h. 1.) To obtain attornment and rent for charitable purposes. Fifty acres of land, meadow and pasture, called the town land of Havenyngham, lying in Badyngham, in the occupation of defendant Tye, the reversion being in feoffees for the use of said town.

Thomas Sayer et al., overseers of the poor of Hallingbury Morley, v. *Lambe et al.* (Eliz. H. h. 2.) To establish a charitable donation. A sum of £20 given by the will of Thomas Lambe, deceased, to be for the perpetual benefit of the poor of Hallingbury parish, and which the bill prays may be laid out in the purchase of land for that purpose.

[Proceedings in Chancery, Vol. II.]

Lyon and wife v. *Hewe and Kemp.* (Temp. Edw. IV.) This is a bill, answer, and replication. The complaint being that the defendants had disposed of property, left for religious and charitable purposes contrary to the will of the plaintiff, Ellen's late husband.

Huckmore v. *Lang*—to recover title deeds for charitable uses.

Buggs et al. inhabitants of parish of Harton v. *Sebley.* For establishing

Dall., 67, where it is said *as the opinion of the court, "that the common law has always been in force." 1 Dall., 73, 211; 3 Serg. & R. (Pa.), 578, (378;) 1 Binn. (Pa.), 519, (579;) 4 Id., 77.

charitable donations. A copyhold tenement which was surrendered by one John Godralf to the use of the poor of the said parish.

Sayer and Pryor, overseers of poor of parish of Morley, v. *Lambe et al.* To recover charitable donation. £20 bequeathed by the will of Thomas Lambe to the inhabitants of the town of Hallingbury Morley—the income thereof to be for ever applied to the use of the poor of the said town.

Heron and Browne, Ex'rs of Freston, v. *Sproton et al.* (Eliz.) For performance of a will respecting charitable donations. Divers messuages, lands, and tenements in Altoffts, &c., &c., late the estate of John Freston—who by his will gave large sums of money for building and endowing an almshouse in Kirkethorpe, and a free-school in Normanton, repairing highways and other purposes.

Fisher for himself and other the inhabitants of the town of Irchester, v. *Bletsoo.* In support of a charitable donation. Divers messuages, lands, &c., in Irchester, &c., which in time of King Henry VII. were given and granted by Will. Taylor and John Lely to trustees for the use of the poor of Irchester, and repair of the bridges there.

Stock et al. on behalf of the poor of Icklingham, v. *Page et al.* For performance of a charity. A capital messuage called the Town-house with fourscore acres of land and a sheepwalk in Icklingham, settled from ancient time in feoffees for the use of the poor of said town.

W. Fisher, master of the Hospital of St. Mary of Ilford, v. *Anne Seward, widow.* (Eliz.) Bill of revivor to recover dues of a charity. Titles of demesne lands of the farm of Eastbury and the tithes of, &c., settled for the relief of poor persons in the hospital of Ilford.

Th. Foxe, for himself and other the inhabitants of the parish of Kybworth, v. *Benbe et al.* (Eliz.) For the support of a charity. Nine messuages and six cottages and six yards land in the towns, fields, and parish of Kybworth, &c., given for the support of a schoolmaster, and grammar-school at Kybworth.

Z. Babington, master or warden of St. John Baptist in the city of Litchfield v. *Sale et al.* (Eliz.) For the support of a charity. A capital messuage and divers other houses and 100 acres of land in Litchfield, &c., held for the support of poor persons in the said hospital, and also of a free grammar-school.

The Mayor and Burgesses of King's Lynn v. *Howes, clerk.* (Eliz.) For performance of a charitable donation. John Titley, Esq., by his will gave a payment, charged upon his dwelling-house at Lynn, for the maintenance of a preacher there, and other charitable purposes.

R. Newton, clerk, and the Church-warden and inhabitants of the parish of Little Monden v. *Dane.* (Eliz.) To establish a charitable donation. A messuage, &c., devised by the will of Rafe Fordam to defendant, for certain charitable purposes stated in the bill.

Rycardes, Moore, and King, for themselves and the rest of the Inhabitants of Rodborough v. *Payne et al.* (Eliz.) To protect a charitable donation. Certain lands, &c., in Rodborough, &c., which in the time of King Henry VI. were given by Margery Breyseyn and others to the church-wardens and inhabitants of Rodborough, for the performance of divine service in chapel of ease to said parish, but which defendants claim as having been forfeited to the crown, being given for superstitious uses.

[Proceedings in Chancery, Vol. III.]

Spenser et al., trustees, v. *Grant and wife Joan.* (Eliz.) Claim to a rent charge given in trust to plaintiff for charitable purposes. Agnes Chepsey of Nottingham, demised unto Coles and Joan his wife, divers messuages, &c., at a certain rent, which she afterwards demised to the plaintiffs in trust to pay into the hands of the chamberlain of Northampton, for and towards two-

The act of 1730 authorizes persons to hold land for *charitable uses. This is said to be an enabling act: but it is upon a different principle from the English statutes which are intended to aid, in some measure, a religion not fully tolerated

fifteenths of the said town; which rent, after the decease of the said Agnes, the defendant Joan and her then husband, the other defendant, refused to pay to plaintiffs.

Smith and Willis, church-wardens of St. Aldatis, Oxford, on behalf of the parish, v. *Smith, Ald. and Furney's feoffees.* Against defendants as feoffees in trust to perform and carry into effect such trusts to charitable uses. Edgecombe being seised of certain houses, &c., in city of Oxford, conveyed the same to certain feoffees in trust; who, from the profits thereof were to repair the church, to relieve the poor, and for other good and charitable purposes. They conveyed the same to new feoffees, of whom the defendants are survivors, and refuse to account.

The Inhabitants of Thirplangton v. *Jarvis, only surviving feoffee.* To compel performance of trusts in a deed of feoffment for charitable uses, and to convey to other trustees, a house on Thirplangton and tenements in East Langton, &c.

Turney and Roberts v. *Buckmasters.* To protect the plaintiffs in the execution of the will of Thomas Knighton for charitable uses. Lands lying within manor of Leighton Bussard. The defendants allege the same to have been left to superstitious uses, and endeavored to get the same into their own hands.

The Master and Brethren of the Hospital of Robert, Earl of Leicester, in Warwick, v. *Lee et al.* (1600.) For payment of an annuity of £20 given to a charity. Robert, late Earl of Leicester, being seised in fee of an annuity of £20, issuing out of a farm called, &c., the inheritance of defendant Ogden, by deed gave the same to the said hospital.

Henry Hall and John Hall, on behalf of themselves and others, the freeholders and inhabitants of Witham, Essex, v. *Parke.* (39 Eliz.) For the support and continuance of a charity. By the gift and grant of well disposed persons, divers lands and tenements in Witham, and also divers sums of money, were given for the reparation of the church, the relief of the poor, and other charitable purposes; which lands were settled in feoffees; and the defendant having got possession thereof, and moneys, and the deeds of settlement, refuses to perform said trusts, or to appoint new feoffees in the names of those dead.

John Lloyd, D. D., vicar, Thomas Baker, and Richard Wilborn, church-wardens, and poor of Writtle, v. *John Aware et al., surviving feoffees in trust for said parish.* (1596, 38 Eliz.) For the continuance of a charity. A messuage and land called Hookes in the parish of Writtle, which in the year 1500 was given by Thomas Hawkins to feoffees in trust for the poor of the said parish.

R. Wyllet and Thomas Sudbury, church-wardens and inhabitants of the town of Middleton, v. *Agnes Middleton, widow.* (13 Eliz.) To recover a charitable pension. A yearly rent of 6*s.* 8*d.* payable to the parish of Middleton, charged upon a messuage and land in Middleton.

John Whitehurst and Thomas Amery, for themselves and other inhabitants and parishioners of the parish of Dulerne in the county of Stafford v. *George Warner.* (1573, 15 Eliz.) For support of a charity. Robert Warner, deceased, and others, inhabitants of the said parish, having a sum of money to invest for the erecting of a grammar-school and providing a schoolmaster, purchased therewith certain lands in Kenwalmerche, &c., in Devonshire, and applied the rents and profits according to the trust; which lands afterwards became vested in defendant as surviving feoffee, who had received other money to purchase a messuage and land in Fradley in the county of Stafford, which he neglected to do.

George Warner v. *Whitehurst et al.* (20 Eliz.) Cross bill setting forth the bill. A decree and an award had been made by the several contending par-

by law. *But in Pennsylvania there is universal toleration, and all sects stand upon equal ground. In England, the mass is held to be superstitious. Boyle, 242.

The statute 23 Henry 8, a mortmain act, avoided deeds "for superstitious uses." But what were deemed to be so *161] in England, *are not held to be so in Pennsylvania. So a statute of Henry 8, prohibited gifts to Catholics.

In 1548, 2 and 3 Edward 6, chap. 1, the act of uniformity establishing the church, directed all ministers to observe *162] the mode therein pointed out. *The Book of Common prayer was thus legalized.

1 Mary, session 2, chap. 2, repealed the above.

1 Elizabeth, chap. 2, re-established the act of Edward, and extended to the people the mandate to use the Book of Common Prayer.

This was again repealed in the time of the Commonwealth.

The 13 and 14 Charles 2, chap. 14, was another uniformity act; and this was the state of the laws relating to religion when the charter of Pennsylvania was granted in March, 1681.

Gifts to Catholic congregations were void. Moo., 784, cited in Boyle, 265; 1 Salk., 162; 1 Eq. Cas. Abr., 96.

When the statutes of conformity were in force all gifts contrary to them were void; and this is the origin of the doctrine of *cy-pres*. 2 Vern., 266.

In 1688, 1 Wm. & M., chap. 18, toleration was extended to all who would sign the thirty-nine articles with some exceptions. This act is all that now supports a use in favor of dissenters. 2 Ves., 273, 275; 2 Eq. Cas. Abr., 193; 3 P. Wms., 144, 344; 1 Ves., 225; 3 Meriv., 409. See also 11 Wm. & M., chap. 4, sec. 3, in which the toleration act is extended to the colonies.

There is not a word in the charter respecting toleration of any religion. Sect. 22 protects the church of England by saying that preachers sent by the Bishop of London may reside in the province.

The stat. 5 Anne, chap. 5, sect. 8, in 1706 secured the rights of the Church of England, as established in that country and

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ties; and for carrying the said award into execution, and to protect the plaintiff against his arbitration bond signed by him, this proceeding is instituted.

Fisher et al., inhabitants of Warwick, v. *Robert Philipps and Thomas Cawdrey*. (1574. 15 Eliz.) For the recovery of sundry bequests of money left by will of Thomas Okery, deceased, to be applied to charitable uses in the town of Warwick.

John Rawley et al., inhabitants of the parish of Wilborough, v. *Lewis et al.* To appoint new trustees of a charity. Lands and tenements in parish of Wilborough, containing 120 acres, of which the defendants were surviving feoffees in trust for repairing the parish church.

the territories thereunto belonging. From the commencement of the reign of Anne to 1712 various disputes occurred between the colonists and the crown and governor respecting recognition of affirmation; the right was asserted by the legislature for the third time in 1710. Wise and Brockden, app. 2, pp. 43, 46, 50; 1 Votes of Assembly, part 2, p. 130; Proceedings of Council, 517.

In 1712, the act of Assembly was passed permitting religious societies to purchase ground, &c., and declaring that gifts should go according to the intentions of the donors. The Assembly remembered Baxter's case, and intended to prohibit the doctrine of *cy-pres*. Whether dissenters were tolerated was discussed till 1755. Smith's History of New York, chap. 4, p. 213, 255, 257.

By the 8 George 1, chap. 6, Quakers were allowed to affirm. Various occurrences took place between 1719 and 1730, when the act of that year was passed, narrowing the ground of prior acts. In *1730, in the case of Christ Church, [*163 an opinion was given by counsel recognizing the law of charitable uses.

In *Remington* v. *The Methodist Church*, this act was construed and a trust for the general Methodist Church held not to be good, because it was not for the benefit of citizens of Pennsylvania.

In 1776, the first constitution of Pennsylvania, (Smith, 430,) brought charitable uses under the protection of the fundamental law. Sect. 45 says all religious societies and bodies of men for advancement of learning or good and pious uses shall be encouraged and protected in their property, &c. No act of incorporation was necessary, because it says, "united or incorporated" for "learning" as well as "religion." The people had been struggling for seventy-six years to obtain from the crown the privilege of holding ground for churches. It was a part of their love of freedom. And now we are told that they have no rights except under the act of 1730.

The legislature made no corporation for any purpose whatever until 1768. 1 Smith, 279.

The proprietary incorporated churches, because it was said they had lost legacies; and this was the apology to the crown for going against the English policy. There was only one attempt to destroy a charitable use before the Revolution. In 1769 a will gave a legacy to an hospital and the poor, to two corporations, Christ Church and St. Peter's. The heir brought an ejectment in 1776, and the church took the opinions of Wilcox and Wilson, both of whom affirmed that the bequest was good at law. In 1779, the cause was ended without a

decision of the question. These corporations were established in 1765 and became trustees for others. The property held is now of great value, and the trust is still kept up without any mismanagement.

After the act of 1730, the governor said in 1734, that there was a Catholic church in Philadelphia where mass was said contrary to law; but the Assembly replied, that in the colony there was a toleration of all religions, and there the matter ended. Worship is held there now.

The city of Philadelphia still holds and administers Franklin's legacy; and so of those of Kirkpatrick, Blakeley, Scott, and Goudenot. There are two other legacies, and the Freemason's Lodge gave a sum of money, all of which are now administered. There is a separate book, called "Devises and Grants."

Are all these to be broken up?

*164] *The spirit of the statute of Elizabeth is extended to Ireland. 4 Dana's Abr., 5, 6; Shelford, 60.

They are also in Pennsylvania as part of the common law; bequests for pious uses are made by all descriptions of persons, no matter how uncertain the objects of the charity may be. The Quakers have held their schools through trustees, and never been incorporated since the settlement of the colony. See 3 Watts, (Pa.), 440.

See 5 Watts, (Pa.), 493, where a trust for a school was said to be "vague and uncertain;" but the court said not, "for the neighbors got the benefit of it." Charity-schools have been favorites in the state, sustained by usage, without any reference to the statute of Elizabeth.

Manuscript case of Zimmerman decided in the Supreme Court of Pennsylvania, on 6th January, 1844, where there was a bequest to an incorporated society for the benefit of poor orphans, and the court said it was good under the constitution, although the statute of 43 Elizabeth is not in force.

7. The American cases are as follows: 12 Mass., 537, 546; 9 Cranch, 292, 43; 9 Cow. (N. Y.), 427, 437; 2 Pet., 566; 3 Id., 501; 3 Shotwell, 9; 3 Paige, (N. Y.), 300; 16 Pick. (Mass.), 107; 6 Paige, (N. Y.), 640; 7 Id., 77; 7 Vt., 241; 4 Dana, (Ky.), 354; 3 Edw. (N. Y.), 79; 1 Voss, 96; 20 Wend. (N. Y.), 119; 24 Pick. (Mass.), 146; Hoffm. (N. Y.), 202.

The Virginia and Maryland cases are not cited because they followed the rule laid down by this court in the case of *the Baptist Association.*

Sergeant, on the same side.

The condition of the law in England and Pennsylvania has

been well examined. Lord Roslyn has said that chancery did not take cognizance of charitable uses before the statute of Elizabeth, but Lord Redesdale and Eldon say otherwise. Roslyn is known to us as the insulter of Dr. Franklin, and now the same great people whom he represented, are harassed because this same Lord Roslyn doubted almost the statute of Elizabeth. When the rubbish of three centuries is swept away and the old records of England brought to light and published, there is evidence enough that the law of charities before the time of Elizabeth was the same that it is now in Pennsylvania. But the counsel on the other side complain that they cannot understand the law of Pennsylvania. It is not necessary that they should; for all that is asked by us is, that she may be suffered to *enjoy the contribu- [*165 tions of her own wise and good, accumulating from the time that the first white man came there to settle with the Bible in his hand. Girard came there after the constitution of 1776 and before that of 1791; he lived in an atmosphere of charities in Philadelphia; he saw Franklin's charity established and upheld by law, administered by the city, and never heard its validity questioned. No tribunal in the state was ever asked or would be permitted to question Franklin's charity. Girard knew where to find the best legal advice, and undoubtedly had it. In Pennsylvania no argument would be listened to, such as we have heard here. We are invited to explain the law by those who do not want to understand it. It has been said by the other side, that no law can be considered as settled which has not been mooted; that is, that if all the courts, for an indefinite period, decide in the same way, it is of no account unless some ingenious and subtle mind calls the law into question. In one case, this court waited for the state court in Ohio to expound its laws, and then followed the decision. In another case, the court in Tennessee construed its laws; this court adopted it. The court in Tennessee reversed its decision; this court did so too. The present is a question of Pennsylvania law, and we have heard the last decision of its highest state court in January, 1844, read from the manuscript report. This concurs with all previous decisions; and yet the counsel on the other side say that they want a fixed system of law. Virginia and Maryland are the only two states where the law is otherwise, and they followed what they understood to be the decision of this court in the case of the Baptist Association. The question is not whether the Pennsylvania law is right or wrong, for we do not wish to impose it upon any one else. But the only question is, what does the law of Pennsylvania say upon the point. Girard's

will was made by the advice of the best counsel that could be found; it was proved as soon as he died; the executors went on to perform their trust, in presence of the proper courts and with universal consent; they paid large sums over to the city. The claimants then brought an ejectment, and exhibited this will to the Supreme Court of Pennsylvania, who found no objection to it. The city of Philadelphia brought a suit under it for some property; no judge nor counsel ever hinted that the will was void. Five years passed. The legislature had passed a law immediately recognizing the will as existing and valid in all its parts. The preamble does so. In the case *166] of the *Town of Pawlet*, Mr. Justice Story says, "the crown *has recognized the existence of the town." Does the recognition of this will by the legislature go for nothing? The capacity of performing certain acts is admitted by the legislature, and is this not as effectual as a recognition by the crown? Ten charities are going on now in Philadelphia. Custom and usage make the common law of England. Why has not Pennsylvania a right to enjoy her common law, not imported in parcels and packages from England, but modified and altered by circumstances and made suitable to the people?

If we are not strong enough to stand alone, we might ask support from the other states whose law is the same with ours. Where did the doctrine of charities spring from? and from what quarter did it enter into the heart of man? We are authorized to denounce as an infidel or worse, the man who hath not charity in his heart. As surely as the pilgrims acknowledged a higher power, so surely did they recognize the obligation to take care of their fellow-creatures. The people of the state are now a hospitable and charitable people, and woe be to him who endeavors to intercept the flow of the current. Where money is given to the poor, is any one at liberty to take it? Thou shalt not steal. This is property under the protection of the court, and the right to it as sacred as that of any man to the enjoyment of his own. The voice of Pennsylvania is accordant and unbroken. We are called upon to examine what the chancellor did before the 43 of Elizabeth, three centuries ago; but this does not concern us. It is now settled even there, that no charity shall fail; if it is indefinite, the king shall administer it. Whether there are trustees or not, whether there be a corporation or not, all take. This charity would be safe in England; and yet it is said we must lose it unless we can show how matters were conducted three hundred years ago. This is a heavy burden to lay on a charity. In Pennsylvania, as in England, the law of charity

established itself. No man can say when it began; it has always existed as far as we know. What is the common law of England? Leaving out its being the perfection of reason, it is such an application of rules as will promote the welfare of society. The law of charity has existed in England for sixteen hundred years, some centuries before Alfred. Before Penn came over, there was a settlement of Swedes near Philadelphia, at Weccacoe, a brave and moral people. They built a place of worship, and about 1700 a better one which remains to this day. The charter of that church bears date in 1765, but the first church was built in 1677. Where was the law of charities for these hundred *years? and what [*167 protected the graves around the church all this time? The same law that exists still. Christ Church was seventy years without a charter. In Walnut street there was a chapel abhorrent to English law, where mass was said. It stood until it was taken down and replaced by a larger one. Who ever offered to take away this church? What is the condition of the Philadelphia Library with its 50,000 volumes? It has always acted without a charter. Story supposes that the rudiments of this law of charities came from the civil law. Thurlow and Eldon thought so too. In 1138, the civil law came into England, and the canon law soon afterwards, and is part of the law of that country to this day. But how did it get into the civil law? It is said from Constantine. But where ever Christianity went, charity went too. Gibbon says "the apostate Julian complained that Christians not only relieved their own poor, but those of the heathen also." The revealed law is part of the law of England. Blackstone says so. When did Christianity come into England? It reached Rome in the time of the Apostles, where Paul and Peter both suffered. But when England? Some say at the same time that it was carried to Rome, and was there trodden down for a time. The latest period is 597, the arrival of Augustine. An archbishop of Canterbury was then appointed, and there has been one ever since. If Christianity carried the law of charity to Rome, it must have done so to England too. It was a part of the common law after the sixth century. Where is there a spot upon earth, where Christianity is found, that the law of charity does not exist also? Alfred sent an embassy to the Christian churches in Syria, in the ninth century, and had the ten commandments translated into Saxon. From one great source have flowed two sorts of charities, one religious, the other more general. The only difficulty that ever existed in Pennsylvania related to the first class—religious charities. In the 14th century lived Wickliffe, called the day-star of the

Reformation; a man confounded with turbulent men, but a professor of divinity and singularly learned. It was an object in that day to save England from paying tribute to the pope. From that time a religious struggle ensued. Henry 8 found the Roman Catholic religion firmly established, the revealed law being part of the law of England. All parties admitted this. From the time of Augustine down, the common law had been undergoing changes to suit the spirit of the age, but the revealed law was a part of it all the time. Tothill, 126, *168] quoted by Judge Baldwin in *McGill and Brown*. To this same *great source we owe the idea of a paternal power in the state—a *parens patriæ*—not the king, nor the chancellor, but a power existing somewhere to take care of the sick, the widow, and the orphan. Take this away and we become a nation of savages. If there is no protection for the infant and the aged, the charm of civilization is lost. In Pennsylvania all this is cared for; by hospitals and houses of refuge. No power is able to stop the flow of charity, because there is liberty of conscience. The same law that enjoins upon a witness in court to tell the truth, instructs him to give to the poor. One is not less binding than the other. All that is asked of government is, that under the protection of law, the great duty of charity may be fulfilled; and it is proposed now to say to every one that he shall not do so; that his gift shall be forfeited. The law of charitable uses furnishes this protection. In the 17 Edward 2, in 1324, the Knights Hospitallers were made new trustees of a charity when the Templars were dissolved. Story (Equity, 403, 412) says, that charities are liberally construed, and in 415, "if the bequest be for charity, no matter how uncertain the beneficiaries may be, a court will sustain the legacy." See also 3 Pet., 484; 4 Wheat., 41; 7 Vt., 289.

A bequest is not void for uncertainty of persons. 7 Cranch, 45; 2 Story, 206; 6 Pet., 436, 437; 2 Id., 256.

The law of charities existed in England prior to the time of Elizabeth. 2 Russ., 407.

The opinion given by Judge Baldwin in the case of *McGill and Brown*, embraces all the law of Pennsylvania. The law of this court is not different. The two cases cited in the decision of the Baptist Association appear now to be reported differently in five different books, and this court afterwards said that a dedication to pious uses should be protected. The case of the Baptist Society is reported in 3 Peters. If the counsel on the other side construe this case rightly, then all charitable uses are swept away; but how then did it happen that Chief Justice Marshall afterwards said that eleemosynary

corporations are to be encouraged. There cannot be a right without a full remedy; and if a man has a right to give, his donation must be protected.

The constitution of 1776, sect. 46, says, "all religious or charitable societies ought to be encouraged and protected." What does the 43 Elizabeth do? It directs charities to be looked up, amounting to twenty-one. Is not the fundamental law of a state of as much potency *as a British [*169 statute? The latter only looks to the past; the former to the future. The statute only includes twenty-one; the constitution takes in all. It says "other pious and charitable purposes." These words must be understood under their appropriate sense, according to their meaning in England at that time. It is of higher authority than the British statute, because it prohibited the legislature from doing any thing contrary to the principle which it established. The constitution is a great land-mark; no one can dispute its authority without treating the people of Pennsylvania with disrespect. In *Beatty and Kirk*, (580,) the court say "the bill of rights of Maryland recognizes the statute of Elizabeth to some extent." Why is not a recognition to the full extent by Pennsylvania equally valid? Pennsylvania even adopts "superstitious uses," as they are called in England. Her settlers were of every shade of opinion.

The monasteries of England were seized upon by Henry 8, but the rapacity of his favorites was even greater than his own. England presents now a great contrast of rich and poor. Some of the largest fortunes are owing to the benefactions of this king, such as that held by the family of Russel. The owner of the "poor flat, Bedford level," complained that Burke received £300 a year. Religious supremacy was established in the king. He laid down six articles, containing the points in dispute between himself and Rome. Who can tell what was then held to be "a superstitious use?" At the end of the Reformation, it was punishable to believe what the statute of 31 Henry 8 ordered. The test of "superstitious uses" was constantly changing down to the time of Charles 2; the Presbyterians, Independents, &c., when uppermost, all trying to compel conformity. Then our ancestors came, abhorring religious supremacy, bringing with them liberty of conscience, and the whole law of religious charities. They asked the crown to give them religious endowments, but not charities, and were at last compelled to take the act of 1730. Churches of all sects had been built, even Roman Catholic. In *Magill and Brown*, page 55, note, Judge Baldwin mentions forty-six charities, none of which were religious. The statutes

23 Henry 8, chap. 19, and 13 Elizabeth, chap. 1, make decrees of synods a part of the law of the land.

The Pennsylvania act of 1791, (Purdon's Digest, p. 181,) recites that any persons who mean to associate for the pur-
*170] poses of charity, may be incorporated with the approbation of the attorney-general. *There never has happened a case where the property of any religious society, Jew or Catholic, was seized upon.

There are two objections made to the validity of the devise.

1. That the proposed system of education is unchristian.

2. That the beneficiaries are too uncertain.

As to the first, all conscientious scruples, honestly entertained, are entitled to great respect. If any man who has charge of an orphan boy is afraid to send him to the college, he may keep him away without censure. It is merely an invitation to come. The constitution of Pennsylvania respects all scruples of conscience, and if children were to be dragged in and kept by force, it would be a violation of its principles. But the will in effect says "obey conscience and yield it to nobody." This scruple is of recent origin. It is not alleged in the bill. Perhaps the complainants felt no scruples then, but do now. If they slumbered so long, they ought to have some charity for Mr. Girard, in whose breast they never awaked. But a great prize is now to be reached, and the judgment may be affected by the will. Two things must be made out to overthrow the devise upon this ground:

1. That it is a superstitious use.

2. That it is inseparable from the trust.

The question is more suitable to a theological board than a court of justice. That the law of charity is the law of the land, is not a proposition depending upon theological inquiry. In Baxter's case, the court was not called upon to say which party was right, but only to decide what it was that the statute said; and because Baxter was a non-conformist, the trust was declared void. What could a Pennsylvania judge have done in such a case? He would find liberty of conscience established by the constitution; that in the constitution of the United States it is provided that Congress shall make no law affecting religion; and that Mr. Madison once affixed his veto to a bill incorporating a church under an apprehension that it trenched upon this delicate ground. It never was held that a charitable devise must make provision for religious education. In the list of forty-six before cited, thirty-seven are for mere charity. Does any one desire that the old times in religion should return, when a man was allowed to do good only in a particular way, and in no other? What was the spirit that led

to burning the convent near Boston? Precisely this. Religious acrimony now destroys property, if it does not doom to the stake.

*We have nothing to do with Mr. Girard's religious [*171 opinions. If any one thinks he can lead a better life, with equal humility and more zeal, let him try. Instead of there being anything against religion in the will, there is a many and unaffected testimony in its favor. The boys are directed to "adopt such religious tenets as mature reason may prefer;" any tenet, without exception. The will then holds religion to be inseparable from human character, but thinks the best way of forming that portion of the character is by attending to it at mature age. It is a speculative question. Can it be said that Girard had no respect for religion? He showed a religious heart by bestowing upon the poor what God had given him, so that, like Franklin's legacy, "it might go round." His desire was that the children should be educated in the manner which he thought the best, to make them religious. Who is to decide whether it is the best way or not? The objection assumes that the Bible is not to be taught at all, or that laymen are incapable of teaching it. There is not the least evidence of an intention to prohibit it from being taught. On the contrary, there is an obligation to teach what the Bible alone can teach, viz. a pure system of morality.

Is it true that ministers alone can teach religion? The officer at the head of the institution (Professor Bache) is a religious man. Can he not expound religion as well as science to his pupils? The laymen are the support, at last, of all churches. The next position will be that clergymen are responsible for every thing, and that a man can do nothing for himself. Every one has to teach his own children. Why can he not equally instruct those of other people? The orphans are not to enter the college until a contract is made for them by somebody. According to the common law, an infant can bind himself to some extent by a contract. So he can here. It must be sanctioned by his guardians too. No one objects to a child being bound out in a vessel where, of course, there is a great chance of his dying without the benefit of religious services, and where his voice, when in extremes, cannot reach an ear which, it is said, it ought to do. We must, upon this doctrine, condemn the House of Refuge. But we may trust that the cry of a child will be heard in mercy, although it may not reach the ear of a priest. If a father should refuse to instruct his children in religion, can the state interpose? Suppose that the will had made no provision on the subject, and the governors of the college had adopted this

same regulation, would the court have denounced it as a violation of their duty? *The case of the University of Virginia is far beyond this. There is no professor of theology, no instruction in divinity. These things are purposely omitted, from a fear that the institution might become sectarian. If Virginia permits it, she is the judge of its propriety and not we. But Girard has neither prohibited religious instruction nor a professorship. What will the United States do with the Smithsonian legacy? Congress cannot connect religion with it. Clothing and feeding the poor are worthy objects. Girard is said to have expressed himself in terms derogatory to Christianity. Suppose he had used a different phraseology, and said that none but laymen should be admitted into the college. This would not have been objectionable, and yet precisely the same result have been brought about. Children are to be fed and clothed. This is not a superstitious use, and must stand. Will you destroy the patient, if there is an unsound limb? The case is left with the court with a perfect conviction that it will not put the knife to the throat of this most useful charity.

Webster, for the appellants, in reply.

The complainants in this cause are the next of kin to Stephen Girard, who come here to try the validity of a devise, purporting to establish what has been called a charity. The counsel on the opposite side have assailed their motives, accusing them of wishing to steal the bread of the orphan, and have censured them for coming to this court instead of resorting to the tribunals of Pennsylvania. The plaintiffs are foreigners, and have a right to come here under the Constitution of the United States. Are they to be reproached for it? But the answer to this objection has already been furnished by the opposite counsel, when they say that in Pennsylvania, the complainants would not have been permitted to question the devise. Here, they are sure of a patient hearing. The cause was not argued in the Circuit Court, because the question arose in that court in 1833, upon the construction of the will of Sarah Zane,* and the court, in its opinion, decided the point. It would, therefore, have been useless to renew the argument there, but the best way was to bring the subject directly up for review.

It was said by the opening counsel, (Mr. *Jones*,) that in England charities are often superintended by the king in virtue of his prerogative, and that no analogous power can exist

*See Appendix.

in a republican government, *where there can be no *parens patriæ;* and it was also said that in order to establish a peculiar and local common law in Pennsylvania, one decision is not enough, but there must be a series of decisions to sustain a system of law. Both these positions are correct.

But the attention of the court will be directed in the first place to that clause in the will which excludes clergymen, &c., from the college; and it is worthy of reflection whether the devise must not be maintained, if maintained at all, upon the ground of its being a charitable devise, and as such entitled to special favor. It is a proposition of the highest magnitude, whether in the eye of jurisprudence it is any charity at all; the affirmative cannot be supported by law, or reasoning, or decisions. There are two objections to it.

1. The plan of education is derogatory to the Christian religion, tending to weaken men's respect for it and their conviction of its importance. It subverts the only foundation of public morals, and therefore it is mischievous and not desirable.

2. It is contrary to the public law and policy of Pennsylvania.

The clause is pointedly opprobrious to the whole clergy; it brands them all without distinction of sect. Their very presence is supposed to be mischievous. If a preacher happens to have a sick relative in the college, he is forbidden to visit him. How have the great body of preachers deserved to be denied even the ordinary rites of hospitality? In no country in the world is there a body of men who have done so much good as the preachers of the United States; they derive no aid from government, constitute no hierarchy, but live by the voluntary contributions of those to whom they preach. It astonishes the old world that we can get on in this way. We have done something in law and politics towards our contribution for the benefit of mankind; but nothing so important to the human race as by establishing the great truth that the clergy can live by voluntary support. And yet they are all shut out from this college. Was there ever an instance before, where, in any Christian country, the whole body of the clergy were denounced? The opposite party have gone as far back as Constantine in their history of charities; but have they found or can they find a single case, where opprobrium is fixed upon the whole clergy? We have nothing to do with Girard's private character, which has been extolled for benevolence. Be it so. We are asked if he cannot dispose of his property. But the law cannot be altered to suit Girard. What is charity? It is the indulgence of kind affections—love—sympathy

for our fellow-creatures. In a narrow sense *it means alms, relief to the poor. But the question is, what is it in a legal sense? The object here is to establish a school of learning and shelter; to give a better education. The counsel upon the other side are right in speaking of charity as an emanation of Christianity. But if this be so, there can be no charity where the authority of God is derided and his word rejected. If it becomes an unbeliever, it is no longer charity. There is no example in the books of a charity where Christianity is excluded. There may be a charity for a school without a positive provision for Christian teachers; but where they are expressly excluded, it cannot be such a charity as is entitled to the special favor and protection of a court. It is said by the counsel on the other side that Pennsylvania is not an infidel state, but a Christian community; and yet children who are orphans, with no parents to look after them, are directed to be shut in to stay until they approach manhood, during the age when the character is formed, and if they happen to have any connections or friends who are clergymen, they are excluded from ever seeing them. There are two objectionable features in this restriction in the will. The first is, that all clergymen are excluded from the college; and the second, that a cruel experiment is to be made upon these orphans, to ascertain whether they cannot be brought up without religion.

[Mr. *Webster* here read a passage from one of the works of the late Bishop White upon this point.]

The doors of the college are open to infidels. The clause, as it stands, is as derogatory to Christianity as if provision had been made for lectures against it. If it be said that infidels will not be encouraged, the answer is, that a court can only judge of the tendency of measures. The trustees must not be supposed to violate the will. But it is said by the counsel that lay teaching can be substituted for clerical. There are at least four religious sects which do not allow this mode of teaching religion; and it is as much against the spirit of the will as teaching by clergymen. The object is to have no religious teaching at all, because in this way controversy will be avoided. Lawyers are as much sectarians as clergymen, and lay teaching leads as directly to controversy as lay preaching. The intention of the will is, that the boys shall choose their own religion when they grow up. The idea was drawn from Paine's Age of Reason, 211, where it said "let us propagate morality unfettered by superstition." Girard had no secrets, and therefore used the *words which he considered synonymous with "superstition," viz.: "religious tenets."

*175]

Ministers are the usual and appointed agents of Christ. In human affairs, where the ordinary means of attaining an object are rejected, the object is understood to be rejected also; much more is this the case when the means are of divine authority. In the New Testament preaching is ordered both before and after the crucifixion. "If any man refuse to hear," &c. "Go ye into all the world and preach the gospel to every creature." Different sects have different forms of worship, but all agree that preaching is indispensable. These appointed agencies have been the means of converting all that part of the world which is now Christian. What country was ever Christianized by lay teaching? By what sect was religious instruction ever struck out of education? None. Both in the Old and New Testaments its importance is recognized. In the Old it is said "Thou shalt diligently teach them to thy children," and in the New, "Suffer little children to come unto me and forbid them not." But this will requires religion to be put off till mature years, as if a knowledge of man's duty and destiny was not the earliest thing to be learned. Man is the only sentient being who knows that he is eternal; the question "If a man dies, shall he live again?" can be solved by religion alone.

Is this school a charity? What is to become of the Sabbath? It is not intended to say that this institution stands upon the same authority as preaching, but still it is a part of Christianity. All sects have a day which is holy, and hold its observance to be important. Lay teachers will not do. Where are the children to go to church, even if they go out of the college? There is no Christian father or mother who would not rather trust their children to the charity of the world at large, than provide in this way for their bodily comforts. The single example of the widow's mite, read as it has been to hundreds of millions of people, has done more good than a hundred marble palaces. No fault can be found with Girard for wishing a marble college to bear his name for ever, but it is not valuable unless it has a fragrance of Christianity about it.

The reasons which the testator gives are objectionable and derogatory to Christianity; they assume that a difference of opinion upon some religious tenets is of more importance than a Christian education, and in order to get rid of superfluous branches, they lay the axe to the root of the tree itself. The same objection is made *by all the lower and vulgar class of the opponents of Christianity. The first [*176
step of infidelity is to clamor against the multitude of sects. Volney, 84, (Ruins of Empires,) says, "they all preach damnation against each other, and all cry out 'our holy religion.'"

The opposite counsel say that Girard was in a difficulty, because if he had thrown open the college to all sects indiscriminately, they would not have agreed with each other. But if it had been so, these orphan children would not have been in a worse condition than other children, and what father would not have preferred that his children should go to this college under any form, than no form of religion? All sects believe in a future state and in a creator of the world. Suppose we carried out these principles of exclusion into our social relations. Differing as we do about government, it would tear up society by the roots. All preachers unite in many points; they would all agree with Franklin, who is reported in the letters of John Adams to his wife, to have said in the days of trouble, "let us have prayers."

[Mr. *Binney* here cited the following authorities to show that Jewish charities can be sustained: 1 Amb., 228, note; 2 Swanst., 487; 7 Ves., 417; Shelford, 107; Boyle, 27.]

Mr. *Webster* said the distinction between the Jewish cases and the present is, that the former were within the ordinary rules of law, whereas this devise could only be sustained by being brought under the peculiar favor of the court, as it belongs to that class of charities. But what would be the condition of a youth coming fresh from this college? He could not be a witness in any court. He had never been taught to believe in a future state of rewards and punishments, because this is a "tenet" upon which he is enjoined not to make up his mind until he can examine for himself. What parent would bring up his child to the age of eighteen years without teaching him religion? What is an oath in heathen lands as well as our own? It is a religious appeal, founded upon a conviction that perjury will be punished hereafter. But if no superior power is acknowledged, the party cannot be a witness. Our lives and liberties and property all rest upon the sanctity of oaths. It is said that there will be no teaching against Christianity in this college, but I deny it. The fundamental doctrine is, that the youthful heart is not a proper receptacle for religion. This is not the charity of instruction. In monasteries, education was always blended with religious teaching. The statute 4 Henry 4, chap. 12, in 1402, established charities of religion, (2 Pickering, 433,) and directed the schoolmaster to perform *divine service, and instruct the children. 1 Edward 6, chap. 14, to the same effect. 2 Swanst., 526, 529, says that care was always taken to educate youths in the doctrines of Christianity, which is a part of the common law of England. That it is so, see 1 Benson, 296; 2 Str., 834; 3 Meriv., 405; 2 Burn's

*177]

Ecclesiastical Law, 95; 2 Russ., 501; Younge & Coll. C. C., 413; *Attorney-General* v. *Cullum*, a full authority.

In this last case there was a charity for the use of the parish, but no provision for religious education. The court said that if the fund were to be applied to education at all, a part of it must go to religious education; not the particular doctrines of the Church of England, but religion in a more comprehensive sense.

Bache, in his Course of Education in Europe, describes a monitorial school in Liverpool upon Bell's plan, but divine service is performed every Sunday. In Shep. Touch., 105, the cases are summed up.

As to the Smithsonian legacy and the University of Virginia, the former is not carried out, and the latter is no charity. Upon this branch of the case the whole argument may be presented in the following question, "Is a school, founded clearly on the principles of infidelity, a charity in the appropriate sense of that word?"

2. What is the law or public policy of Pennsylvania?

If there be a settled policy there, no gift or devise to over turn it can be recognized. It is an independent state, a popular government recognizing all guarantees of popular liberty. It is lawful to speak or write against all these guarantees, such as trial by jury, &c., but if the aid of a court be asked to carry on these attacks, it will be refused.

Mr. Girard in his lifetime might have paid people to write against the right of suffrage, but it is a different thing when it assumes the shape of a charitable devise, and requires the strong aid of a court to carry out the design. The Christian religion is as much a part of the public law as any of these guarantees. The charter says that Penn came over to spread the Christian religion; and the legislatures have often acted upon this principle, as where they punished the violation of the Lord's day. That it is a part of the common law, see 11 Serg. & R. (Pa.), 394, *Updegraff* v. *The Commonwealth*. So the court set aside a trust because it was inconsistent with public policy. See the case of *The Methodist Church*, 5 Watts (Pa.) The policy of a country is established either by law, or courts, or general consent. *That Christianity is a part [*178 of the public law of Pennsylvania by general consent, if there were no other source of authority, the churches, meeting-houses, spires, and even grave-yards over the face of the country all show. The dead prove it as well as the living.

If the trust cannot be executed, can it be reformed?

Who is to do it? The doctrine of *cy-pres* cannot apply and give the benefit to some other society. It would be an extrav-

agant application of the doctrine. Who is to supply the place of the trust stricken out? The trustee cannot. It is a case where there is no doubt of the intentions of the testator. They are positive. In other cases there is room for discretion, but none here. The testator calls these articles restrictions and limitations. Courts of equity have gone to an extravagant length in *cy-pres* cases, but it is impossible to reach this. 7 Ves., 490, said that if authority were out of the way, the gift would be void, and the case be one of intestacy; but the court thought itself bound to follow authority and decree that the testator should be charitable in the court's way. See also Str., 127, *Attorney-General* v. *Dowling*. But the entire doctrine of *cy-pres* is rejected by the Pennsylvania courts. See 17 Serg. & R. (Pa.), 93; 1 Watts, Pa.), 226.

As to the second division of the argument of the case, what is the law of Pennsylvania with respect to such devises?

This court will adopt the construction which the courts of a state place upon its laws. 2 Cranch, 87; 11 Wheat., 361; 2 Pet., 58; 6 Id., 290; 12 Wheat., 153. There have been four cases decided in Pennsylvania, viz.: 17 Serg. & R. (Pa.), 88, *Witman* v. *Lex;* 1 Pa., 49, *McGin* v. *Aaron;* 3 Rawle (Pa.), 170, *Mayor, &c.* v. *Elliott, &c.;* 1 Watts (Pa.), 218, *Methodist Church* v. *Remington*. All these cases are in our favor, except a single *dictum* in one of them. The opposite counsel are obliged to reject the points decided in two. In the first case it was decided that the statute of Elizabeth was not in force, and the devise was not so uncertain as to be void. The second was a gift to a congregation for a house of religious worship; in the third there was no uncertainty in the *cestui que trust*, and in the fourth the trust was declared void.

The old records of England do not militate against the decision of this court in the case of the Baptist association. *179] (4 Wheat., 1.) There is believed to be no case in them of an indefinite charity in *perpetuity sustained by the authority of chancery prior to the time of Henry 8. Corporations competent to take, whether aggregate or sole, are not included within this remark. Decisions before the 43 Elizabeth are apt to be misunderstood, because the term "charity" is applied to cases where there is no uncertainty. 1 Proceedings in Chancery, 208. Of the fifty cases cited from the old records, only three are given at length; in one of which the objects of the trust are specially declared, and in the other two there was a license from the king. All the cases referred to did not take place before the time of Elizabeth.*

*The following remarks upon the old records of England, were hastily

*The acts of the legislature of Pennsylvania after the death of Girard can have no effect upon the rights of parties which were then vested.

drawn up and presented to the court by Mr. *Cadwallader*, one of the counsel for the complainants:

The new information developed by the researches of the counsel of the appellees, upon the obscure subject of the law of charities before the statutes 39 and 43 Eliz., tends rather to confirm than to invalidate the opinion of this court expressed in the Baptist Church case, that there is no satisfactory evidence of an uncertain charity of indefinite duration having been enforced before the statute, or since the statute, without its aid.

Cases of frankalmoigne, the Templars, the Hospitalers, &c., &c., were those of corporations sole or aggregate. Counsel on both sides concur that the dissolution of monasteries, and of certain ecclesiastical aggregate and sole corporations, and the recusancy and consequent disfranchisement of many incumbents of benefices of this description, had, by the time of Elizabeth, caused many charities, previously valid, to fail for want of their anterior support of corporate trustees or administrators. The recitals and enactments of the statutes of this and the previous reigns, and particularly of the 39 and 43 Eliz. may be explained by a due regard to this portion of the previous history of England. This is affirmed on both sides of the argument. It is not perceived that any just reasoning on this foundation tends to support the proposition that indefinite uncertain charities could subsist without the aid of an incorporation. On the contrary, the natural inference appears to be, that they could not be otherwise maintained, without statutory assistance.

Judicial recognitions of charities before 39 and 43 Eliz. are liable to be misapplied, unless due care be observed in ascertaining the definition of a charity as understood at that day. The cases in which nothing more is said than that the trust, or use, or purpose was a charitable one, prove nothing. Whatever the true modern technical definition may be, the passages cited from Reeves' History prove, that the term charity in the olden time was frequently applied to trusts which were neither uncertain in their objects nor perpetual in their duration; in other words, to subjects for which a trust could have been maintained according to the ordinary rules of property, as contradistinguished from the rules of charities. *Edwards* v. *Kimpton*, read from (Record Commission) 1 Calendar of Proceedings in Chancery, 280, was the case of a rent granted for the relief of the converts inhabiting the house belonging to the Master of the Rolls. In *Lyon* v. *Hews*, same publication, vol. 2, p. 44, both bill and answer mention works of charity as the objects of the trust to be enforced, and state that the property had been left for religious and charitable purposes. But the purposes and objects of this trust were specifically declared, and were, 1st. Finding a priest by a year in a certain church; 2d. Making an aisle in the porch of the same church; 3d. Marriage of five poor maidens; and 4th. Amending the highways in the lane behind the mews. Of these uses none was to be extended to a perpetuity, and none was in any greater degree uncertain than must necessarily be the case with objects of a power or discretion exercisable within the period of a perpetuity. So in Alderman Symond's case, in Moore's Readings, Duke, 163; the "charitable use," decreed before the statute, "upon ordinary and judicial equity in chancery," though not described as to its objects, appears to have been one of which a final disposition could be made within a reasonable period. The case in 38 Assizes, 222, (a) vol. 3, was one in which the distribution, for the good of the testator's soul, was to be made by his executors; i. e. within a life in being. Of the fifty cases quoted from these Calendars, three only are stated at length. Of the rest nothing more than a meager abstract is presented. Of the three which are given at large, one, *Lyon* v. *Hews*, is mentioned above. In each of the two others, a patent or license had been obtained from the crown, enabling the trustees to hold the land conformably to the provisions of the trust. In many of the other cases, the proceedings, if given in full, would doubtless indicate the same thing. The statutes of mortmain must otherwise have prevented

The case in 3 Pet., 99, 115, *Inglis* v. *The Trustees of the* **Sailor's Snug Harbor*, rested upon the ground that the devise was good as an executory devise.

If the devise in trust be void in this case, what becomes of the fee? It must rest [vest?] somewhere. In England, where a devise was made to a corporation which could not take, the fee was decided to be in the heir at law. Hob., 136. But where a court of chancery charges itself with the whole administration of the charity, it takes possession of the fee as an incident to this power. In Pennsylvania there is no such authority anywhere, and this court cannot exercise it. What is done in England is done by virtue of the statute of Elizabeth, which

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the grants from being available. One of the cases mentioned in the Calendar, vol. 2, p. 264, *Newton* v. *Kitteridge*, a bill to protect the complainant's title against an inquisition for charitable uses, by which his land had been found to have been given to the poor of Aldham, certainly occurred after, and was founded on the 43 or 39 Eliz. The same thing is probably true of very many of the others of which the date is not given. It is remarkable that although all of the cases in the Calendar on various subjects are entitled as of the reign of Elizabeth, or of earlier reigns, some of them, in the places where abstracted, are stated to have occurred during the usurpation, and others at dates in the reign of James I. Of all the cases in the Calendar, only seven, including the three above mentioned, are shown to have occurred before the statute 39 Eliz. But all this is perhaps unimportant here. Upon such examination as has been practicable, it is apprehended that none of the cases previous to 39 Eliz., and none of those of uncertain date, can be said affirmatively to have been instances of indefinite perpetual charity.

To understand some of them it is necessary to refer to 1 Edw., 6, c. 14, which made masters of grammar schools corporations sole; and to understand a larger number of them, it will be right to refer to the doctrine which prevailed before the statute of Elizabeth, under which, gifts of chattels to the poor of a municipal or religious corporation, were sustained as gifts to the corporation; a doctrine which affirms the competency of the corporation, and the incapacity of the poor. This doctrine is thus laid down in the note to the case in 38 Assizes, mentioned above. It is there stated to have been the opinion of the court that if a man give bond or other thing, to A. and B., parishioners of a certain church, and to the parishioners of the said church, the gift is good, and it vests in the church, &c. The same doctrine, in those days, was held in the case of land where there had been a license or dispensation with the mortmain acts. Of course the same rule applied where there was a trust for a corporation, or for its poor, or its members. If the purposes of the grant were consistent with the objects of the charter, the gift could be sustained independently of the peculiar law of charities. Now, with the exception of four or five instances where the charity does not appear to have been of undefined duration, and of which the date, whether before or after the statute 39 Eliz. does not appear, it is believed, subject to correction, that in all the cases cited from this Calendar, and not already particularly noticed, there had been a grant or devise to, or in trust for, a municipal or private corporation; and in most instances the proceeding was by, or on behalf of, such a corporation. These cases, therefore, furnish strong negative evidence that the law before the statutes 39 and 43 Eliz. did not rest on the same footing as it has since stood upon. If it had been thus established, the trustees for the inhabitants of a municipality, or for the poor of a parish or a church, would not have needed the protection of the corporations and *quasi* corporations, under whose capacity to take and to enjoy, they appear to have thought it necessary to shelter themselves.

has no force in this case. Suppose the corporation had renounced the trust, what would have become of the fee? Could the court in such case have divested the heirs of the fee and appointed another trustee? There is no power to remodel a trust, as in England, or to exercise a right of visitation.

There is a want of power in the trustees to administer the charity. The fee must rest in the entire body of the corporation whilst others *are administering the trust. [*182 It is true that sometimes trusts have been conferred on the heads of corporations, and the whole body been held responsible. But the will here can give no power. There is no connection between this trust and the powers of the corporation. The school is out of the city, and the only interest which the city has in it is that some of the poor may be provided for. But suppose a defalcation to take place. The mayor, &c., are chosen for the purpose of laying city taxes for city purposes. Can they levy a tax to replace the sum thus abstracted? Are the whole people of the city responsible by taxation for an abuse of trust? Yet they are a part of the corporation which is the trustee. The 16 section of the charter contains the power to hold land, but this does not go far enough. If the city cannot execute the trust, what becomes of it? It was the intention of the testator that a particular trustee and no other should execute it, and if that trustee is incapable of doing it, the trust must fail altogether.

By the Pennsylvania statutes of 1730, 1791, and 1833, the policy of the state is shown to be that a moderate limit is fixed for the amount of property held for religious or charitable purposes, first of £500, and afterwards $2000. These laws are intended to act upon just such devises as this. Can it be said, with these laws in view, than an unincorporated body, such as these boys, or any one in trust for them, can hold property to the amount of $2,000,000? The policy of the state is to prevent large amounts in perpetuity, and if any one desires to exceed the limits fixed in those laws he must apply to the legislature for a special permission. Constitution of Pennsylvania, sect. 37; Purdon's Digest, title Estates-tail.

Where is the supervisory power over this trust? In 2 Vesey, 43, *Attorney-General* v. *Foundling Hospital*, it is said that chancery must supervise. When it is given to a corporation with power to trustees to go on, there is no need of a supervisory power except to protect the fund. 2 Bro. C. C., 220, 236.

In 17 Ves., 409, it is said that if there are no visitors appointed in the charter, the chancellor interferes to visit, through a petition addressed to him as keeper of the great seal,

representing the king in person. But there is no such power to be found any where in Pennsylvania. Girard should have provided for a charter, and the legislature could have seen how much property was going into mortmain and directed accordingly.

*183] The city is incapable of executing this trust, because it cannot make *contracts beyond the range of its charter. Suppose the trust should not be faithfully carried out by any agents, and the corporation be held responsible. In Pennsylvania, in case of a judgment against a corporation, any money on its way to the treasury can be arrested. In Bridgeport, Connecticut, the corporation issued bonds upon which there was a judgment, and private property in dwelling houses seized in execution; yet these persons could not prevent the bonds from being issued. There is no security anywhere for any species of property except by holding corporations to a strict exercise of their power. No good can be looked for from this college. If Girard had desired to bring trouble, and quarrel, and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to that result, it will be the crowning mercy of my professional life.

Mr. Justice STORY delivered the opinion of the court.

This cause has been argued with great learning and ability. Many topics have been discussed in the arguments, as illustrative of the principal grounds of controversy, with elaborate care, upon which, however, in the view which we have taken of the merits of the cause, it is not necessary for us to express any opinion, nor even allude to their bearing or application. We shall, therefore, confine ourselves to the exposition of those questions and principles which, in our judgment, dispose of the whole matters in litigation; so far at least as they are proper for the final adjudication of the present suit.

The late Stephen Girard, by his will dated the 25th day of December, A. D. 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, proceeded in the 20th clause of that will to make the following bequest, on which the present controversy mainly hinges. "XX. And whereas I have been for a long time impressed," &c. [See the statement prepared by the reporter.]

The testator then proceeded to give a minute detail of the plan and structure of the college, and certain rules and regulations for the due management and government thereof, and the

studies to be pursued therein, "comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the *French and [*184 Spanish languages," (not forbidding but not recommending the Greek and Latin languages,) "and such other learning and science as the capacities of the several scholars may merit or warrant." He then added, "I would have them taught facts and things rather than words or signs; and especially I desire that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience as guaranteed by our happy constitutions shall be formed and fostered in the minds of the scholars."

The persons who are to receive the benefits of the institution he declared to be, "poor white male orphans between the ages of six and ten years; and no orphan should be admitted until the guardians or directors of the poor, or other proper guardian, or other competent authority, have given by indenture, relinquishment or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York; and lastly, to those born in the City of New Orleans." The testator further provided that the orphan "scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age."

The testator then, after suggesting that in relation to the organization of the college and its appendages, he leaves necessarily many details to the mayor, aldermen, and citizens of Philadelphia, and their successors, proceeded to say: "there are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First, I enjoin and require," &c. [See statement of the reporter.] This second injunction and requirement is that which has been so elaborately commented on at the bar, as derogatory to the Christian religion, and upon which something will be hereafter suggested in the course of this opinion.

The testator then bequeathed the sum of $500,000 to be invested, and the income thereof applied to lay out, regulate, and light and pave a passage or street in the east part of the

city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide and to be called Delaware Avenue, &c.; and to this intent to obtain such *acts of Assembly, *185] and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, &c., &c.; and he proceeded to give other minute directions touching the same.

The testator then bequeathed to the commonwealth of Pennsylvania the sum of $300,000 for the purpose of internal improvement by canal navigation, to be paid into the state treasury as soon as such laws shall be enacted by the legislature to carry into effect the several improvements before specified, and certain other improvements.

The testator then bequeathed the remainder of the residue of his personal estate in trust to invest the same in good securities, &c., so that the whole shall form a permanent fund, and to apply the income thereof to certain specified purposes, which he proceeds to name; and then said: "To all which objects," &c. [See statement of the reporter.]

These are the material clauses of the will which seem necessary to be brought under our review in the present controversy. By a codicil dated the 20th of June, A. D. 1831, the testator made the following provision: "Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16th, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, outbuildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township: Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will

devoted the said estate to said purpose—consequently, the said square of ground is to constitute, *and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty of my will, it being my intention, that the said square of ground shall be built upon, and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section." The testator died in the same year; and his will and codicil were duly admitted to probate on the 31st of December of the same year.

The legislature of Pennsylvania passed the requisite laws to carry into effect the will, so far as respected the bequests of the $500,000 for the Delaware Avenue and the $300,000 for internal improvement by canal navigation, according to the request of the testator.

The present bill is brought by the heirs at law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, aldermen, and citizens of Philadelphia in trust as aforesaid to be declared void, for the want of capacity of the supposed devisees, to take land by devise, or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust; and because the objects of the charity for which the lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, nor any trust-estate devised that can vest at law or in equity in any existing or possible *cestui que trust;* and therefore the bill insists that as the trust is void, there is a resulting trust thereof for the heirs at law of the testator; and the bill accordingly seeks a declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief.

The principal questions, to which the arguments at the bar have been mainly addressed are; First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will: Secondly, whether these uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania: Thirdly, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will; or it belongs, as a

resulting or implied trust, to the heirs and next of kin of the testator.

*187] As to the first question, so far as it respects the capacity of the *corporation to take the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The act of 32 and 34 Henry 8, respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The act of the 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the Mayor, Aldermen, and Citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times for ever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects to them and their successors for ever, or for any other or less estate," &c., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established." Some, at least, of these objects might certainly be promoted by the application of the city property or its income to them—and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the true scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where

the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same *manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable: but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities; but a single case may suffice. In *Sonley* v. *The Clockmaker's Company*, 1 Bro. Ch., 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmaker's Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation, was, by the English statute of wills, void, that statute prohibiting devises to corporations, and the question was, whether the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron Eyre, in his judgment, said that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named. Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth: *à fortiori*, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly dehors the purposes of the incorporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. In the case of *Green* v. *Rutherforth*, 1 Ves. 462, a devise was made to St. John's College in Cambridge of the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred, if there should be any one capable thereof in the college; if [*188

none such, they should present the *senior divine, then fellow of the college, and on his refusal the next senior divine, and so downward; and, if all refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but fell within the jurisdiction of the visitor. Sir John Strange (the Master of the Rolls) who assisted Lord Hardwicke at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it (the trust;) and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees. And though they are a collegiate body whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special purposes, the court will look on them as trustees only, and oblige them to execute it under direction of the court." Lord Hardwicke, after expressing his concurrence in the judgment of the Master of the Rolls, put the case of the like trust being to present no member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a state where the statutes of mortmain do not exist, (as they do not in Pennsylvania,) the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of $1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuykill, (an object which some thirty or forty years ago would have been thought of transcendant benefit,) why, although not specifically enumerated among the objects
*190] of the charter, would not such a devise upon such a trust have been valid, *and within the scope of the

legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the state. We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.

It is manifest that the legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the acts of the 24th of March, and the 4th of April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust act, expressly states that it is passed "to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which, the testator had desired the legislature to pass the necessary laws. The tenth section of the same act, provides "That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in said will, &c., &c.; to carry which into effect," the testator had desired the legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same act, which declares "That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same [*191 shall be recommended by *the trustees or directors

of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other act is also full and direct to the same purpose, and provides "That the select and common councils of the city of Philadelphia, shall be and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them. No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will.

It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts; and if those trusts were valid in point of law, the legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding, by which it should seek to devest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the state in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a *quo warranto*, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the legislature, are of the highest importance and potency.

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not
*192] only are charities for the maintenance *and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of

colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth, ch. 4, has been adjudged by the Supreme Court of Pennsylvania not to be in force in that state. But then it has been solemnly and recently adjudged by the same court, in the case of *Zimmerman* v. *Andres*, (January term, 1844,) that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formally promulgated in the case of *Witman* v. *Lex*, 17 Serg. & R. (Pa.), 88, at a much earlier period, (1827.)

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation of such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such an indefinite nature are not good at the common law, (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges) and hence the charity fails; and the decision of this court in the case of the *Trustees of the Philadelphia Baptist Association* v. *Hart's Executors*, 4 Wheat., 1, is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which state the statute of 43 Elizabeth, ch. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain and indefinite. *Both [*193 circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examina-

tion of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, ch. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights, (certainly in no small degree shadowy, obscure, and flickering,) the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects occurred. The court said: "We find no dictum that charities could be established on such an information (by the attorney-general) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon *Collison's case*, Hob., 136; (s. c., cited Duke on Charities, by Bridgman, 368, Moo., 888,) and *Platt* v. *St. John's College, Cambridge*, Finch., 221; (s. c., 1 Cas. in Chan., 267, Duke on Charities, by Bridgman, 379,) and the case reported in 1 Ch. Cas., 134. But these cases, as also *Flood's* case, Hob., 136, (s. c., 1 Eq. Abr., 95, pl. 6,) turned upon peculiar circumstances. *Collison's* case was upon a devise in 15 Henry 8, and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a competent capacity to take, so that there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The dictum of Lord Loughborough in *Attorney-General* v. *Bowyer*, 3 Ves., 714, 726, was greatly relied on, where he says: "It does not appear that this court at that period (that is before the statute of wills) had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting, (an information to establish a college under a devise before the statute of mortmain of 9 Geo. 2, ch. 36;) but they made out their case as well as they could at law." In this suggestion Lord Loughborough had under his consideration *Porter's* case, 1 Co., 16. But there a devise was made in 32 Henry 8, to the testator's wife, upon condition for her to [*194 grant the lands, &c., in all convenient speed after his decease *for the maintenance and continuance of a certain free-school, and almsmen and almswomen for ever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was,

whether the devise was not to a superstitious use, and therefore void under the act of 23 Henry 8, ch. 2, or whether it was good as a charitable use. And it was resolved by the court that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good, before the statute of Elizabeth, upon the ground of the common law, there being a good devisee originally, although the condition was broken and the use was for charitable purposes in some respects indefinite. Now if there was a good devisee to take as trustee, and the charity was good at the common law, it seems somewhat difficult to say, why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since trusts for other specific purposes, were then, at least when there were designated trustees, within the jurisdiction of chancery.

There are, however, dicta of eminent judges, (some of which were commented upon in the case of 4 Wheat., 1,) which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 of Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute. Such was the opinion of Sir Joseph Jekyll in *Eyre* v. *Countess of Shaftsbury*, (2 P. Wms., 102; 2 Eq. Abr., 710, pl. 2,) and that of Lord Northington in *Attorney-General* v. *Tancred*, 1 Eden, 10, (s. c. Amb., 351, 1 W. Bl., 90,) and that of Lord Chief Justice Wilmot in his elaborate judgment in *Attorney-General* v. *Lady Downing*, Wilmot's Notes, p. 1, 26, given after an examination of all the leading authorities. Lord Eldon, in the *Attorney-General* v. *The Skinner's Company*, 2 Russ., 407, intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir John Leach, in the case of a charitable use before the statute of Elizabeth, (*Attorney-General* v. *The Master of Brentwood School*, 1 Myl. & K., 376,) said: "Although at [*195
*his time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact the charity was so decreed in that very case, in the 12th year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in the *Attorney-General* v. *The Mayor of Dublin*, 1 Bligh, 312, 347, (1827,) where he says:

"We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, &c.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that by information by the attorney-general the same thing might be done." He then adds, "the right which the attorney-general has to file an information, is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." So that Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of the *Incorporated Society* v. *Richards*, 1 Dru. & W., 258, where Lord Chancellor Sugden, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that, which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

Mr. Justice Baldwin, in the case of the will of Sarah Zane, which was cited at the bar and pronounced at April term of the Circuit Court, in 1833, after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion *in which the district judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

*196]

But very strong additional light has been thrown upon this subject by the recent publications of the Commissioners on the public Records in England, which contain a very curious and interesting collection of the chancery records in the reign

of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the *Trustees of the Philadelphia Baptist Association* v. *Hart's Executors*, 4 Wheat., 1, was before this court, (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.[1]

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the legislature to supply the defects. It is no proof of the non-existence of equitable rights, that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and *enforced in the state courts of Pennsylvania, as far as their remedial process would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman* v. *Lex*, 17 Serg. & R. (Pa.), 88, and that of Sarah Zane's will, before Mr. Justice Baldwin and Judge Hopkinson. In the former case, the court said "that it is immaterial whether the [*197

[1] APPROVED. *Estate of Hinckley*, 58 Cal., 492, 495.

person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid; and were enforced accordingly. The case then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and Secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator, (of which indeed we can know nothing,) nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us.
*198] The question, what *is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it

is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws, and decisions necessarily bring before us.

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government. The constitution of 1790, (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838,) expressly declares, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff* v. *The Commonwealth*, 11 Serg. & R. (Pa.), 394.

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear *and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated. [*199

Now, in the present case, there is no pretence to say that any such positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Chris-

tianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked; why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

*200] But the objection itself assumes the proposition that Christianity *is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity as well as ecclesiastics. There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be, men, not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings, which

such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers? Certainly there is nothing in the will, that proscribes such studies. Above all, the testator positively enjoins, "that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that on their entrance into active life, they may from inclination and habit evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer." Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive. The objection, then, in this view, goes to this,—either that the testator has totally omitted to provide for religious instruction in his [*201 *scheme of education, (which, from what has been already said, is an inadmissible interpretation,) or that it includes but partial and imperfect instruction in those truths. In either view can it be truly said that it contravenes the known law of Pennsylvania upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an omission to provide for instruction in Christianity in any scheme of school or college education a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equally fatal? These questions are propounded, because we

are not aware that any thing exists in the constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take the case of a charitable donation to teach poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction; would the donation be void, as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto it has been supposed, that a charity for the instruction of the poor might be good and valid in England even if it did not go beyond the establishment of a grammar-school. And in America, it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require any thing to be taught inconsistent with Christianity.

Looking to the objection therefore in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the state of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city, or become a resulting trust for the heirs at law.

Upon the whole, it is the unanimous opinion of the court, that the decree of the Circuit Court of Pennsylvania dismissing the bill, ought to be affirmed, and it is accordingly affirmed with costs.

*202]

*ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Pennsylvania, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause be, and the same is hereby affirmed with costs.

JOHN L. CHAPMAN, PLAINTIFF, *v.* HENRY H. FORSYTH AND THOMAS LIMERICK, MERCHANTS AND CO-PARTNERS, UNDER AND BY THE FIRM, NAME, AND STYLE OF FORSYTH AND LIMERICK, DEFENDANTS.

Under the late bankrupt act of the United States, the existence of a fiduciary debt, contracted before the passage of the act, constitutes no objection to the discharge of the debtor from other debts.[1]

A factor, who receives the money of his principal, is not a fiduciary within the meaning of the act.[2]

A bankrupt is bound to state, upon his schedule, the nature of a debt if it be a fiduciary one. Should he omit to do so, he would be guilty of a fraud, and his discharge will not avail him; but if a creditor, in such case, proves his debt and receives a dividend from the estate, he is estopped from afterwards saying that his debt was not within the law.[3]

But if the fiduciary creditor does not prove his debt, he may recover it afterwards from the discharged bankrupt, by showing that it was within the exceptions of the act.[4]

THIS case came up on a certificate of division from the Circuit Court of the United States for the district of Kentucky.

The record was as follows:—

[1] The same rule obtained under the act of 1867. *Ex parte Tracy*, 2 Bank Reg., 98. *Contra*, *Ex parte Kimball*, 6 Blatchf., 292; s. c., 2 Bank Reg., 74.

[2] APPLIED. *Palmer* v. *Hussey*, 87 N. Y., 308. DISTINGUISHED. *In re Seymour*, 1 Ben., 352; s. c. 6 Int. Rev. Rec., 60; *Fulton* v. *Hammond*, 11 Fed. Rep., 294, 295. FOLLOWED. *Curtis* v. *Waring*, 92 Pa. St., 109; *Kaufman* v. *Alexander*, 53 Tex., 568, 569. REVIEWED. *Gibson* v. *Gorman*, 15 Vr. (N. J.), 327. CITED. *In re Smith*, 9 Ben., 495; s. c. 18 Bank Reg., 24; *Du Pont* v. *Beck*, 81 Ind., 274; *Bergen* v. *Patterson*, 24 Hun, (N. Y.), 254. And see *Neal* v. *Clark*, 5 Otto, 708; *Ex parte Lord*, 5 Law Rep., 258; *Ex parte Tebbetts*, Id., 259. But the debt of an auctioneer is a fiduciary one and not barred. *Ex parte Lord*, 5 Law Rep., 258.

[3] *Contra* as to the last point, under the act of 1867. *Laramore* v. *McKinzie*, 60 Ga., 532.

[4] The following debts were held to have been contracted whilst acting in a fiduciary character within the meaning of the exception in the act of 1867:

The indebtedness of factors and commission merchants as such. *Hardenbrook* v. *Colson*, 61 How. (N. Y.), Pr., 426; s. c. 24 Hun, 475; *Banning* v. *Bleakley*, 27 La. Ann., 257 (but see *Baines* v. *Adams*, 33 Id., 46); *Palmer* v. *Hussey*, 87 N. Y., 303; *Scott* v. *Porter*, 93 Pa. St., 38; s. c. 39 Am. Rep., 719. *Contra*, *Ownsly* v. *Cobin*, 15 Bank Reg., 489; *In re Smith*, 18 Id., 24; s. c. 9 Ben., 495; *Kaufman* v. *Alexander*, 53 Tex., 562.

The indebtedness of the bankrupt as guardian. *Simpson* v. *Simpson*, 80 N. C., 332.

A debt owing by an executor, as such, to a legatee. *Crisfield* v. *State*, 55 Md., 192.

Money due to the state from a defaulting sheriff. *Johnson* v. *Auditor*, 78 Ky., 282.

The following were held not to have been so contracted:

The liability of a surety on a guardian's bond, before breach, in the condition of the bond. *Reitz* v. *People*, 72 Ill., 435; *Simpson* v. *Simpson*, 80 N. C., 332; *Davis* v. *McCurdy*, 50 Wis., 569; *McDonald* v. *State*, 77 Ind., 26.

A debt created by a person acting as an attorney in fact. *Woodward* v. *Town*, 127 Mass., 41.

The following statement of questions and points of law which arose in this case, and the adjournment thereof into the Supreme Court of the United States for decision, was ordered so be entered, to wit:

"This was an action of assumpsit for the proceeds of 150 bales of cotton, shipped to and sold by defendants, as the property of the plaintiff, the defendants having been a factor," &c.

The defendant, Forsyth, pleaded he had been duly discharged as a bankrupt, on his own voluntary petition.

*203] To this the plaintiff replied; the replication was demurred to, and *upon the hearing and argument of the demurrer, which presented the whole case, the following questions of law arose, and on which the judges were opposed in opinion:—

1st. Could the defendant be discharged, as a bankrupt, from any part of his debts, on his own petition, when he was indebted, in a fiduciary capacity, in part, within the exception in the first section of the bankrupt law; that is, were all persons indebted excluded, that held and owed moneys in the capacity of trustees (as a class,) from the benefit of the act, although they owed other debts besides the moneys held in trust?

2d. Is a commission merchant and factor, (who sells for others,) or indebted in a fiduciary capacity, within the act, provided he withholds the money received for property sold by him, and which property was sold on account of the owner, and the money received on the owner's account?

3d. Whether, when the decree of discharge, and the regular certificate of being a bankrupt, have been obtained without contest in the District Court, they are conclusive and binding on all persons named as creditors by the bankrupt in his petition and list of creditors; and whether a creditor, who did not prove his debt, and which the bankrupt owed said creditors in a fiduciary capacity, can come into court, and sue the bankrupt for such fiduciary debt, notwithstanding the decree of discharge and certificate, the debt having been set forth in the

The appropriation by a collection agent of the proceeds of negotiable paper sent to him for collection. *Green* v. *Chilton*, 57 Miss., 598.

The liability of one of two joint speculators in corn, for money advanced by the other with which to make purchases, profits and losses to be equally divided. *Pierce* v. *Shippen*, 90 Ill., 371.

The individual note of an administrator given to distributees of the estate for a balance due them on final settlement. *Elliott* v. *Higgins*, 83 N. C., 459.

Moneys collected, pursuant to a custom, by a stable-keeper, along with his own bills, for the carriage maker and blacksmith. *Guilfoyle* v. *Anderson*, 9 Daly, (N. Y.), 64.

A subscription to corporate stock. *Morrison* v. *Savage*, 56 Md., 142.

petition and list as an ordinary debt, not due in a fiduciary character?

Which divisions of opinion, at the request of the plaintiff, are certified to the Supreme Court of the United States, for their opinion and certificate on the three questions on which the judges of this court were opposed in opinion.

The case was submitted upon the following printed arguments by *Moorehead*, for the plaintiff, and *Loughborough*, for the defendant.

This was an action of assumpsit for the proceeds of 150 bales of cotton, shipped to and sold by the defendants, as the property of the plaintiff, the defendants having been a factor, &c.

Upon a demurrer to the replication to the plea of the defendant Forsyth, three questions arose—

1. On the first question the counsel for Chapman does not propose to submit argument. The only authorities, of which he is aware, that bear materially on the point, are the decisions on the circuits, and with them the court is familiar.

*2. On the second question, the undersigned would [*204 remark, that the words of the statute, "while acting in any other fiduciary capacity," would seem to have been inserted expressly to embrace all other cases of trusts besides those specifically mentioned. A factor, with goods and money in his hands belonging to his principal, is in estimation of law, a trustee. His relation with the principal is a fiduciary relation. The language of the act is extremely comprehensive, and it is contended that the case under consideration is within the equity of it.

3. The opinion of the late Judge Thompson in the matter of *Brown*, settles that a fiduciary creditor may or may not, at his election, come in under the bankruptcy, and if he declines to do so, his debt is not discharged. So at least the undersigned understands the opinion as given in the public prints, not having seen any authoritative report of the case.

It is submitted that such is the true doctrine on the subject.

J. T. Morehead, for Chapman.

The questions presented in this case arise under the late bankrupt law of the United States.

1. The first has already been considered in many of the circuits, and several of the members of this court have pronounced opinions upon it.

It is contended by the counsel of *Forsyth et al.*, that the exception in the first section of the bankrupt act, in

reference to fiduciary debts, is of such debts, not of the persons owing them, if they owe other debts which have not arisen from a breach of trust since the passage of the act. In this case the debt arose prior to the passage of the act. This has been held to be the correct exposition of the act in the Ohio circuit, *Matter of Lord*, 5 Law Rep., 258, in the New York circuit by the late Judge Thompson, in the *Matter of Brown*, Id., 25, and in the Massachusetts circuit, in the *Matter of Tebbetts*, Id., 259. Decisions have been made in other circuits, of which the counsel have not seen reports in print.

This question has doubtless been maturely considered by all the members of this court, and the counsel for Forsyth would not hope to exhibit any new views of the subject.

2. The debt of a commercial factor to his principal, is not an excepted debt. These factors are of various kinds, and the case *does not state whether the factor, respecting whom the question is asked, acted under an ordinary or a *del credere* commission; a point, perhaps, worthy of consideration.

*205]

The excepted debt is one which has arisen "in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." These expressions are not appropriate to commercial affairs. "Defalcation" is ordinarily used to express the misapplication of the funds with which he is intrusted by a public officer, or some express trustee. Does a commission merchant act in any other such fiduciary capacity as is meant by the act? The term fiduciary is a legal, not a commercial one. It has a comprehensive import, which may be given to it without including a mercantile debt; and according to the course of trade in this country, a very common mercantile debt.

A very large proportion of the debts which have been discharged by the courts under the bankrupt law, are the debts of factors to their principals. Millions have been so discharged, which will be revived, if this court shall decide them to be fiduciary, within the meaning of the act.

3. Upon the last point it is contended, that the proceedings in bankruptcy in the District Court, when in conformity to the act, are a suit, the decision of which by a decree of bankruptcy, and the discharge of the applicant, is conclusive upon the parties thereto, who are the petitioner himself and at least all such of his creditors as are named in his list, and to whom notice is given.

Such is the nature of the proceedings authorized by the

act:—Process is to be served upon the creditor, or a notice in writing sent to him. In effect, the proceeding is a suit by the debtor against his creditors for a discharge.

It was not necessary for the applicant to have stated in his petition the nature or origin of the debt. It was enough that he stated, as in this case, the name of his creditor, his residence, and the amount due to him. See the first section of the act.

What is a fiduciary debt may in a given case, be a matter of doubt. This contest shows it. Shall an applicant, acting upon his best lights, stating the name and residence of his creditor, and the sum due to him, and expressly summoning him in, to contest, if he chooses, be prejudiced because he has not denominated the debt fiduciary, when he and his counsel did not deem it to be so? Shall the creditor thus notified lie by, and, after the adjudication of the *District Court, [*206 come forward with the objections which he should have made there?

The certificate of the District Court is made conclusive everywhere, except in cases where there has been fraud, or the wilful concealment of property. Fraud is not suggested here. The expressions of the act in conferring jurisdiction upon the District Court, and in declaring the effect and conclusiveness of its adjudications, are most broad.

The District Court had jurisdiction to grant or refuse the discharge of Forsyth. The exercise of this jurisdiction involved the consideration of the question, whether the existence of the debt to Chapman was a bar to the discharge. Contest might have been made in the District Court on that ground, and, it is contended, should have been made there.

The decree of discharge having been made by the District Court, is it not to be held that the questions now made have been already decided between these parties, by a court of competent jurisdiction?

P. S. Loughborough.

Mr. Justice McLEAN delivered the opinion of the court.

This was an action of assumpsit for the proceeds of 150 bales of cotton, shipped to and sold by defendants as the property of the plaintiff, the defendants being factors. The defendant, Forsyth, pleaded that he had been duly discharged as a bankrupt, on his own voluntary petition. A replication was filed, to which there was a demurrer.

The suit was brought in the Circuit Court for the district of Kentucky; and on the argument of the demurrer the following points were made, on which the opinions of the judges

were opposed; and at the request of the parties the points were certified to this court.

1. "Could the defendant be discharged as a bankrupt from any part of his debts on his own petition, when he was indebted in a fiduciary capacity in part, within the exception in the first section of the bankrupt law; that is, were all persons indebted, excluded, that held and owed moneys in the capacity of trustees, (as a class,) from the benefit of the act, although they owed other debts besides the moneys held in trust?

2. "Is a commission merchant and factor, who sells for others, indebted in a fiduciary capacity within the act, provided he withholds the money received for property sold by him, and which property *was sold on account of the owner, and the money received on the owner's account? *207]

3. "Whether, when the decree of discharge and the regular certificate of being a bankrupt, have been obtained without contest in the district court, they are conclusive and binding on all persons named as creditors by the bankrupt in his petition and list of creditors; and whether a creditor, who did not prove his debt, and to whom the bankrupt was indebted in a fiduciary capacity, can come into court and sue the bankrupt for such fiduciary debt, notwithstanding the decree of discharge and certificate, the debt having been set forth in the petition and list as an ordinary debt, not due in a fiduciary character?"

These questions are far less important than they would have been had the bankrupt law not been repealed. But they are still important as affecting a large class of citizens and to a large amount.

The first section of the bankrupt law provides that, "all persons whatsoever, residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it.

The debts here specified are excepted from the operation of the act. This exception applies to the debts and not to the person, if he owe other debts. The language is, all persons owing debts, not of the description named, may apply, &c. Now, an indebtment by an individual, not created as above stated, is within the provisions of the act, although he may be under fiduciary obligation. This is the natural import of the provision, and it is sustained by reason. It was proper that

Congress should not relieve from debts which had been incurred by a violation of good faith, whilst, from other obligations a full discharge to the same person should be given. But, to have refused a discharge because the individual owed a fiduciary debt, would, by withholding a general privilege, have superadded a penalty to a past transaction without notice. That this consideration influenced the legislature is shown by the fourth section, which provides, "that no person who after the passage of the act shall apply trust-funds to his own use," shall be discharged. Now, if a person who owed a fiduciary debt, was not entitled to a discharge from other debts by the first section, this provision was useless. A misapplication *of trust-funds, as declared, covers the enumerated [*208 cases in the first section. But, whilst the first section only withholds from the jurisdiction of the bankrupt court fiduciary debts, the fourth declares that if such debts have been contracted subsequent to the law, the individuals shall not be discharged. From this provision the strongest implication arises, that if the fiduciary debts were contracted before the passing of the act, the petitioner would, for other obligations, be entitled to a discharge. Viewing then the first and fourth sections of the act, we are of the opinion that fiduciary debts, contracted before the passage of the act, constitute no objection to a discharge of the same person for other debts.

The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act.

If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.

The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian," or "trustee," are not cases of implied but special trusts, and the "other fiduciary capacity" mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act.

This view is strengthened and, indeed, made conclusive by the provision of the fourth section, which declares that no "merchant, banker, factor, broker, underwriter, or marine

insurer," shall be entitled to a discharge, "who has not kept proper books of accounts." In answer to the second question, then, we say, that a factor who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act.

The answer of the first question leads, necessarily, to the answer of the third. For if fiduciary debts are not within the act, a discharge can in no respect affect the interest of the fiduciary creditor. Without his consent, it is clear the bankrupt court can take no jurisdiction of his debt. And,

*209] although the bankrupt may include the *debt in his schedule, and the discharge may be general, yet as the law gave the court no jurisdiction over the debt it is not discharged.

The fourth section provides, "that the discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under the act, and may be pleaded as a complete bar," &c.

Now it is supposed that, if a fiduciary debt, within the act, be placed upon his schedule by the bankrupt, that it is incumbent on the creditor to preserve his right, by showing, before the bankrupt court, the nature of his debt. And that, consequently, should he fail to appear after notice, he will be barred, as other creditors, by the discharge.

The bankrupt is bound to show on his schedule the nature of his debts, at least so far as to enable the court to take jurisdiction of them. If, for instance, he owe a debt as executor, and he state it on his schedule as an ordinary debt, he commits a fraud on the law, and the discharge cannot avail him. If, in this respect, he suppress the truth or state falsehood, he is guilty of fraud, and this may be shown against his discharge.

But as the discharge operates only on debts, contracts, &c., which are provable under the act, it is said that consent cannot include fiduciary debts.

Such debts, without the assent of the creditor, are clearly not within the act. But if his debt shall be found on the schedule, and he not only proves it but receives his proportionate share of the dividend, he is estopped from saying that it was not within the law. He is a privileged creditor, and is not bound by the bankrupt law; but he may waive his privilege. As a creditor, he has a right to come into the bankrupt court and claim his dividend. He does not establish his claim as a fiduciary one, but as a debt "provable within the statute." And having done this, he can never controvert the discharge.

From these considerations, we are led to say, in answer to

the third question, that, unless a fiduciary creditor shall come into the bankrupt court, prove his debt, &c., he is not bound by the discharge, but may sue for and recover his debt from the discharged bankrupt, by showing that it was within one of the exceptions of the first section.

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*Peter Harmony and others, Claimants of the Brig Malek Adhel, *v.* The United States. [*210

The United States *v.* The Cargo of the Brig Malek Adhel.

Under the act of Congress of March 3, 1819, ch. 75, (200,) to protect the commerce of the United States and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court.[1]

It is no matter whether the vessel be armed for offence or defence, provided she commits the unlawful acts specified.

To bring a vessel within the act it is not necessary that there should be either actual plunder or an intent to plunder: if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.

The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing.

A piratical aggression, search, restraint, or seizure is as much within the act as a piratical depredation.

The innocence or ignorance on the part of the owner of these prohibited acts, will not exempt the vessel from condemnation.[2]

The condemnation of the cargo is not authorized by the act of 1819.

Neither does the law of nations require the condemnation of the cargo for petty offences, unless the owner thereof co-operates in, and authorizes the unlawful act. An exception exists in the enforcement of belligerent rights.

Costs, in the admiralty, are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances.[3]

Although not *per se* the proper subject of an appeal, yet they can be taken notice of incidentally, as connected with the principal decree.[4]

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[1] Cited. *The Steamboat Magnolia*, 20 How., 334.

[2] Cited. *Jecker* v. *Montgomery*, 18 How., 116; *The Siren*, 7 Wall., 156; *Dobbin's Distillery* v. *United States*, 6 Otto, 400.

[3] S. P. *Canter* v. *Amer. & Ocean Ins. Co.*, 3 Pet., 307; *Sizer* v. *Many*, 16 How., 98.

[4] The discretionary power of a court of admiralty over costs cannot be exercised on an appeal from taxation after the expiration of the term at which the decree is entered. *The Caithnesshire*, Abb. Adm., 163.

In the present case, as the innocence of the owners was established, it was proper to throw the costs upon the vessel, which was condemned, to the exclusion of the cargo, which was liberated.

THIS case came up by appeal from the Circuit Court of the United States, for the district of Maryland, having originated in the District Court.

On or about the 30th of June, 1840, the brig Malek Adhel sailed from New York bound to Guayamas, in California, under the command of Joseph Nunez. The vessel was armed *211] with a cannon and *some ammunition, and there were also pistols and daggers on board. It appeared from the evidence, which is hereinafter particularly set forth, that she stopped several vessels upon the high seas, and at length put into the port of Fayal, where she remained for some days. Departing thence, she arrived at Bahia, in Brazil, about the twenty-first of August, 1840, where she was seized by the Enterprise, a vessel of war belonging to the United States, and sent into the port of Baltimore for adjudication. A libel was there filed against vessel and cargo upon five counts, all founded upon the act of Congress to protect the commerce of the United States, and to punish the crime of piracy, passed on the 3d of March, 1819, ch. 76, (200.) Two other counts were afterwards added in an amended information, charging the acts complained of to have been done in violation of the laws of nations.

A claim was filed for the brig, her tackle, apparel, furniture, and cargo, on behalf of Peter Harmony, Leonardo Swarez, and Bernard Graham.

The evidence produced upon the trial in the District Court, will be recapitulated when the proceedings before the Circuit Court are stated; under which evidence the case was argued, together with the following admission of the proctors for the United States:

United States
v. } District Court, United States.
The Malek Adhel and cargo.

The proctors of the United States in this case admit, for the purposes of this case, and to have the same effect as if fully proven, that the claimants were, when the Malek Adhel left New York, the exclusive owners of that vessel, and were such owners during the period the acts stated in the information are alleged by the United States to have been done. And they also admit, that the claimants never contemplated or authorized said acts. They further admit that the equipments of the said vessel when she left New York, and ever afterwards, were the usual equipments of a vessel of her class, on

an innocent commercial voyage from that port to Guayamas, the voyage stated in the evidence in this case.

NATH'L WILLIAMS,
and REVERDY JOHNSON,
Baltimore, 15 *June*, 1841. *Proctors for the United States.*

The District Court condemned the vessel, restored the cargo to the claimants, apportioned a part of the costs upon the claimants, and directed the residue to be deducted from the proceeds of the property *condemned. Both parties appealed from this decree; the claimants from the condemnation of the vessel, and the United States from that part of it which restored the cargo. [*212

The cause came before the Circuit Court upon the evidence which had been given before the District Court, (reduced to writing by consent,) and upon additional evidence which is set forth in the following deposition. It was corroborated in its main points by the evidence of two other persons.

John Myers, a witness, produced and examined on the part of the United States, deposes as follows:—

That he was not first mate when he joined the Malek Adhel; Peterson was first mate; witness joined her 23d June, 1840. On Friday, afterwards, Peterson came on board, hauled the vessel out into the stream. On Sunday, Captain Nunez told Peterson to go on shore on account of a quarrel; Peterson was intoxicated; witness was then made first mate; witness told the captain, that one of the crew (W. R. Crocker) was competent to go out as second mate, and he was then promoted to that office. On Tuesday, 30th June, took pilot, got under weigh about ten or eleven o'clock that day, and went to sea; discharged the pilot on afternoon of same day; fourth or fifth day out, captain said the chronometer wouldn't speak, had forgotten to wind it up; on the 6th of July, saw a vessel standing to the northward, and we to the eastward, five or six miles apart; ran down to the vessel and hove maintopsail back; ran to leeward and then to windward of her, and fired a blank cartridge; hailed the vessel and asked "where from?" they said from Savannah, bound to Liverpool; we hailed her again, and told her to send her boat alongside; she sent her boat with four men and an officer, and they came alongside; Captain Nunez asked if they had a chronometer; officer in the boat said he did not know whether they had or not; would go on board and see; went on board and returned in about half an hour with a chronometer; brought it on board, and while we were regulating our chronometer, our captain and four men went on board the other vessel, which was the "Madras,

of Hull;" captain stayed on board a short time and then returned; they then took their chronometer and returned to their vessel, the Madras; while we were hoisting our boat up and securing her, the Madras made sail; as soon as the boat was secured, we ran to leeward some distance, and fired another blank cartridge, but not in the direction of the Madras, and then proceeded on our own course. Next, *213] about *9th or 10th July, a vessel was standing to the westward, we to the eastward; captain said he would run after the vessel and catch her, as he wanted to send a letter to New York; made sail after her, and finding we did not come up very fast, we fired a blank cartridge; they still not taking any notice, our captain told the man to load a gun with shot; loaded the gun with shot and fired, when the other vessel hove her maintopsail back; we were about half a mile apart; we both had our American flag flying at first; when the second shot was fired, Captain Nunez ordered the Mexican or Columbian flag to be hoisted; we then hailed; they said they were from Liverpool, bound to Charleston; her name was the brig "Sullivan;" she was an American vessel; had "Sullivan, New York," on her stern; hailed her and told her to send a boat alongside; while they were coming, our captain told Martin (called Peter Roberts in the shipping articles) to tell the crew not to speak any English, while the boat was alongside; this order the captain first told him in Spanish, then in English; when the boat came alongside, they asked where we were from; captain told Martin in Spanish, to say, we were from Vera Cruz, bound to Barcelona, and out forty-five days; Martin did so; our captain then told him we wanted some lamp-oil; the officer in the other boat said he did not know whether they had any, but he would go on board and see; when they reached their own vessel, they hoisted their boat, and proceeded on their course; we had lamp-oil sufficient to last us twelve months; after they proceeded on their course, we made sail likewise; ran to leeward and fired a shot at her; this fire our captain ordered Martin to make; he, (Martin,) generally acted as gunner. Martin belonged to Malaga, and spoke Spanish; at the time of second fire, the vessels were about an eighth of a mile apart, hailing distance; we then kept on, and she did the same; the gun was fired at her; we were then standing to eastward, she to westward; did not see where the ball struck.

The next vessel we saw and spoke, was the "Ten Brothers;" this was two or three days after the affair with the Sullivan; passed her without doing any thing. Next vessel we met, was the "Vigilant, of Newcastle, England;" spoke her; she

showed English colors; hailed her, and told her to send her boat alongside; she did so. Nunez asked if they had a chronometer; they said that they had none; they were out of water, and wanted bread; we gave them two small barrels and some bread, by our captain's orders; we went on our course. The next vessel we met was the San Domingo, *two days afterwards; our captain was acquainted with [*214 the passengers on board; he asked them to dine with him, which they did; after they left, Captain Nunez told witness, that the passenger had been a slaver, and was just returning from a prosperous voyage; the vessel belonged to Terceira, one of the Western Islands; she was Portuguese; we laid together that night, and the next morning the Portuguese sent on board of us to buy provisions; we then parted company, and two or three days after, went into Fayal; Nunez said his intention in going to Fayal, was to repair the vessel, and get his chronometer rated; remained there five or six days; had one carpenter employed four days, who did some slight work; he made a side ladder and some awning extensions, and put her to her head to find out leak. The principal leak was about eight or ten inches above the water line; the vessel leaked at sea, but not at Fayal; leaked as bad after we left there as she did before; the place of the leak discovered at Rio; there never having been oakum at all in that part of the seam, could put a knife in the seam; leak came into cabin; that leak was not stopped at Fayal.

We took in at Fayal, potatoes, bread, and beef, for the use of the crew; we also took in two men as passengers, and a cabin boy; one of the passengers was named Silvie and the other Curry; the boy is here; the last I saw of the passengers was at Rio; got under weigh from Fayal on Tuesday; do not know whether Nunez knew the two passengers before he saw them at Fayal; came to anchor and waited until Wednesday; there was a pleasure-party to come on board to sail about the harbor; in attempting to tack she missed stays, captain at the helm; missed stays a second time; we were about twenty yards from the rocks; Nunez knew nothing of the usages of an American vessel before we left New York; I always worked the vessel myself; Nunez might have known, but he did not speak English well enough to make the men understand. After the sailing match about the harbor, we left Fayal with the whaling vessel Minerva, from New Bedford; Nunez went on board of her and took the chronometer to have it rated; had done nothing with it at Fayal; Nunez knew nothing about managing a chronometer, though it is the captain's duty. Captain Nunez remained on board the Minerva five or six

hours; he went on shore at Fayal before we had our sails furled; he went in a shore boat. After Nunez came from the Minerva we made sail and proceeded on our course; he brought
*215] chronometer with him: next day we saw a vessel *standing to westward with all sail set, going directly before the wind; we were standing to southward; Nunez ordered to chase her; finding we did not come up very fast we fired, by Nunez's orders, a blank cartridge towards her; she still went on her course; Nunez ordered one of the guns to be shotted and fired at her, which was done; she then hove her maintop back; we were then about a mile astern of her; we rounded to, to fire at her; we came up, hailed her; she said she was from Palermo, bound to Boston; she was the "Emily Wilder;" told her to send her boat alongside with their chronometer; they came alongside with the chronometer; we rated ours by it; I rated it and found a difference of time, and noted it in the log-book; after comparing the time of the two, they then took chronometer and went on board again; I made the entry in the log-book; we each made sail and stood on our course; they asked us no questions, except where we were from; Nunez said, from New York, bounded around Cape Horn; we stood to southward until 4th of August; the day before, captain said he was going to Rio; I told him it was a bad place to go, because it was a rendezvous for American vessels of war; on the 4th of August Nunez came on deck about half-past seven in the evening, and found fault with some orders witness had been giving, and Nunez told me that he did not want me to do more work on board the ship, and I accordingly went off duty; we ran on our course; that night Captain Nunez had the watch from eight to twelve; I heard a noise on board, went up and saw a vessel close ahead on the weather bow; when we came up Nunez hailed her, and told them to heave the maintop back; they did so, and we did the same; this was about ten o'clock at night; hailed them again and told them to send their boat aboard of us with the captain and his papers; this they said they could not do as their boat leaked and the night was dark; Nunez then got angry and told us to double shot the gun; it was done, and fired towards the strange vessel; Martin directed the gun; we were within close hailing distance. Curry, the forementioned passenger, then hailed in English and told them again to send their boat; the other captain answered in Portuguese or Spanish. Curry told witness that the answer was, "they might sink their brig, but he could not come on board." Nunez then told us to lower our boat and go on board the strange brig; Curry, Crocker, the second mate, Peter Roberts, (Martin,) John

Gray, and Dill or Smith, then went on board the stranger; Curry and Crocker had each a pair of pistols, they were buckled in a belt *round their bodies; our boat returned [*216 in about three quarters of an hour with Curry and the captain of the strange brig, and three of her men; Curry and the captain came on board the Malek Adhel, the men remained in their boat alongside; the strange captain gave Nunez a tin box with the ship's papers, I believe; ship's papers are carried in such boxes. Curry and Captain Nunez took them down below; strange captain remained on deck; I saw them down the companion way, examining the papers in the cabin; they had them about a quarter of an hour, and then brought them up and gave them to the Portuguese captain; Nunez spoke English and told Curry to tell strange captain he must pay twenty dollars for the shot Nunez had fired at him, and ten dollars for a keg of oil which had been knocked over by the recoil of the gun. Nunez also told Curry in English to look and see if there were any guns and powder on board the other vessel, and if there were any, to spike the guns and bring the powder on board, and see if any sweetmeats were on board, and bring them on board also; then they shoved off, Curry with them, and went to the Portuguese vessel; Nunez told me that the Portuguese vessel was from Rio Grande, bound to Oporto, with a cargo of hides and horns; in half an hour after our boat returned with those who originally went on board the Portuguese vessel, and brought a jar of sweetmeats, one dog, and twenty dollars for the shot; after the boat was secured Captain Nunez put me on duty again; this was two o'clock in the morning; Curry told me he had got twenty dollars for the shot, but was ashamed to ask for the other ten for the oil; I saw Curry give the captain the money in Spanish dollars; Curry said he wouldn't take Brazilian money, which was first offered him by the Portuguese captain; after that we left the vessel and proceeded on our course. The next vessel we met was on the 10th or 12th of August; they were standing to northward, we to southward; when she came abeam of us, she tacked ship and went in the same direction with us; in about two hours after we hove our maintop back and ran foul of each other; Captain Nunez got enraged and told them to shot the gun and fire at the stranger; it was done; we fired a second shot; Nunez ordered the second shot.

When the first shot was fired, we were within close hailing distance; and also, when each shot was fired; we fired five times, gun shotted each time. After our fifth fire all our powder was gone: Nunez then told Martin something witness did not understand, and Martin then told the crew,

he (Captain Nunez) said he would give *$500 to any volunteers of his crew, who would go and bring the captain aboard. Nunez asked me to go. I told him, I did not like it. He told me not to be afraid, and gave me his dirk; I threw the dirk down on the deck, and said to Nunez, I was afraid to go on board with the boat, for fear they would throw something in the long boat and sink her, when we were alongside. Nunez said, he wanted to bring the other captain on board the Malek, and give him twenty-five lashes; we were then some distance astern. Nunez told Martin to take two men, Dell and Helm, and go on board; they did so, and remained half an hour; they returned and brought back with them the time. I saw one shot go through the flying jib; it was the second shot. When Martin came back, he told Nunez he must send his chronometer with an officer, and rate it; I took the chronometer, went on board the other vessel, and rated it. Strange captain asked me why Nunez had fired at him; I said I did not know; the captain had ordered it. He asked me where we were bound. I said, "God only knows." When I returned to the Malek Adhel, I told Nunez what had happened, and he laughed. The strange brig was the "Albert;" she was an English brig and bound to Rio; her stern sign was disfigured; she had English colors flying. We then proceeded on our course, and made the Brazils about the 20th or 21st of August; the land was some miles north of Cape Antonio. The passengers on board told me they were to go to Bahia. We got to Bahia about six o'clock in the evening, and Curry, Silvie, and the captain went ashore. They came on board again about nine o'clock next morning, and Nunez told me to make ready to clear the cargo, as he was going to repair his vessel. Nunez stayed about half an hour on board and went ashore again. Next morning got all clear, and about half-past eleven Nunez came on board; the men told me they would do no more work until they saw the American consul; this was told me before Nunez came on board; when he came, I told him; he asked me if I wanted to see the consul too. I said, "Yes." He then said, "Very well, I will go ashore and see." He went on shore, and the next morning between nine and ten o'clock, he came on board again. He told me to tell all the crew, who wanted to see the consul, to come aft, and go on the larboard side; the whole crew went on the larboard side, Martin among them. The second mate, Mr. Crocker, and four or five men, went on shore that day; they stayed on shore until about three
*218] o'clock, and then returned. Captain Nunez came on board *the next morning, and told me the consul

wanted to see me, and that I must go on shore with him. We went to the consul's office, and he asked me about these charges. I had kept an account of some small transactions on a piece of paper; I gave it to the consul. The captain said I could be discharged, if I desired it; but the consul said, "Not until the affair was settled." By small transactions, witness means the firing, &c. Captain Nunez admitted that it was all right, as I had put it down. I told the American consul the same story as I am now telling. When we were going ashore, Nunez said, "Suppose I sell the brig, how much she worth?" He also said, one man had offered to give him $22,000 for her. I told him I did not know how much she was worth. I stayed on shore until two o'clock, and then went on board again; that night, about one or two o'clock, a vessel ran foul of us, and tore away our jib-boom. The next morning while we were repairing it, the captain came on board and told me the consul wanted to see me. I went, returned afterwards on board, got my clothes and went ashore, where I remained nine or ten days; went on board, afterwards, the American brig Yankee, and remained there until the Enterprize, a United States schooner, seized and took the Malek and her crew. There were four men shipped by the captain at Bahia, after I left the brig; they were one Portuguese, one Spaniard, one English, and one American. The crew were examined in succession by the consul. We left Bahia on the 26th September, under the charge of Lieut. Drayton, on board the brig; nine men and two officers were put on board; we then went to Rio; four of our crew were from the schooner Enterprize; we left Martin and the cook behind at Bahia. The day I returned from the consul's on board the Malek, Nunez and the cook had a quarrel, and Nunez struck the cook; cook said, "When I shipped, I did not know I shipped on board a slaver." I saw Captain Nunez at Rio, in prison. We stayed at Rio from the 2d of October until the 1st of March. We were taken before the authorities at Rio; they let the captain out of prison. I saw him afterwards walking about in Rio. I left Rio in the Malek, under the command of Lieut. Ogden, and with the crew who are now in prison, where we have been since we arrived. Lieut. Ogden had on board, besides ourselves, four men and one midshipman. I kept the log-book of the Malek; Captain Nunez got it from me, to take it to the consul the day we went before him. It was laid before the consul, and I never saw it afterwards. The log-book contained some of the *particulars about the firing. (Here a book is shown to the [*219

witness.) This book was kept by the captain. Lieut. Drayton kept a log-book from Bahia to Rio.

Cross-Examination.

Upon cross-examination, the witness further deposed: While I was on board the Yankee, a midshipman and four men came on board and ordered me on board the schooner Enterprize. I was not imprisoned at Bahia. Peter Roberts (Martin) was among the men who went on the larboard side. I do not know whether the pistols Curry carried were loaded or not; one pistol out of the four was loaded, I know. The men who accompanied Curry were unarmed, to the best of my knowledge. The Albert answered the hail of the Malek Adhel. Our brig had her name on the stern. I saw Curry put the money down on the cabin table. I did not tell any one I had seen the money counted out. On my examination at Bahia, I stated that Curry had told me that he had received the money. I do not recollect whether I stated then that I saw it. The cook's deposition was not taken, that I know of. Silvie and the boy were in the cabin with Nunez and Curry. I am from Philadelphia, but have sailed out of New York for the last five years. Have sailed as mate twice before. Before the offer of $500, made by Nunez to his crew to board the Albert, he had not ordered the crew, nor had they refused to go.

Further Cross-Examination of John Myers.

John Myers, upon his further cross-examination, deposed as follows:—

We left Captain Nunez at Bahia. When we first arrived at Rio, I did not see him. The second time I went ashore I saw him in jail. I do not know how long he remained in jail. We remained at Rio four months. I never saw Nunez after the frigate Potomac arrived. The Enterprize and the Malek Adhel went into Rio together. Nunez was at liberty on shore after the Enterprize arrived. I saw Nunez three or four days before we sailed from Rio; he told me he was going to take command again of the Malek Adhel. Martin went with the rest of the crew before the consul. I saw him in the consul's office. I never saw Martin at Rio; we left him at Bahia. I saw both Curry and Sylvie at Rio, but do not know how they got there. A vessel bound direct from Bahia to Guayamas would not stop at Rio. I did not see either Curry or
*220] Sylvie after the Potomac *arrived. I should think the Potomac was at Rio twelve or fifteen days before we sailed for home.

At November term, 1841, the Circuit Court affirmed the

decree of the District Court, dismissed the appeals, and ordered each party to pay their respective costs in that court. Both parties appealed to the Supreme Court.

Z. Collins Lee, and *R. Johnson*, for the United States.
Meredith, and *Nelson*, (attorney-general,) for the claimants.

Lee, made the following points on behalf of the United States, as appellants:—

1st. That the cargo of the said vessel was subject to forfeiture, and ought to have been condemned; and the decree, so far as regards it, ought to be reversed.

2d. That no part of the costs and expenses incurred in the prosecution should be paid out of the proceeds of the property condemned; but that Peter Harmony and Co. should be decreed to pay the same.

And on behalf of the United States, as appellees.

3d. That the Malek Adhel, her tackle, apparel, and furniture, were properly condemned; and that the decree, so far as regards them, ought to be affirmed.

Lee argued that the brig was "an armed vessel, or a vessel of which the crew were armed" within the true meaning and intent of the act of Congress of the 3d March, 1819, 3 Story's Laws, p. 1738; the 1, 2, 3, and 4 sects. of which were continued by the act of 15th May, 1820, 3 Story, 1798, and afterwards without limitation by the act of 30th January, 1823, 3 Story, 1874. And in the second place, that from the evidence exhibited on the record, the aggressions, restraints, and depredations proved were "piratical" and such as the act of Congress contemplated and intended to punish.

And lastly, that, assuming the said brig not to be "an armed vessel" within the meaning of the act, yet the aggressions and depredations perpetrated on the Portuguese vessel were, according to the law of nations, piratical.

To sustain the above propositions he referred to the following authorities:—

Act of Congress of 1790, ch. 36, 1 Story, 82, defining piracy.

Act of 1825, ch. 276, 3 Story, 1999, defining and punishing as piratical certain offences therein named.

*Also, to the following cases:— [*221

United States v. *Palmer*, 3 Wheat., 610; p. 626, as to the construction of the act of 1790; *The Marianna Flora*, 11 Wheat., 37; and to show that a single piratical act is sufficient, referred to the speech of Chief Justice Marshall in the case of *Jonathan Robbins*, reported in the appendix to 5 Wheat., p. 8, 12; 3 Wash. C. C., 221, 214, case of *United States* v. *John Jones*; 5

Wheat., 145, 149, 153, and notes; Id, 412, 192; 2 Azuni, 351; 4 Bl. Com., 72, defining sea-robbery; 2 East, P. C., 707, Vattel, ch. 15, § 226; Grotius, ch. 15, § 85; Molloy, 57.

Upon the question of the forfeiture of the cargo:—

Dods. Adm., 470; case of *The Neptune*, 5 Robinson and Wheaton on Captures; 1 Hagg., 142, case of *The Hallen;* 3 Dall., 133, case of *The Adams*, and commented on the opinion of the court in the case of *The Marianna Flora*, 11 Wheat.

Meredith, for the claimants.

There are two questions in the case.

1. The construction of the act of Congress.

2. The bearing of the evidence.

The innocence of the owners is admitted on the record. They were sole owners during all the voyage, and engaged in a lawful trade. The vessel was properly equipped for such a voyage, and the owners had nothing to do with the acts complained of. These admissions were not gratuitous but proved, and placed in this form for convenience.

Does the act of 1819 reach such a case? She was armed only as the voyage required, and the captain departed from the orders of the owners. It is an important question, because, if decided in the affirmative, the risks of ship-owners will be increased, and in violation of the natural principles of justice.

It is an open question. Some expressions of opinion by the court in the case of *The Marianna Flora* appear to incline to the construction of the other side, but there is no decision in any case. The only question there was one of damages; the claim of forfeiture was abandoned by the captors and by the United States. There was nothing to call for an opinion as to the construction of the act of 1819. The passage quoted by the opposite counsel was in answer to an argument used at bar that there was nothing suspicious in the case; but there has been no adjudication upon the point.

*222] *If the act of 1819 includes the case of an innocent owner, it must be because,

1. That such owner was liable under the maritime law, or

2. That Congress intended to extend that law.

1. As to maritime law.

The owner, if liable, must be so *in personam* or *in rem.*

His liability *in personam*, although varying in some particulars, is mainly the same with the liability of an employer at common law. The master is his agent. In civil cases the captain can sometimes bind his owner to a greater degree than other agents can, but not for torts. The owner is always responsible for the negligence of his agent in acts done within the

scope of his authority, but not where the act is wilful and beyond the authority. And this is equally true whether the agent was or was not engaged, at the time, about the business of his principal.

The whole law is collected in Story on Agency, 456. See also Skin., 228; 1 East, 106; 4 Barn. & Ald., 592; 19 Wend. (N. Y.), 343, cases collected; 1 Hill (N. Y.), 480.

These cases show that the owner is responsible for negligence or unskilfulness, but not for wilful torts.

The maritime law has the same rule. 8 T. R., 533; Story on Agency, 327, § 319; Curtis, 195 note, 205 note; 1 Taunt., 567; Ingersoll's Roccus, 23, notes 11, 12, 13, 15; Salk., 282; 19 Johns. (N. Y.), 235, referred to in Story's Abbott, 19; 2 Brown's Admiralty Law, 140.

Is the owner bound *in rem?*

It would be contrary to reason and justice to hold him so. If he is not bound in damages, why is his vessel responsible? There is no moral delinquency in the owner. The ship, it is true, is considered sometimes as the offender, but only when something is done for which the owner is responsible, either for his own acts or those of his agent acting within the scope of his authority. 2 Brown Adm., 142, 143.

The torts of the master cannot hypothecate the ship; she is seized only until the captain gives bail. Abbott, 99, note 1; same principle, Duponceau's Bynckershoek, ch. 18, pp. 129, 150, 151, 152, 154.

In prize cases there is no forfeiture except on the presumed liability of the owner. The modern doctrine is that contraband does not affect the ship, or even cargo, if it is put on board without the knowledge of the owner, even by the captain.

*Bynckershoek, ch. 12, p. 93, says, that if the owner [*223 knows of it, or the captain is executing the orders of the owner, the vessel is forfeited—otherwise not. See also 1 Rob. Adm., 67–70, 104, 130; 3 Id., 143, 178.

The owner is not responsible in damages where the vessel becomes a pirate. 3 Wash. C. C., 262, was a case of a privateer, where the owner's bond was liable and ship too, because of an understood contract to that effect between the government and all privateers; but not so as to other vessels.

A piratical capture does not divest the owner of his property. 1 Moll., 88, sect. 31, book 1, ch. 4; 1 Rob., 81, 229; 6 Id., 229; 1 Beawes's Lex Mercatoria, 6th ed. 364; 1 Rolle, 285.

Did Congress intend to extend the provisions of the maritime law?

Before saying so, the court will look to the injustice of such

a construction, and its dangerous consequences to ship-owners. The act was not intended to repair private losses, but to punish crimes; and such a construction will punish one man for offences committed by another.

The state of the country when the act was passed was referred to by the other side, to illustrate its meaning. It was shortly after a general peace, except as to South America. Sailors were discharged from navies; privateers abounded, and the transition was easy to piracy. In all the cases in this court, the vessels had been privateers. The act, therefore, did not contemplate merchant vessels armed for defence, but ships fitted out as privateers. The vessel is confiscated by the act, but there is a singular omission as to the cargo. Why not include it, if merchant vessels were embraced by the act? The omission was intentional, because on the same day an act was passed to suppress the slave trade, in which the cargo is forfeited as well as the ship. In 5 Wheat., 338, the court were prepared to construe an act as we contend for; the owners there were said to be innocent, because the ship was in the possession of piratical captors; 5 Wheat., 352. Yet the words of that act were as peremptory for that case as the act of 1819 is for ours. In page 357, the court say, that the vessel would have been restored if she was in possession of piratical captors, because the owners would have been innocent.

In 13 State Trials, *Dawson's* case, taking the vessel from the owners was itself held to be an act of piracy.

2. What is the bearing of the evidence?

*224] The offences of "aggression, search," &c., must be "piratical," *that is, with an intention to commit piracy; not piracy under the law of 1790, but under the law of nations, because it punishes the vessels of other nations as well as our own, and the last section refers to piracy under the law of nations, which is sea-robbery, forcible depredation at sea, *animo furandi*. At common law there is no piracy. The English statute did not change the nature of the offence, but only the mode of punishing it. Is there any proof of an intention to commit robbery? if not, the case is not within the act of Congress. There seems to have been a hallucination in the captain's mind, bordering on madness; wanted always to rate his chronometer. He had many opportunities to plunder, but did not; some vessels passed by, others were supplied with provisions. He did not think he had done wrong, because he permitted his crew to go freely to the American consul at Bahia, and would not take Brazilian dollars for the powder and oil which he had lost.

But the cargo is sought also to be condemned. At first the

information contained only counts depending upon the act of Congress; two were afterwards added upon the law of nations, with a view of reaching the cargo. The capture itself was a harsh measure; the papers showed the ship to have been American property; the crew were faithful to their duty, and it would have been praiseworthy to have despatched her on her voyage, in charge of the mate. The protection of commerce does not require that the cargo in this case should be aimed at as well as the ship. The offence charged in these two counts is a "hostile aggression with intent to plunder." If this is piracy under the law of nations, it is merged in the act of 1819, but the offences charged are only misdemeanors. 2 Brown's Adm. appendix, p. 519.

The Constitution gives Congress power to define and punish piracies and offences against the laws of nations. If Congress has not done it, this court cannot punish petty offences.

Nelson, attorney-general, on the same side, examined the facts in the case as disclosed by the record, and then commented on the acts of 1819, 1823, 1825, 1790, to show the history of the legislation upon the subject of piracy. The "restraints, aggressions," &c., must be "piratical," as that term is understood by the laws of nations. The 5th section of the act of 1819 declares that persons who commit piracy, as understood by the laws of nations, shall suffer death. The 8th section of the act of 1790 was said by the court, (5 Wheat., *184, 185, 202, 206,) not to be repealed; [*225 this decision was given on the 1st of March, 1820, and an act of Congress was passed immediately thereafter, (15th May, 1820,) the third section of which declared what should be piracy, (3 Story, 1798,) making robbery a necessary ingredient. The act of 1825, by implication, repeals the 8th sect. of the act of 1790, by declaring such offences to be felony. No person could be indicted under the acts of Congress as a pirate, because the act of 1825 says he shall be punished with death as a felon. The consequence is, that there is no piracy recognized by the laws of the United States, except that known to the law of nations, and the act of 1819 must be so construed. The offences charged in the five first counts under that act must, therefore, be shown to be piratical under the law of nations; that is, committed for the purposes of robbery. Does the evidence justify this? The court, acting as a jury, must acquit unless the affirmative be made out clearly. The acts of the captain are like those of an insane man.

[Mr. *Nelson* here commented on these acts, in the case of each vessel successively.]

In the case of the *Palmyra*, 12 Wheat., 15, it is said that a petty aggression is not a cause of condemnation, unless it indicates a bad mind.

Ought the vessel to be condemned?

There is no other law to condemn it except that of 1819. The policy of that law was to bear upon armed vessels, or the crews of which were armed. But neither branches of the alternative includes this case. The crew cannot be said to have been armed, within the meaning of the act, because the agreement says that the vessel had only ordinary equipments. All vessels going to the Pacific carry arms for defence. In the case of the Palmyra, the court said, a vessel might be armed for commercial purposes. So here. Why did not the act of 1819 include the cargo? because it struck at privateers who have no cargo. In all revenue laws, the cargo is condemned as well as the vessel.

If the acts of the master were piratical, that very fact protects the owners, because the first offence was against them in divesting them of their property and converting it to his own purposes. He was guilty of a barratry, at least. Can the owners lose their property through an act of piracy? The 8th sect. of the act of 1790, makes it piracy to run away with a vessel or voluntarily give her up to a pirate. If this act be in force, the captain was a pirate. *All the cases say that piracy does not divest ownership. 5 Wheat., 338, 357, 358. There need not be personal violence in running away with a ship. 1 Gall., 247, 253, 256. The proof here shows that the captain had been negotiating in Fayal for a sale of the vessel.

*226]

Ought the cargo to be condemned?

The act of 1819 clearly does not embrace the cargo, and there must be something more proved than an "aggression" or "restraint." The opposite counsel cannot proceed on a statute for half and the law of nations for the other half, because Congress has exercised its power in the premises. How does the law of nations reach the cargo of an unoffending owner? If the vessel be construed to be the offender, the cargo is not. In war, the cargo is condemned, but then different rules apply. The vessel must be taken *in delicto*.

The *Marianna Flora*, 11 Wheat., 40, 57, in which case the capturing vessel was attacked. But here, the Enterprize was not.

As to costs—they are within the discretion of the court. Dunlap's Practice, 164; 2 Mason, 58; 4 Gall., 414.

Costs cannot be appealed from. 3 Pet., 307, 319.

R. Johnson, for the United States, in reply.

There are three questions,

1. What is the true construction of the act of 1819, as to the vessel?

2. What is the law of nations as to the cargo?

3. Does the evidence show the ship to be within the act of Congress, and the cargo to be within the law of nations?

1. The act of Congress had two objects in view, first, to protect commerce; and second, to punish piracy personally. Piracy had been in part defined and punished by the act of 1790. That of 1819 was passed when commerce was suffering, and its object was to punish piracy up to the full extent of the law of nations; it is punished with death.

There are three objections made by the other side:

1. That the act does not cover the case of an innocent owner, but that the United States must always show that the owner was either a pirate himself or knowingly fitted out his vessel for such purposes.

2. That the vessel must be armed for "offensive purposes," and that the mere fact of being armed is not enough.

3. That the acts are not piratical, because it is not shown that they were done for the purposes of plunder.

*1. As to the innocence of the owner. Must his guilt be [*227 established? The language of the act is "to protect merchant vessels from piratical aggressions and depredations," and the President is authorized to instruct officers to send in any armed vessel or crew which shall have attempted any piratical aggression upon an American vessel or any other. It is not their business to ask who is the owner; the fact is enough. It is said that the vessels must be fitted out for the purpose of depredating; but the history of the matter is, that the vessels intended to be reached were not so fitted out, but seized upon by the crews for piracy. The construction of the other side entirely defeats the object of protecting commerce. There are no words in the law relating to the owners; the vessel is declared to be the guilty thing. The only facts necessary to be proved are, that the vessel was armed, and that a piratical aggression was committed. Merchant vessels can aid in these captures. If Congress had intended to exempt the property of innocent owners, they would have left some discretion in the court; but the language is, the vessel shall be condemned. It is said to be unjust to punish the innocent for the guilty; but the object of Congress was to stop the crime by breaking up the means of committing it.

In the case of the Marianna Flora, this court said that inno-

cence of owners was no excuse. This was not a mere dictum, as the opposite counsel have said, but a point in the case.

2d objection. That this vessel was not armed within the meaning of the act. The only fact which the law looks to, is, whether the vessel was armed at the time of committing the aggression. Here, both vessel and crew were armed. But it is said that the arms were put on board for an innocent voyage. True. But so it was in the case of the Marianna Flora, and the court said she might have committed an aggression within the meaning of the act. What difference does it make, when the object of the law is to protect commerce? It is not said what number of guns must be on board, or to what extent the crew must be armed. What the law regarded was, that neither should be so far armed as to be capable of injuring commerce. It is said that the aggression must be piracy as described in the 5th section; that it must amount to sea-robbery. But it is perfectly clear Congress did not intend this; they knew what piracy was by the law of nations, and have declared that an "attempt" to commit a depredation shall be punished. A "search," "aggression" or "restraint" *228] are all punishable; and these are all beyond the limits of *national law. These offences are not punished personally, but in the 5th section piracy is punished with death. The offences, therefore, are not the same. In the case of the *Palmyra*, 12 Wheat., 14, 15, it was argued that the vessel could not be condemned until the person was convicted; but the court said it was not necessary, because there was no personal punishment provided in the sections against restraint, &c. There is something more meant, therefore, than piracy at common law. There need not be robbery; a "restraint" is enough. In the 3d section, where merchant vessels are authorized to capture, the word "piratical" is dropped; the act meant to protect against all aggressions, and considered them all as piratical.

[Mr. *Johnson* here examined the cases of aggression *seriatim*.]

3d objection. That the acts were not piratical, because it is not shown that they were committed for the sake of plunder. But the amount is not material in a question of robbery, and violence threatened is as criminal as if used; and it was argued on the other side, that there was sufficient evidence to show that the captain had run away with the ship, which was piracy. The money was paid by the Portuguese vessel under fear. The boarding party was armed with pistols and a dirk. Fear was purposely instilled, or why did the captain send his men armed. The firing into the other vessels was wilful and malicious. In the Marianna Flora, the court said, if death

had ensued from firing, it would have been a grave inquiry whether some greater punishment should not be inflicted, although it was under a mistake.

2d point. What is the law of nations as to the cargo? Did it originally cover the case; and if so, has it been abrogated by Congress?

Where a party roves the sea to commit murder and get gain by violence, he is at war with the whole world; and when his property is seized, a right of condemnation ensues as in the case of other enemies' property. But it is objected that this cargo is the property of innocent persons. The answer is, that the same motives which induced the act of 1819 to give the vessel to the captors, induces the law of nations to give them the cargo also. Nor has this rule been changed by legislation. In the case of *United States* v. *Smith*, 5 Wheat., 153, the court say that the 8th section of the 1st article of the Constitution, giving power to Congress to define and punish piracies and offences against the laws of nations, includes the power of punishing lesser offences than piracy. Congress did not intend, by the act *of 1819, to take away [*229 any of the admiralty jurisdiction which had previously been vested in the judiciary. We must resort to the law of nations. The power to "define and punish" means to inflict personal punishment, and the jurisdiction of admiralty is always *in rem*. It is untouched by the law. If a pirate were to claim a cargo, would a court give it to him? and yet the court can only condemn or restore. Admiralty law gives to the captors the property in the thing captured; and if the vessel be condemned, what can save the cargo? the same reason applies to both, which is, holding out an inducement to captors to be vigilant. If the captain were the owner of both ship and cargo, would the court condemn his vessel and restore his cargo? In 11 Wheat., before cited, the owner of the ship is held responsible for the acts of the agent, and what good reason can be given why the owner of the cargo should not also be so, especially when he is the same person who owns the ship.

Mr. Justice STORY delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland, sitting in admiralty, and affirming a decree of the District Court rendered upon an information *in rem*, upon a seizure brought for a supposed violation of the act of the 3d of March, 1819, ch. 75, (ch. 200,) to protect the commerce of the United States, and to punish the crime of piracy. The information originally contained five counts, each asserting a piratical aggression and restraint

on the high seas upon a different vessel: one, the Madras, belonging to British subjects; another, the Sullivan, belonging to American citizens; another, the Emily Wilder, belonging to American citizens; another, the Albert, belonging to British subjects; and another upon a vessel whose name was unknown, belonging to Portuguese subjects; and this last count contained also an allegation of a piratical depredation. The Malek Adhel and cargo were claimed by the firm of Peter Harmony and Co., of New York, as their property, and the answer denied the whole gravamen of the information. At the hearing in the District Court, the vessel was condemned and the cargo acquitted, and the costs were directed to be a charge upon the property condemned. An appeal was taken by both parties to the Circuit Court; and upon leave obtained, two additional counts were there filed, one alleging a piratical aggression, restraint, and depredation upon a vessel belonging
*230] to Portuguese subjects, whose name was unknown, in a hostile manner and with intent to destroy *and plunder the vessel, in violation of the law of nations; and another alleging an aggression by discharge of cannon and restraint upon a British vessel called the Alert, or the Albert, in a hostile manner, and with intent to sink and destroy the same vessel, in violation of the law of nations. Upon the hearing of the cause in the Circuit Court, the decree of the District Court was affirmed; and from that decree an appeal has been taken by both parties to this court.

It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equipments on board were the usual equipments for such a voyage. It appears from the evidence that the brig sailed from the port of New York on the 30th of June, 1840, under the command of one Joseph Nunez, armed with a cannon and ammunition, and with pistols and daggers on board. The acts of aggression complained of, were committed at different times under false pretences, and wantonly and wilfully without provocation or justification, between the 6th of July, 1840, and the 20th of August, 1840, when the brig arrived at Bahia; where, in consequence of the information given to the American consul by the crew, the brig was seized by the United States ship Enterprize, then at that port, and carried to Rio Janeiro, and from thence brought to the United States.

The general facts are fully stated in a deposition of one John Myers, the first mate of the Malek Adhel; and his testi-

mony is corroborated by the other evidence in the cause, in its main outlines and details. The narrative, although long, cannot be better given than in his own words. He says, among other things, "On Tuesday, the 30th of June," [Here the judge read a part of the evidence of Myers, which is set forth in the statement of the case by the reporter.]

Now upon this posture of the case, it has been contended, 1st, That the brig was not an armed vessel in the sense of the act of Congress of 1819, ch. 75, (ch. 200.) 2. That the aggressions, restraints, and depredations disclosed in the evidence were not piratical within the sense of the act. 3. That if the case in both respects is brought within the scope of the act, still neither the brig nor the cargo are liable to condemnation, because the owners neither participated in nor authorized the piratical acts, but are entirely innocent thereof. 4. That if the brig is so liable to condemnation, the cargo is not, either under the act of Congress or by the law of nations.

*We shall address ourselves accordingly to the [*231 consideration of each of these grounds of defence. The act of 1819, ch. 75, (ch. 200,) provides, in the first section, that the President is authorized and requested to employ the public armed ships of the United States with suitable instructions "in protecting the merchant ships of the United States, and their crews from piratical aggressions and depredations." By the second section the commanders of such armed vessels are authorized "to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel of the United States, or of the citizens of the United States, or upon any other vessel," &c. By the third section it is provided "that the commander and crew of any merchant vessel owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid, by the commander or crew of any other armed vessel whatsoever, not being a public, armed vessel of some nation in amity with the United States, and may subdue and capture the same." &c. Then comes the fourth section, (upon which the five counts of the original information are founded,) which is as follows, "That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged

and condemned to their use and that of the captors, after due process and trial in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion." The fifth section declares, that any person who shall on the high seas commit the crime of piracy as defined by the law of nations, shall, upon conviction thereof, be punished with death.

Such are the provisions of the act of 1819, ch. 75, (ch. 200.) And it appears to us exceedingly clear, that the Malek Adhel is an "armed vessel" within the true intent and meaning of the act. No distinction is taken, or even suggested in the act, as to the objects, or purposes, or character of the armament, *232] whether it be for offence or defence, legitimate or illegitimate. The policy as well as the words *of the act equally extend to all armed vessels which commit the unlawful acts specified therein. And there is no ground, either of principle or authority, upon which we are at liberty to extract the present case from the operation of the act.

The next question is whether the acts complained of are piratical within the sense and purview of the act. The argument for the claimants seems to suppose, that the act does not intend to punish any aggression, which, if carried into complete execution, would not amount to positive piracy in contemplation of law. That it must be mainly, if not exclusively, done *animo furandi*, or *lucri causa;* and that it must unequivocally demonstrate that the aggression is with a view to plunder, and not for any other purpose, however hostile or atrocious or indispensable[1] such purpose, may be. We cannot adopt any such narrow and limited interpretation of the words of the act; and in our judgment it would manifestly defeat the objects and policy of the act, which seems designed to carry into effect the general law of nations on the same subject in a just and appropriate manner. Where the act uses the word "piratical," it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes

[1] The word "indispensable" is probably a misprint for "indefensible," but the editor has followed the language of the court as given in the former edition of these reports, by the official reporter of the court.

of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, *hostis humani generis.* But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa.* The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis.* We think that the aggressions established by the evidence bring the case completely within the prohibitions of the act; and if an intent to plunder were necessary to be established, (as we think it is not,) the acts of aggression and hostility and plunder committed on the *Portuguese vessel [*233 are sufficient to establish the fact of an open, although petty plunderage.

Besides, the argument interprets the act of Congress as though it contained only the word "depredation," or at least coupled aggression and depredation as concurrent and essential circumstances to bring the case within the penal enactment of the law. But the act has no such limitations or qualifications. It punishes any piratical aggression or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation. Either is sufficient. The search or restraint may be piratical although no plunder follows, or is found worth carrying away. What Captain Nunez designed under his false and hollow pretences and excuses it may not be easy to say, with exact confidence or certainty. It may have been to train his crew to acts of wanton and piratical mischief, or to seduce them into piratical enterprises. It may have been from a reckless and wanton abuse of power, to gratify his own lawless passions. It could scarcely have been from mental hallucinations; for there was too much method in his mad projects to leave any doubt that there was cunning and craft and worldly wisdom in his course, and that he meditated more than he chose to explain to his crew. They never suspected or accused him of insanity, although they did of purposes of fraud.

The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. Here, again, it may be remarked that

the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be condemned. Nor is there any thing new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine
*234] also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has *been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of *The United States* v. *The Schooner Little Charles*, 1 Brock., 347, 354, a case arising under the embargo laws, the same argument which has been addressed to us, was upon that occasion addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report." The same doctrine was held by this court in the case of the *Palmyra*, 12 Wheat., 1, 14, where referring to seizures in revenue causes, it was said: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same thing applies to proceeding *in rem* or seizures in the

Admiralty." The same doctrine has been fully recognized in the High Court of Admiralty in England, as is sufficiently apparent from the *Vrow Judith*, 1 Rob. Adm., 150; the *Adonis*, 5 Id., 256; the *Mars*, 6 Id., 87, and indeed in many other cases, where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.(*a*.) [1]

The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.

*The act of Congress has therefore done nothing [*235 more on this point than to affirm and enforce the general principles of the maritime law and of the law of nations.

The remaining question is, whether the cargo is involved in the same fate as the ship. In respect to the forfeiture under the act of 1819, it is plain that the cargo stands upon a very different ground from that of the ship. Nothing is said in relation to the condemnation of the cargo in the fourth section of the act; and in the silence of any expression of the legislature, in the case of provisions confessedly penal, it ought not to be presumed that their intention exceeded their language. We have no right to presume that the policy of the act reached beyond the condemnation of the offending vessel.

The argument, then, which seeks condemnation of the cargo, must rely solely and exclusively for its support upon the sixth and seventh counts, founded upon the law of nations and the general maritime law. So far as the general maritime law applies to torts or injuries committed on the high seas and within the admiralty jurisdiction, the general rule is, not forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonably allowable, to be enforced by a proceeding therefor *in rem* or *in personam*. It is true that the law of nations goes in many cases much farther, and inflicts the penalty of confiscation for very gross and wanton violations of duty. But, then, it limits the penalty to cases of extraordinary turpitude or violence. For petty

(*a*) See 3 Wheaton's Rep., Appendix, p. 37 to p. 40.

[1] CITED. *Smith* v. *Maryland*, 18 How., 76; *Hay* v. *Railroad Co.*, 4 Hughes, 354.

misconduct, or petty plunderage, or petty neglect of duty, it contents itself with the mitigated rule of compensation in damages. Such was the doctrine recognized by this court in the case of the *Marianna Flora*, 11 Wheat., 1, 40, where an attempt was made to inflict the penalty of confiscation for an asserted (but not proved) piratical or hostile aggression. Upon that occasion, the court said: "The other count" (which was similar to those now under our consideration) "which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh pun-
*236] ishments. Whatever *may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults or common negligence. It may be just in such cases to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law." And the court afterwards added: "And a piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack in a time of peace is not necessarily piratical. It may be by mistake or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or it may be without any just excuse, and then it carries responsibility in damages. If it proceed farther, if it be an attack from revenge or malignity, from a gross abuse of power, and a settled purpose of mischief, then it assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer;" that is (as the context shows), confiscation and forfeiture of the offending vessel.

Now, it is impossible to read this language and not to feel that it directly applies to the present case. In the first place, it shows, that the offending vessel may, by the law of nations, in the case supposed of an attack from malignity, from a gross abuse of power, and a settled purpose of mischief, be justly

subjected to forfeiture. But it is as clear that the language is solely addressed to the offending vessel and was not intended, as of course, to embrace the cargo, even if it belonged to the same owner, and he did not participate in or authorize the offensive aggression. For the court afterwards, in another part of the case, where the subject of the cargo was directly under consideration said, "But the second count" (founded on the law of nations) "embraces a wider range; and if it had been proved in its aggravated extent, it does not necessarily follow that the cargo ought to be exempted. That is a question which would require grave deliberation. It is in general true that the act of the master does not bind the innocent owner of the cargo; but the rule is not of universal application. And where the master is also agent and the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise in the principle of decision." So that the *court studiously avoided [*237 giving a conclusive opinion upon this point. Looking to the authorities upon this subject, we shall find that the cargo is not generally deemed to be involved in the same confiscation as the ship, unless the owner thereof co-operates in or authorizes the unlawful act. There are exceptions founded in the policy of nations, and as it were the necessities of enforcing belligerent rights against fraudulent evasions, where a more strict rule is enforced and the cargo follows the fate of the ship. But these exceptions stand upon peculiar grounds, and will be found, upon a close examination, to be consistent with, and distinguishable from, the general principle above suggested. Many of the authorities upon this subject have been cited at the bar, and others will be found copiously collected in a note in the appendix to the 2d vol. of Wheat., p. 37—40.

The present case seems to us fairly to fall within the general principle of exempting the cargo. The owners are confessedly innocent of all intentional or meditated wrong. They are free from any imputation of guilt, and every suspicion of connivance with the master in his hostile acts and wanton misconduct. Unless, then, there were some stubborn rule, which, upon clear grounds of public policy, required the penalty of confiscation to extend to the cargo, we should be unwilling to enforce it. We know of no such rule. On the contrary, the act of Congress, pointing out, as it does, in this very case, a limitation of the penalty of confiscation to the vessel alone, satisfies our minds that the public policy of our government in cases of this nature is not intended to embrace the cargo. It is satisfied by attaching the penalty to the offending vessel, as all that public justice and a just regard to

private rights require. For these reasons, we are of opinion that the decrees condemning the vessel and restoring the cargo, rendered in both the courts below, ought to be affirmed.

There remains then, only the consideration of the costs, whether the courts below did right in making them exclusively a charge upon the proceeds of the condemned property. Costs in the admiralty are in the sound discretion of the court; and no appellate court should ordinarily interfere with that discretion, unless under peculiar circumstances. Here, no such circumstances occur. The matter of costs is not *per se* the proper subject of an appeal; but it can be taken notice of only incidentally as connected with the principal decree, when the correctness of the latter is directly before the court. In the

*238] present case the cargo was acquitted, and there is no ground to *impute any fault to it. If it had been owned by a third person, there would have been no reason for mulcting the owner in costs, under circumstances like the present, where it was impracticable to separate the cargo from the vessel by any delivery thereof, unless in a foreign port, and no peculiar cause of suspicion attached thereto. Its belonging to the same owner might justify its being brought in and subjected to judicial examination and inquiry, as a case where there was probable cause for the seizure and detention. But there it stopped. The innocence of the owner has been fully established; the vessel has been subjected to condemnation, and the fund is amply sufficient to idemnify the captors for all their costs and charges. We see no reason why the innocent cargo, under such circumstances, should be loaded with any cumulative burdens.

Upon the whole, we are all of opinion that the decree of the Circuit Court ought to be, and it is affirmed, without costs.

ORDER.

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 now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, without costs.

BROCKETT ET AL. *v.* BROCKETT.

Where there are many parties in a case below, it is not necessary for them all to join in the appeal bond. It is sufficient if they all appeal and the bond be approved by the court.[1]

No appeal lies from the refusal of the court below to open a former decree.[2]

But if the court entertains a petition to open a decree, the time limited for an appeal does not begin to run until the refusal to open it, the same term continuing.[3]

Where an appeal is prayed in open court, no citation is necessary.[4]

THIS was an appeal from the chancery side of the Circuit Court of the United States for the District of Columbia.

The case was not reached in regular order, but a motion was made, under the rule, to dismiss the appeal under the following state of facts.

*A final decree was pronounced in the court below on the 10th of May, 1843, from which an appeal was prayed. A petition to re-open the decree was filed during the term, and referred to a master, who reported on the 9th of June following. Upon his report the court refused to open its former decree, and from this refusal, as well as from the original decree, an appeal was prayed, in which all the parties [*239

[1] CITED. *Railroad Co.* v. *Bradleys*, 7 Wall., 578; *United States* v. *A quantity of Tobacco*, 10 Ben., 12; *Rutherford* v. *Penn. Mut. Life Ins. Co.*, 1 McCrary, 123.

The approval may be by a judge out of court. *Hudgins* v. *Kemp*, 18 How., 530; *Sage* v. *Railroad Co.*, 6 Otto, 712. But the power cannot be delegated to the clerk. *O'Reilly* v. *Edrington*, Id., 724; *National Bank* v. *Omaha*, Id., 737. It need not be in writing. *Davidson* v. *Lanier*, 4 Wall., 453. If one of the defendants below have a several interest which is affected by the decree he alone may appeal; if his interest is joint and the other defendants do not desire to appeal, he may appeal alone after a summons and severance. *Todd* v. *Daniel*, 16 Pet., 521; *Forgay* v. *Conrad*, 6 How., 201.

[2] FOLLOWED. *McMicken* v. *Perin*, 18 How., 511; *Brown* v. *Evens*, 6 Sawy., 508.

Thus, where a bill has been taken *pro confesso*, no appeal lies from the refusal of the court to allow an answer to be filed. *Dean* v. *Mason*, 20 How., 198. S. P. *Crandall* v. *Piette*, 1 Oreg., 226.

[3] DISTINGUISHED. *Sage* v. *Central R. R. Co.*, 3 Otto, 418. EXPLAINED. *Wylie* v. *Coxe*, 14 How., 2. FOLLOWED. *Slaughter-house Cases*, 10 Wall., 289; *Memphis* v. *Brown*, 4 Otto, 717. See *Cambuston* v. *United States*, 5 Otto, 287.

[4] FOLLOWED. *Milner* v. *Meek*, 5 Otto, 258. S. P. *Reilly* v. *Lamar*, 2 Cranch, 344; *The San Pedro*, 2 Wheat., 132.

Where by agreement of parties there is full knowledge by the respondent of appellants intention to appeal, a citation may be held unnecessary. *United States* v. *Gomez*, 1 Wall., 690.

The objection of want of a citation is a mere technicality, and a motion to dismiss upon that ground is too late unless made at the first term. *Buckingham* v. *McLean*, 13 How., 150. But the mere presence in court of appellee's attorney, at a subsequent term will not dispense with a citation. *Castro* v. *United States*, 3 Wall., 47. A general appearance by counsel, however, is a waiver of the citation. *United States* v. *Yates*, 6 How., 605; *Buckingham* v. *McLean*, 13 Id., 150.

joined. On the 15th of June, the bond was executed by three of the parties, not being all.

Jones and *Brent* moved to dismiss the appeal on the following grounds, and cited 8 Pet., 526.

1. For irregularity, on account of the failure of the appellants to give the proper appeal bond; the bond given having been executed by only a part of the defendants in the court below, and for other reasons in the record.

2. That notwithstanding said bond may be regular, the appeal ought to be dismissed as to that part taken from the refusal of the court below, to open the final decree made upon the 10th of May, 1843; the said refusal having been made in the discretion of the court below and not "a final decree or order" from which an appeal can be taken.

3. That the parties are not named in the writ of error and citation.

Bradley and *Neale* opposed the motion.

The motion in this case is put upon two grounds. As to the first, the bond, it will be seen by reference to the record that a final decree was rendered on the 10th day of May, 1843, from which an appeal was prayed by all the parties.

During the same term a petition was filed by Robert Brockett to have that final decree opened for certain purposes. And the court referred it to the commissioner. The commissioner made his report, and on the 9th day of June, 1843, the same term still continuing, the court refused to open the final decree; and from this refusal, as also from the final decree of the 10th of May, an appeal was taken, and the court then directed the penalty of the bond. All the parties joined in this appeal also. The bond bears date the 15th June, 1843, and is executed by three of the parties in the decree, and by their sureties.

Under this state of facts the appellants maintain, First, That the bond was properly given, and as the law requires.

*240] *The law requires that all should join in the appeal, but does not direct or require that they should all join in the bond. The whole object of the law in that respect is security. That is a question for the court below; if the security is sufficient, the bond is sufficient.

Second, The appeal was properly taken. The cause was not finally disposed of till the adjournment of the term. All judgments and decrees are under the control of the court during that period, and may be opened or revised.

The petition for the opening of the decree was addressed to

the discretion of the court. The court entertained it. By this the effect of the final decree was suspended. Substantially the decree was not final until the 9th June, 1843.

That appeal was taken, as has been said, to the former decree, and it is clear the Circuit Court did not consider the former decree as final, because they did not direct the amount of the penalty in the bond.

A third point has been suggested as to the writ of error and the citation, and the case in 8 Peters is relied on. The answer is, no writ of error was necessary here, nor citation, because the appeal was taken in open court. The case does not apply.

The cases in 2 Pet., and 7 Id., do not apply. The appeals in these cases were taken by a part, only, of the parties. Besides, Mandeville's was a partnership case.

Mr. Justice STORY delivered the opinion of the court.

A motion has been made to dismiss this appeal upon several grounds. The first is, that although all the defendants have appealed from the decree of the court below, yet a part of them, only, have signed the appeal bond. This objection is not maintainable. It is not necessary that all the defendants should join in the appeal bond, although all must join in the appeal. It is sufficient if the appeal bond is approved by the court, as satisfactory and complete security, by whomsoever it may be executed.

The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decree *was [*241 rendered on the 10th of May, 1843. During the same term, a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given within ten days from this last period.

Another and the last ground of exception is to the want of proper parties to the writ of error and citation. No writ of error lies in this case, but an appeal only; and the appeal having been made in open court, no citation was necessary.

Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled.

WILLIAM A. DROMGOOLE, FREDERICK G. TURNBULL, AND CHARLES A. LACOSTE, PLAINTIFFS IN ERROR, *v.* THE FARMERS' AND MERCHANTS' BANK OF MISSISSIPPI.

A statute of Mississippi allows suit to be brought against the maker and payee, jointly, of a promissory note, by the endorsee. But an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another state, provided the maker and payee of the note both reside in Mississippi.[1]

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern district of Mississippi.

*242] *In 1838, the following promissory note was executed:

2899 50-100 *Princeton, Washington Co., May 17th*, 1838.

On the 1st of January, 1839, we, or either of us, promise to

[1] CITED. *Bank of the United States* v. *Moss*, 6 How., 37, 39; *Watson* v. *Tarpley*, 18 How., 520; *Codman* v. *Vermont &c. R. R. Co.*, 17 Blatchf., 2. S. P. *Coffee v. Planter's Bank of Tenn.*, 13 How., 183. 187.

And this is so even where the payee indorsed the note to the plaintiff for the accommodation of the maker. *Small* v. *King*, 5 McLean, 147.

The rule applies also to non-negotiable notes. *Shuford* v. *Kain*, 3 West. Jur., 294.

But the indorsee may sue an *indorser* notwithstanding the residence of maker and payee in the same state. *Coffee* v. *Planters' Bank, supra; Gaylord* v. *Johnson*, 5 McLean, 448; *Dennison* v. *Larned*, 6 Id., 496.

pay to the order of Briggs, Lácoste and Co., two thousand eight hundred and ninety-nine 50-100 dollars for value received, payable and negotiable at the Planters' Bank of Mississippi, at Natchez.

WILL. A. DROMGOOLE,
F. G. TURNBULL.

The makers and payees were all residents of the state of Mississippi. Lácoste, in the partnership name, endorsed it to the Farmers' and Merchants' Bank of Memphis, the stockholders of which are alleged to reside in Tennessee. The bank brought suit upon it in the Circuit Court of the United States for the district of Mississippi. The suit was brought against Dromgoole and Turnbull as the makers, and also against Lácoste; the junction being permitted by a statute of Mississippi. The defendants pleaded in abatement as follows:

"And the said defendants, who are citizens of the state of Mississippi, in their own proper persons, come and defend the wrong and injury, and say: that the persons composing the commercial firm of Briggs, Lácoste and Co., to whom the said promissory note declared upon was made and delivered at the time of its date and delivery, then were, and are yet, citizens of and resident in the state of Mississippi, and were so at the time of the supposed transfer and delivery of the said promissory note to the said plaintiffs, by reason whereof, this honorable court cannot in law have or entertain jurisdiction of this cause, and this they, the said defendants are ready to verify. Wherefore, the said defendants pray judgment of the said writ and declaration, and that the same may be quashed.

SANDERS, for defendants."

To this plea the plaintiffs demurred, and the court sustained the demurrer. Judgment was accordingly entered for the plaintiffs, and to review the opinion of the court upon the demurrer, the present writ of error was brought.

The case was argued by *Walker* for the appellants, who relied upon the cases in 16 Pet., 86 and 315.

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the southern district of Mississippi.

*The original action was brought by the bank of [*243
Memphis, alleging the stockholders to be citizens of Tennessee, against the plaintiffs in error, (the original defendants,) alleging them to be citizens of Mississippi; and it was founded

upon a promissory note made by Dromgoole and Turnbull, (two of the defendants,) dated at Princeton, Washington county, Mississippi, May 17th, 1838, whereby on the 1st of January, 1839, they, or either of them promised to pay to the order of Briggs, Lácoste and Co., $2,899.50, for value received, payable and negotiable at the Planters' Bank of Mississippi, at Natchez. The declaration alleged title in the bank to the note by the endorsement of the payees, Lácoste using the name and description of Briggs, Lácoste and Co. to them; and the suit was brought jointly against both the maker and the payee, in conformity to a statute of Mississippi, authorizing such a proceeding. The defendants pleaded that they are citizens of Mississippi, and that the persons composing the firm of Briggs, Lácoste and Co. were, and yet are citizens and residents of Mississippi, and were so at the time of the supposed transfer and delivery of the promissory note to the bank. To this plea there was a demurrer and joinder, on which the Circuit Court gave judgment for the bank; and the present writ of error is brought to revise that judgment.

The 11th section of the Judiciary act of 1789, ch. 20, provides, "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 the suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Now, the present case falls directly within the prohibition of this clause. The suit is brought by the plaintiffs to recover the contents of a promissory note of which they are the endorsees of the payee, and the payee and the makers are all citizens of Mississippi. The ground on which the original judgment was given, probably, was that the statute of Mississippi required all the parties to the note to be joined in the suit; and as all the plaintiffs were citizens of Tennessee, and all the defendants citizens of Mississippi, it was a case falling directly within the general provisions of the 11th section of the Judiciary act of 1789, ch. 20, which gives jurisdiction to the Circuit Court in cases where "the suit is between a citizen of the state where the suit is brought, and a citizen of another state." But it has been
*244] already decided by this court, that the statute of Mississippi is of no force or effect in the *courts of the United States, and that independently of that statute no such joint action is by law maintainable. This was decided in *Keary* v. *The Farmers' and Merchants' Bank of Memphis*, 16 Pet., 89. The other point, that the case falls within the prohibition of the 11th section of the Judiciary act of 1789, ch. 20, was as

fully recognized by this court in *Gibson and Martin* v. *Chew*, 16 Pet., 315.

There is nothing then in the present case which is open for argument. The judgment of the Circuit Court of the southern district of Mississippi is, therefore, reversed, and the cause remanded to that court with directions to enter a judgment for the defendants.

ORDER.

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 Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court, to enter judgment for the defendants.

THOMAS GRIFFIN AND HUGH ERVIN *v.* ROBERT THOMPSON.

A marshal has no right to receive bank notes in discharge of an execution unless authorized to do so by the plaintiff. If he does receive such papers, the court, in the exercise of its power to correct the irregularities of its officer, will refuse a motion of the defendant to have satisfaction entered on the judgment, and refuse also to quash a second *fieri facias*.[1]

UPON a certificate of division from the judges of the Circuit Court for the southern district of Mississippi.

This was a motion made by Thomas Griffin and Hugh Ervin to have satisfaction entered on an execution of *fieri facias*, which issued from the clerk's office of the court against them on the 4th day of June, 1840, in favor of Robert Thompson, for the sum of $1,740.02, with interest thereon at the rate of 8 per cent. per annum, from the 7th day of November, 1839, until paid, together with costs. And also to quash an execution of *fieri facias* which issued against them, *in favor of said Thompson, on the same judgment, on the 6th day of November, 1841. [*245

[1] CONFIRMED. *McFarland* v. *Gwin*, 3 How., 717, 720. DISTINGUISHED. *Buckhannan* v. *Tinnin*, *post* *261. See also *Gwin* v. *Breedlove*, *ante* *29.

In support of this motion, the plaintiffs below read in evidence first, an execution of *fi. fa.* numbered 874, which was sued out of the court against Griffin in favor of Thompson on the 1st day of January, 1840, returnable on the 1st Monday of May ensuing, for the sum of $1,740.02 and the costs, this being the amount of a judgment recovered in the court on the 7th day of November, 1839. Upon this execution was endorsed the return of the marshal, dated May the 4th, 1840, setting forth the levy of that process on the 25th of March, 1840, on certain subjects of property, the execution of a forthcoming bond by Griffin with Ervin as surety for the delivery of the property at the day and place of sale, and the forfeiture of the bond by the failure of the obligors to comply with its condition. Accompanying this return is a receipt in these words:

January 2d, 1840. Received on this execution one thousand dollars in post-notes of the Mississippi Union Bank.

WM. M. GWIN, *Marshal.*
By his deputy, JNO. F. COOK.

The plaintiffs next produced in evidence, their forfeited forthcoming bond with the execution of *fieri facias* sued thereon, in favor of Thompson on the 4th of June, 1840, returnable to the 1st Monday of November with the following endorsements and returns thereon, viz.:

Endorsement on Fi. Fa.

No security of any kind is to be taken. This execution is entitled to a credit of one thousand dollars, paid 2d January, 1840, in Union post notes. See marshal's return on *fi. fa.* No. 874, to May term, 1840.

(Signed) WM. BURNS, *Clk.*

Marshal's Return.

Made on this case four hundred dollars, Nov. 3d, 1840. Received balance of this case, in full for costs, &c., say five hundred and fifteen $\frac{30}{100}$ dollars.

WM. M. GWIN, *Marshal,*
Nov. 3d, 1840. By W. L. BATTO, *Dept.*

They then read in support of their motion the execution of *fieri facias* sued forth against them in favor of Thompson, on the 6th day of November, 1841, which execution is the same that the plaintiff in the court below moved to quash. Upon it is the following endorsement:

232

**Endorsement.*

This execution is entitled to a credit of $803.47, paid 3d November, 1840, on *fi. fa.* No. 451, to November term, 1840. No security of any kind is to be taken for balance.

W. H. BROWN, *Clerk.*

Marshal's return, 'stayed by *supersedeas*', received April 1, 1842.

A. MILLER, *Ml.*
By dept. J. S. GOOCH.

They then read in evidence to the court the following receipts which were proved to be signed by, and in the handwriting of, John F. Cook, who at the date of said receipts, and before, was a deputy of William M. Gwin, marshal of the southern district of Mississippi, which receipts are in the words and figures following, to wit.:

Received of Thomas Griffin the sum of eight hundred dollars, to be applied to part payment of an execution obtained *vs.* him at the November term, 1839, of Circuit Court United States as security for I. Griffin, which amount I am to credit said execution with.

W. M. GWIN, *Marshal.*
December 10th, 1839. By his deputy, JNO. F. COOK.

Received of Thomas Griffin the sum of two hundred dollars in Union Bank money, to be applied to a certain execution I hold *vs.* said Griffin, or I am to return the said money to the said Griffin.

JNO. F. COOK.
February 17th, 1840.

The said sums of $800 and $200, mentioned in said receipts constituting the $1000 in post-notes of the Mississippi Union Bank, returned by the marshal as received on 2d of January, 1840, on execution of *fieri facias* herein-before referred to, dated 1st January, 1840.

They also read in evidence to the court the following additional receipts, to wit.:

Thompson
v.
Griffin and Surety. } Circuit Court U. S. *fi. fa.* to Nov. term, 1840.

Received of Thomas Griffin in the above stated case, the sum of four hundred dollars in Louisiana money.

November 3d, 1840. W. M. GWIN, *Marshal,*
Per deputy, JNO. F. COOK.

Received of Thomas Griffin the sum of five hundred dollars, *to be applied to the payment of an execution, [*247

in the hands of the marshal, of *Thompson* v. *Thomas Griffin and sureties.* Wm. M. Gwin, *Marshal,*
November, 1840. By his deputy, Jno. F. Cook.

The said Robert Thompson then, in opposition to said motion, read in evidence to the court, the judgment pronounced at its November term, 1841, quashing so much of the return of the marshal made on the execution of *fieri facias* numbered 874, which issued on the first day of January, 1840, as stated that he had "received on said execution one thousand dollars in post notes of the Mississippi Union Bank," which judgment is in the words and figures following, to wit.:

"Robert Thompson
v.
Thomas Griffin.

Motion by the plaintiff to quash that part of the marshal's return on *fi. fa.* No. 874, to May term, 1840, which is as follows: 'January 2d, 1840. Received on this execution one thousand dollars in post notes of the Mississippi Union Bank.'

"Motion sustained and said marshal's return on said *fi. fa.* quashed, and an alias *fi. fa.* ordered to May term, 1842."

The said Thompson then introduced Joseph Holt as a witness, who being sworn, stated that he was one of the plaintiff's attorneys of record, who obtained the said judgment of $1,740.02 against said Thomas Griffin, at the November term, 1839, of the court; and that as the attorney of record of the said plaintiff, (Robert Thompson,) he had full authority to collect said judgment, and to control the executions which might issue thereon; that supposing the execution on said judgment when issued would come into the hands of the said "Jno. F. Cook," deputy marshal; he had a conversation with him a short time after the judgment was rendered, say some time in the month of November, 1839, in which he notified the said Cook distinctly, that good money would be required to be collected on said judgment, and that he must receive no other kind of money on the execution, when it should come into his hands. That he saw said Cook several times during the ensuing winter, but that he (Cook) never mentioned to him that he had made any collection on said judgment. That the first knowledge or intimation witness had of the receipt of
*248] the $1,000 in post-notes of the Mississippi Union Bank, *mentioned in the return of the said Cook on the execution as collected 2d January, 1840, was in the month of May, 1840, when going into the marshal's office at Jackson, Mississippi, he found the said execution had just been

returned, with the receipt of the $1,000, in post-notes of the Mississippi Union Bank, endorsed thereon as aforesaid.

Witness at once refused to receive said post-notes from the marshal in part satisfaction of said execution, and has ever since refused, and still refuses to receive them. Witness further stated, that at the time referred to, (May, 1840,) said post-notes had greatly depreciated in value, and were not worth more than fifty cents to the dollar, and that on the 17th of February, 1840, said post-notes were worth but seventy-five cents to the dollar. That he immediately entered a motion to quash said return of the said deputy marshal, (Cook,) which motion was sustained by the court at its November term, 1841. Witness further stated that in a conversation he had held with said Thomas Griffin, he (Griffin) had stated that the $800 mentioned in said receipt, dated 10th December, 1839, and the $200 mentioned in said receipt, dated 17th February, 1840, constituting together the $1,000 returned as made on 2d January, 1840, in "post-notes of the Mississippi Union Bank," were paid by him to said John F. Cook, deputy marshal as aforesaid, at times mentioned in the said receipts respectively, in post-notes of the said Mississippi Union Bank. It was also in proof that, on the 10th day of December, 1839, the post-notes of the Mississippi Union Bank were current in the state of Mississippi, and were generally received by the sheriffs and marshal unless instructions to the contrary were given by plaintiffs or their attorneys. It was also admitted that Griffin had no actual notice of the instructions given by the plaintiff's attorney in this case to said John F. Cook, deputy marshal. This was all the evidence offered either in support or in opposition to the plaintiff's motion. Whereupon on the question whether satisfaction should be entered on said execution of *fieri facias*, which was sued out on the 4th of June, 1840, in favor of said *Robert Thompson* v. *Thomas Griffin* and *Hugh Ervin* for the sum of $1,740.02 with interest and costs as aforesaid; and also on the question whether said execution of *fieri facias* which was sued out against the said Griffin and Ervin on the 6th of November, 1841, should be quashed, the judges were opposed in opinion, and the questions were ordered to be certified to this court for decision.

The cause was argued by *Henderson* for Griffin, the defendant in *the original suit below, who had made the [*249 motion to have satisfaction entered on the judgment and to quash the second *fieri facias;* and by *Harrison* and *Holt* for Thompson, the plaintiff below.

Henderson, for plaintiffs.

This was a motion in the court below to have satisfaction entered on a certain execution against the plaintiffs, in the motion which issued against them on 4th June, 1840; and to have a subsequent execution quashed, which was issued on the same judgment, 6th November, 1841, and after said judgment was wholly satisfied, as the plaintiffs in the motion allege.

The first execution issued first January, 1840, for $1,740.02, returnable to May term, 1840, which the marshal returned bonded, and with a credit in these words:

"January 2, 1840. Received on this execution one thousand dollars in post-notes of the Mississippi Union Bank."

After the return, viz., 4th June, 1840, the plaintiff sued out another execution, on which is endorsed by the clerk:

"This execution is entitled to a credit of one thousand dollars, paid 2d Jan'y, 1840, in Union post-notes."

This execution, returned to November term, 1840, bears the marshal's endorsement, as follows:

"Made on this case four hundred dollars, Nov. 3, 1840. Rec'd balance of this case in full, for costs &c., say five hundred and fifteen $\frac{39}{100}$ dollars. Nov. 3, 1840."

On 6th November, 1841, notwithstanding the previous satisfaction, so made and returned, another execution issued, credited only by $803.47, paid 3d November, 1840.

This constitutes the plaintiff's case in the motion, though some receipts and statements of account were presented, substantially in accordance with the foregoing returns of the marshal.

The defendant in the motion then exhibited a judgment of November term, 1841, of the court below, quashing so much of the marshal's return on the first execution, as denoted the receipt of $1,000 Union post-notes, on 2d January, 1840, which judgment was entered, on the now defendant's motion, with the court's order for the execution, which subsequently issued, of 6th November, 1841.

*250] The attorney of the plaintiff in the execution (the defendant in *this motion) testified, that in November, 1839, he informed Cook, deputy marshal, that "good money" would be required.

That he knew nothing of the collection of the Union Bank notes till in May, 1840, and he then refused to receive them.

That in May, 1840, these notes were down to fifty cents in the dollar, and on 17th February, 1840, they were worth but seventy-five cents to the dollar.

Record states it was in proof these notes were current 10th

Dec., 1839, and that the defendants in the execution (plaintiffs in this motion) knew nothing of plaintiff's instruction to Cook, the deputy marshal.

On the case so presented, the court below divided in opinion, whether or not the execution of June 4, 1840, should be discharged as against the defendants therein; and that issued against them of November 6, 1841, quashed.

The sole question presented by the record is, Does the record in its proofs show the defendants, in the executions which issued on January 1, 1840, and June 4, 1840, lawfully paid and discharged them? For if so, the motion in the court below should be sustained.

The record presents no case of the marshal assuming to settle a plaintiff's debt, without a writ authorizing him.

No case of a false return of the execution.

No case of a sheriff's assuming to discharge an execution by an offset of his own debt to the defendant in execution.

No case of taking promissory notes in discharge of an execution.

No case, in our opinion, of the sheriff having seized, or received any thing, in satisfaction of the execution, which the law did not authorize him, in his discretion, to receive in discharge of the writ. We make no question against the adjudged cases upon such and similar facts.

Nor shall we contend, if this motion was against the marshal to pay the plaintiff in execution in lawful coin, he could resist the motion, by showing he had received, in satisfaction of the execution of the defendant, copper coin, or unlegalized foreign coin, or bullion, or Treasury notes of the United States, or bank-notes of the states.

But the first question is, Are not state bank-notes a good tender, if not objected to? All our state courts uniformly decide they are, and so decided this court in 10 Wheat. 347; and *Gwin* v. *Breedlove*, decided at this term.

And bank-notes certainly constitute good and lawful payment, if *received; and the effect of such payment [*251 cannot, for cause of depreciation of the notes before redeemed, or the like, be avoided, and the original demand resorted to; as if promissory notes only had been received. All our state courts decide this principle continually, and so in England. Burr., 457.

These principles of tender and payment in bank-notes, as between debtor and creditor, have never been questioned. Copper coin, Treasury notes, and bank-notes, are the greater part of our currency; and as all society use them as currency, as the law recognises and legalizes their circulation, debtors

may lawfully tender them in payment, and creditors may lawfully receive them, though not legally bound to do so.

The marshal is the plaintiff's agent, who, by his execution, may receive payment of the plaintiff's debt. He who may lawfully receive payment, may have lawful tender of payment made to him. What sophistry can plausibly maintain, that a tender of bank-notes to the principal, and not objected to, is a good tender; or payment in such notes to the principal is a good payment; and yet the like tender, and like payment, is not equally good when made to the agent?

But it is said in this case, the principal forbade the marshal to receive bank-notes. Admit the fact thus; it is also admitted in the record, the defendant in execution, who tendered and paid his bank-notes to the marshal, was ignorant of plaintiff's instruction; and we maintain this fact can only avail the plaintiff in execution as between himself and the marshal, who may have disregarded his instruction. See decision, *Gwin* v. *Breedlove*.

But the marshal's return of satisfaction of the execution in bank-notes, in no state of case, as against the debtor in execution, can be treated as a nullity; and so I understand the intimation of the court in the case of *Gwin* v. *Breedlove*.

But the proof in this case is not, as in the case of *Gwin* v. *Breedlove*, that specie would be required of the officer; on the contrary, the inference is irresistibly otherwise. The testimony of plaintiff's attorney for the execution is, that in November, 1839, he told Cook, the deputy, that "good money would be required." And it is in proof also, that this bank paper was current—was "good"—as late as 10th December, 1840, and no proof it was depreciated before 17th February, 1840, being one and a half months after its payment; while *252] the historical fact is, the bank did not suspend *specie payments till 22d March, 1840. The payment of these notes on execution was 2d January, 1840.

It is in proof, too, that much of the remaining amount due by this execution was paid in bank-notes of the state of Louisiana.

Why then has not the plaintiff in execution sought to have execution for the whole amount of the judgment? Why, but that he has regarded the Louisiana bank-notes "good money" within the meaning of his instructions.

We contend, too, the plaintiff adopted this payment of $1,000 on the first execution of 1st January, 1840, by issuing his 2d execution, of 4th June, 1840, with a credit endorsed of the $1,000 previously paid. The attorney proves he knew the payment of this $1,000 in May, 1840; and in June following

he issued his second execution, adopting the payment by way of credit.

This was after he had told the sheriff he would not receive it, and the legal presumption must be, he had changed his purpose, and that the clerk but obeyed his instructions in proceeding to collect the remainder by a further execution.

This court, as matter of evidence, are bound to regard this act as *prima facie* the act of the party, and a subsequent ratification of the previous payment. In conformity with this legal aspect of the proof, the balance due is returned, fully satisfied on the 2d execution, 3d November, 1840. One year afterwards, November term, 1841, a motion was made and sustained, not against the marshal, but *ex parte* against Griffin, to eradicate and annul to his prejudice a payment made by him twenty-two months before on executions returned finally satisfied one year before. Griffin is not shown to have had any notice of that motion, and is first admonished in April, 1842, by another execution, that his payments were unsatisfactory to the plaintiff. If then the rule of law was, as the plaintiff in execution insists, viz.: that a defendant in execution can make no safe payment of the execution to the sheriff in bank-notes, though the sheriff be content to receive them, unless the plaintiff shall approve such payment as a discharge of the defendant; yet the rigor of such a rule should, in common and equal justice, require the plaintiff to notify his objection to the defendant, so soon at least as the return of the execution shall advise the plaintiff of the manner of its payment. Here the plaintiff slept upon his collection of the defendant, implying his approval (if such approval as to the defendant be necessary), without notice to the defendant, of any exception for nearly two years after execution, *evi- [*253 dencing the objectionable payment was returned; and the plaintiff admits he knew the fact. Must defendants in execution, though not required by the sheriff, always pay in specie, or be subject to traps of this sort for ever after, or how long after?

We consider this case is not governed in any degree by the process act of Congress, of May 19, 1828. The motion in this case now pending, and the motion and judgment therein rendered in the court below, to quash the marshal's return on the execution of January 1st, 1840, are predicated on no statute of Mississippi, nor in conformity to any established rule of proceedings, or of decisions. They are motions of first impression pursued upon general common law principles. In this view of the subject, I notice the case in 5 How. (Miss.), 624. The facts in that case present no proper analogy to this. There

the sheriff was also the defendant. Hence, beside other inconsistencies of his case, he could not avail himself of our position that, as defendant, he paid the sheriff, ignorant that the plaintiff entertained objections to the currency in which payment was made. He, in fact, could not pay himself. It is only by this explanation of the case that the decision can be sustained. The language of the court, then, that "the return was not a legal return, and the plaintiff was not bound by it, unless he had agreed to receive such money or notes in payment," is language only properly predicable of a controversy between the plaintiff and the sheriff, or as in that case against the defendant too, he being the sheriff.

This court, in the case of *Gwin* v. *Breedlove*, in referring to the above case in 5 How. (Miss.), are not understood to mean more by the reference than to show the case not then applicable as a precedent; while it is submitted, as a fair conclusion, whether the principles adopted in the case of *Gwin* v. *Breedlove* do not go to show, this court would not extend the decision of that case beyond its peculiar facts.

This court, in *Gwin* v. *Breedlove*, again declare, as in 10 Wheat., that payment in bank-notes is good, unless objected to. And they apply the declaration of this rule in a case where payment was to the marshal in bank-notes, on execution, where it was in proof that, as between the marshal and plaintiff in execution, he had been forbidden to receive bank-notes; and the integrity of the rule must come to this, or it is no rule as to payments made on execution.

Such payment, received without objection by the sheriff (who undoubtedly has the right to receive payment), must have some recognition *in law, or it is a nullity. And if such payment is a nullity, it is so, whatever the form of return. A payment, therefore, of an execution in bank-notes, with a return "satisfied," will, of course, not prevent the plaintiff from pursuing the defendant with further executions, if he can show that such payment was made in bank-notes; for such payment, if good at all, is good for itself, and not made good or bad according as the sheriff may report the facts in his return. If it can ever be good, it is only so because it is a discharge lawfully made of the defendant's debt.

*254]

The reasoning of the court in *Gwin* v. *Breedlove*, we think, shows that such payment is a good and valid payment, and discharges the debtor in execution, if received without objection by the sheriff; and that such payment, though not binding the plaintiff in his demand against the sheriff, does bar him from further process against the defendant.

The rule of law is, that whatever the sheriff may lawfully take in discharge of an execution, must bar the plaintiff from further execution *v.* the defendant, though plaintiff get nothing from the sheriff. 12 T. R., 207; 4 Mass., 403; 7 T. R., 428; 2 Ld. Raym., 1072.

When a sheriff seizes goods to satisfy an execution, he cannot compel the plaintiff to receive the goods or property in kind (except in cases of extent); and though he waste the goods, the defendant is discharged. Either plaintiff or defendant in execution may controvert, with the sheriff, the truth of his return.

The sheriff is estopped by his own return. The sheriff cannot be heard to testify in disproof of his own return. 3 How. (Miss.), 68.

And, *quære*—Is not the rule universal, that the plaintiff, as to the defendant in execution, is bound and precluded by sheriff's return?

Now, it is in proof, by return on the second execution, of 4th June, 1840, that the marshal received $515.30, as balance in full of debt and cost. Whilst this remains true and uncontradicted, what pretext has the plaintiff for further execution against the defendant? If the balance of the case, in full, for costs and all, have been received by the marshal on the execution, what right has the plaintiff further against the defendant?

And this execution and its return have not been complained of, have not been quashed, or in any way set aside. If it stands, therefore, for any evidence, it is evidence, full and complete, to discharge the defendant, as sought for by his motion in this case.

Harrison and *Holt*, for Thompson. [*255

The motion in this case was on behalf of defendant and sureties, to have satisfaction entered on the judgment, and the last execution of *fi. fa.* which issued, quashed. The plaintiff resists the motion on several grounds. As to the $800 for which a receipt of the deputy marshal (Cook) was produced, dated in November or early in December, 1839, it is insisted that this sum cannot be taken in part discharge of the execution, because it was collected before the execution issued, and of course without warrant of law. The officer derived his power solely from the process, and acting before its existence, his act was unofficial, could not be obligatory on the principal marshal and sureties, or on the plaintiff. The following authorities are full to the point that money collected by an officer after the return day of an execution is no satisfaction of it. 4 Rand. (Va.), 336; 1 Bibb (Ky.), 608; 5 Lit. (Ky.),

19; 2 J. J. Marsh. (Ky.), 29, 30; 5 How. (Miss.), 246. So in 3 Stew. & P. (Ala.), 385—388, it was held that the receipt of money by an officer before an execution issued, was no satisfaction of the *fi. fa.* which afterwards came into his hands.

But it is further urged that neither the $800 received in 1839, nor the $200 received in February, 1840, can be taken in part payment of the execution, because these sums were collected, not in money, but in depreciated post-notes of the Mississippi Union Bank, not only without the assent of the plaintiff, but in direct violation of the instructions of his attorneys.

The command of the process to the officer, was that he should cause to be made so many dollars, which in legal estimation are gold or silver dollars—the constitutional coin of the United States. The special authority thus given, being matter of law, of which all concerned were bound to take notice, could not be departed from to plaintiff's prejudice, without his assent express or implied—neither of which is shown or alleged. This question has been settled repeatedly, by tribunals of the highest respectability. 4 How. (Miss.), 404; 5 Id., 246, 621—624; 9 Johns. (N. Y.), 261, 262; 1 Cow. (N. Y.), 46; 4 Id., 553; 2 J. J. Marsh. (Ky.), 70, 71; 2 N. C., 529; Dud. (N. C.), 356; Mart. (La.) N. S., 205.

Inasmuch as the execution process, and the forms of returns upon it as existing in Mississippi are the creatures of the local laws of that state, it is believed that the decisions of her Supreme Court cited, should be conclusive of the questions involved.

*256] *Mr. Justice DANIEL delivered the opinion of the court.

This court is unable to perceive upon what principle of law either of the objects sought by the motion of the plaintiffs in the Circuit Court could have been accorded to them. It cannot be questioned that the defendant in that motion was entitled to the full benefit and operation of his execution, and these were to cause to be made for him of the goods and chattels, lands and tenements, of his debtor, the sum of $1740,02 of lawful money of the United States. With his claim thus solemnly ascertained of record, we are aware of no authority, from any source, which can compel him to commute it, or to receive in satisfaction thereof any other thing which he shall not voluntarily elect. But least of all should such an authority be recognized in a quarter more fruitful than any other of abuses in its exercise; for instance, from the will either of the debtor, or the officer whose position would enable him in some degree to practice on both creditor and

debtor. To permit either the debtor or the officer to impose upon the creditor the receipt of depreciated paper in payment, would be to permit not merely a repeal of the judgment, but a violation, a virtual abrogation indeed, of the contract on which it was founded;[1] for none can fail to perceive the thousand fraudulent devices for profit or favor which the toleration of such a practice would naturally call into action to defeat the rights of creditors. The courts of justice might thus be made to subserve only the purposes of dishonesty, and be transformed into engines of monstrous wrong. It has been argued in support of this motion, that bank-notes constitute good and lawful payment if received; that as the law recognizes their circulation, debtors may lawfully tender them in payment, and creditors may lawfully receive them though not legally bound to do so. From these postulates it is then attempted to draw the following conclusions: 1. That the marshal is the plaintiff's agent, who by the execution may receive the plaintiff's debt. 2. That he who may lawfully receive payment, may have a lawful tender of payment made to him. 3. That if a tender or payment of bank-notes to the principal, not by him objected to, is a good tender or payment, the like tender or payment to the agent is equally good. This argument, to say the least of it, is wholly untenable. 'Tis undoubtedly true that the creditor may receive either bank-notes or blank paper in satisfaction of his debt, for the reason that his power over that debt is supreme, and he may release it without payment of any kind, if he think proper. But the fallacy of the argument here *consists in [*257 totally misconceiving the situation and functions of the marshal. He is properly the officer of the law rather than the agent of the parties, and is bound to fulfil the behests of the law; and this too without special instruction or admonition from any person. If, then, when commanded to levy a sum of money, he make a return that he has not done this, but has of his own mere will substituted for money depreciated bank-notes, his return is an admission, on oath, that he has both disobeyed his orders and transcended his powers, for legally he has no powers save those he derives from the precept he is ordered to obey. Can it be doubted that upon application from those whose interests are involved in the performance of his duties by the marshal, it is the right and the duty of the court in such a case to correct the irregularities of its officer, and to compel him to perform his duty? There is inherent in every court a power to supervise the conduct of its officers,

[1] QUOTED. *Boyd* v. *Olvey*, 82 Ind., 300.

and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless. The returns of the marshal in this case upon the final process in his hands, showing the receipt by him of depreciated bank-paper in satisfaction of that process which ordered him to collect money, are held to be departures from the performance of his duty as plainly enjoined by the process itself, are deemed therefore illegal and void, and ought, upon the application of the party injured thereby, to have been set aside and annulled by the court. In conformity with the principles herein sanctioned, we therefore order it to be certified to the judges of the Circuit Court for the southern district of Mississippi, that satisfaction should not be entered on the execution of *fieri facias* which was sued out in this case on the 4th of June, 1840, in favor of the said *Robert Thompson* v. *the said Thomas Griffin and Hugh Ervin*, for the sum of $1740.02 with interest and costs; and farther, that the execution of *fi. fa.*, which was sued out against the said Thomas Griffin and Hugh Ervin on the sixth day of November, 1841, should not be quashed; and that the motion of the plaintiff in the Circuit Court should be overruled.

ORDER.

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 Mississippi, 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 agreeably 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 satisfaction should not be entered on the execution of *fieri facias*, which was sued out in this case on the 4th of June, 1840, in favor of the said Robert Thompson against the said Thomas Griffin and Hugh Ervin for the sum of $1740.02, with interest and costs: and farther, that the execution of *fi. fa.*, which was sued out against the said Thomas Griffin and Hugh Ervin on the 6th day of November, 1841, should not be quashed: and that the motion of the plaintiff in the Circuit Court should be overruled. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

*258]

BUCKHANNAN, HAGAN AND CO., FOR THE USE OF GEORGE BUCKHANNAN, PLAINTIFFS, *v.* WILLIAM TINNIN, RALPH CAMPBELL, AND JOHN G. ANDREWS, DEFENDANTS.

If the marshal receives bank-notes in discharge of an execution, and the plaintiff sanctions it, either expressedly or impliedly, he is bound by it, and a motion to quash the return ought to be refused.[1]

THIS case came up on a certificate of division of opinion, from the Circuit Court of the United States for the southern district of Mississippi.

Buckhannan, Hagan & Co. recovered a judgment in the court below against Tinnin, and issued a *fieri facias* on the 16th of December, 1839. A part of the money was received in bank-notes, under the circumstances stated in the motion to quash that part of the return, upon which motion the judges were divided in opinion.

It was as follows:—

This was a motion made by plaintiff in the above entitled case, to quash so much of the marshal's return on an execution of *fieri facias*, which issued from the clerk's office of this court, on the 16th day of December, 1839, in favor of Buckhannan, Hagan and Co., use of George Buckhannan, against William Tinnin, Ralph Campbell, and John G. Andrews, for the sum of $4492. 54, with interest from 23d of May, 1839, until paid, together with costs, as is in the words and figures following, to wit:

* "Received on this execution thirteen hundred dol- [*259
lars, in Union money, 17th February, 1840."

And in support of said motion, said execution of *fieri facias* was read in evidence to the court, which execution of *fieri facias* together with the return and endorsements thereon, which were also read in evidence to the court, are in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Southern district of Mississippi. } ss.

The President of the United States, to the marshal of the southern district of Mississippi, greeting: Whereas, at the May term, 1839, of the Circuit Court of the United States for

[1] See *Griffin* v. *Thompson*, *ante* *244; *Gwin* v. *Buchanan*, 4 How., 1.

said district, George Buckhannan, John Hagan, and Edward Whittlesey, under the firm of Buckhannan, Hagan and Co., for the use of George Buckhannan, recovered judgment against William Tinnin for the sum of $4492.54, with interest thereon at the rate of eight per cent. per annum from the 23d day of May, A. D. 1839, until paid, together with costs and charges by said plaintiffs in and about their suit in that behalf expended, whereof the said defendant was convicted, as appears to us of record. And whereas, on the nineteenth day of June, A. D. 1839, an execution of *fieri facias* issued from our said court, directed to the marshal of said district, for the amount of said judgment, interest, and costs as aforesaid, which execution was levied on certain property of said defendant, which property was suffered to remain in possession of said defendant, upon executing a forthcoming bond according to law, with Ralph Campbell and John G. Andrews as security, which said bond was returned to our said court, at the November term thereof, A. D. 1839, by the marshal aforesaid forfeited, and thereby has the force and effect of a judgment, according to the statute in such case made and provided, as well against the said sureties as against the defendant to said original execution for said debt, interest and costs. Now, therefore, you are hereby commanded, that of the goods and chattels, lands and tenements, of the said William Tinnin, Ralph Campbell, and John G. Andrews, late of your district, you cause to be made the amount of said judgment, interest, and costs, so recovered as aforesaid; also the sum of $89.67 including the costs accrued since the emanation of said execution, and that you have the said moneys before our said Cir-

*260] cuit Court, at a term to be held on the first Monday of May *next, to render to the said plaintiffs; and have, also, then and there this writ.

WITNESS the Honourable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Jackson,
[L. S.] the first Monday of November, A. D. 1839, and in the 64th year of the independence of the United States.

Issued the 16th day of December, 1839.

WM. BURNS, Clerk.

Endorsed. "No security of any kind is to be taken."

WM. BURNS, Clerk.

Marshal's Return.

Received on this execution thirteen hundred dollars in Union money, 17th February, 1840, and balance suspended by order of plaintiffs.

W. M. GWIN, *Marshal*,
By J. F. COOK *Deputy*.

	Fees.	
Com'n $1300 . . .	$19 00	
½ com's on $3282 21 . . .	34 32	
Levy, ent'g and ret'g . .	6 50	
Mileage	1 50	
		$61 32

It was admitted that the words "Union money," in said return, signified notes of the Mississippi Union Bank, and that on the 17th day of February, 1840, said notes were worth but seventy-five cents to the dollar.

Which was all the evidence offered on the trial of said motion, which motion was contested by the said William Tinnin, Ralph Campbell, and John G. Andrews; and on the question, whether that portion of said marshal's return, which is in the words and figures following, to wit:

"Received on this execution thirteen hundred dollars in Union money, 17th February, 1840," should be quashed, the judges were opposed in opinion, which is ordered to be certified to the Supreme Court of the United States for decision.

The cause was submitted upon printed argument by *Duncan* and *Holt*, for the plaintiffs in the court below.

On a certificate to the Supreme Court, from the judges of the *United States Circuit Court for the [*261 southern district of Mississippi, that in this case they were opposed in opinion.

Upon a *fieri facias* from said court in favor of the plaintiffs against the defendants, dated 16th December, 1839, returnable on the first Monday in May, 1840, the marshal, on the 17th day of February, 1840, without the assent of the plaintiffs, received $1300 in notes of the Mississippi Union Bank, then depreciated 25 per cent.

The marshal returned that he had received Union money; and the plaintiffs moved to quash so much of the return; and it was admitted on the trial that the Union money was bank-notes of the Union Bank, and that those notes were depreciated twenty-five per cent. The District Court had uniformly quashed such returns, and the Supreme Court of the state has repeatedly quashed such returns. The circuit judge, differing in opinion, brings the question before this court.

Plaintiffs argue that the marshal had no right to receive any property in discharge of the execution, because the process required him to make money. The authority of the marshal was special, and derived from the law of the land, and the defendants and all others had notice of the extent of the

powers delegated by the law to the officer; and if he took any thing but dollars, which in legal intendment must be gold and silver, he was abusing his trust and acting without authority. The marshal was bound to bring into court the dollars, not property.

Plaintiffs rely on the following authorities: 4 How., 404; 5 Id., 246, 621–624; 9 Johns. (N. Y.), 261, 262; 1 Cow. (N. Y.), 46; 4 Id., 553; 2 J. J. Marsh. (Ky.), 70, 71; 2 N. C., 529; Dud. (N. C.), 356; Martin's L. Acts, 205.

Upon the manner of executing process, and the forms of process and returns, and their effects in any state, the decisions of the Supreme Courts of such state are entitled to great weight, if not conclusive.

Mr. Justice DANIEL delivered the opinion of the court.

The principles ruled in the case of *Thompson* v. *Griffin* and *Ervin* as those which define the duties and should govern the conduct of the marshal in levying executions committed to his hands, have been here again considered and approved. They would be decisive also of the case now under consideration, but for two points of difference between this and the case of *Thompson* v. *Griffin et al.* These two points arise, 1st, upon the time intervening between the return of the marshal and the plaintiff's motion, as tending to show an *acquiescence by the plaintiff; and, secondly, upon the additional evidence in this case amounting to proof of approbation or sanction by the plaintiff, express or implied, of the conduct of the marshal. In *Thompson* v. *Griffin et al.*, application was made to the court at the earliest practicable period to set aside the marshal's return, and there was throughout no fact or circumstance tending to show a recognition, by the party, or a moment's acquiescence by him in the irregularity complained of. In the present case, the return of the marshal showing the receipt by him of the depreciated bank-notes bears date on the 17th February, 1840; the motion to quash was made in May, 1842. Thus an interval of more than two years was permitted to elapse between the return and the motion; a period during which the party must be presumed to have been cognisant of the return, a public and official proceeding to be found amongst the files and records of the court to which access might at all times have been had. If this fact stood alone, unassociated with and unexplained by any other, it would of itself imply at least, on the part of the plaintiff, laches and negligence in the prosecution of his interests, if not an assent by him to the acts of the officer. This fact of time, however, is by no means solitary or isolated in the evi-

*262]

dence in this cause. The language of the return certainly imports no objection by the plaintiff or by any other to the receipt of the $1300, or to the medium in which they were collected: so far from this, when taken altogether, that language strongly implies, if it does not directly declare, that the plaintiff, or whosoever he was that took control of the matter, approved of the proceeding so far as it had gone, and objected only to a collection of the residue of the execution at that time. It should not be lost sight of either, in construing this language, that no exception to any one kind of medium, or preference for any other, is indicated in the inhibition as stated; it is a simple direction to proceed no farther. It cannot be objected to the return in question, that it is the act or declaration of the officer whose conduct in making it is impeached. Although the act of that officer, it is a sworn return, and must stand until falsified. It is introduced by the plaintiff himself in support of his motion; is indeed the only evidence he has adduced to sustain it: he relies on this return, and in so doing must take it entire; he cannot be permitted to garble it. The return must be received as stating the truth. It must be received in all its parts; and if so, it comes (especially when viewed in connection with the interval between the dates of that return and of the motion in this *case,) [*263 on the part of the plaintiff, an acquiescence if not a direct sanction, which, at this day, this court is unwilling to disturb. Great wrong might, by so late an interference, be visited upon the officer, who may have been reposing upon the conduct of this plaintiff; and the danger of a result like this is enhanced by the total absence of any thing like proof to show that the plaintiff ever refused to receive the amount collected by the marshal, and may not have actually received and applied it to his own use, or at what rate of value if so received. This court is of the opinion upon the case certified to them, that the return of the marshal of the 17th of February, 1840, should not, under the facts disclosed in this case, be quashed.

ORDER.

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 Mississippi, 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, agreeably 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 return of the marshal

of the 17th of February, 1840, should not, under the facts disclosed in this case, be quashed. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JOHN MURPHY AND JOHN DARRINGTON, ADMINISTRATORS OF WILLIAM MATHESON, DECEASED, PLAINTIFFS IN ERROR, *v.* ANGUS STEWART, ADMINISTRATOR OF ALEXANDER GRANT.

The court below, on motion, arrested a judgment for the plaintiff, after verdict, but without entering also that he took nothing by his writ. The declaration contained two counts; in the first, the plaintiff sued as administrator; and in the second, in his own personal right. A general verdict was given, and the judgment arrested on account of the misjoinder of counts. Afterwards, and before a writ of error was brought, a motion was made by the plaintiff to set aside the order arresting the judgment, and for leave to enter a *nolle prosequi* upon the second count. An affidavit was filed by the
*264] plaintiff's counsel, stating that the only evidence offered on the trial was given on the part of the plaintiff, and that the defendant *offered no evidence whatever. The nature of the evidence was also stated, and the facts stated in the affidavit were not controverted. The court below set aside the order arresting the judgment, a year after it was made, and allowed the verdict to be amended by entering the same *nunc pro tunc*, on the first count only. *Held* no error.[1]

All that is required is that the court should amend the verdict within a reasonable time; and this may be done upon the judge's notes of the evidence given at the trial or upon any other clear and satisfactory evidence. The practice is a salutary one and in furtherance of justice.[2]

The necessity of a profert of letters of administration depends upon the local laws of a state.

Where the declaration alleges a partnership, and the jury find a general verdict, they must be presumed to have found that fact; and proof that the chose in action was endorsed in blank was sufficient to sustain the first count. The plaintiff has a right to elect in what right he sues.

After all, the question of amendment was a question of discretion in the court below, upon its own review of the facts. This court has no right or authority, upon a writ of error, to examine the question; it belonged appropriately and exclusively to the court below.[3]

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[1] FOLLOWED. *Washington &c. S. P. Co.* v. *Sickles*, 24 How., 345. CITED. *Bank of the United States* v. *Moss*, 6 How., 37, 39; *Sheppard* v. *Wilson*, Id., 278.

[2] APPLIED. *Insurance Co.* v. *Boon*, 5 Otto, 126. CITED. *Roulo* v. *Valcour*, 58 N. H., 347.

The court may amend clerical errors in its own records, without notice to the parties, and in their absence, even after a great lapse of time. *Cromwell* v. *Bank of Pittsburg*, 2 Wall. Jr., 569.

[3] CITED. *Davis* v. *Township of Delaware*, 13 Vr. (N. J.), 517. S. P. *Morsell* v. *Hall*, 13 How., 212; *Turner* v. *Yates*, 16 How., 14; *Early* v. *Rogers*, Id., 599; *Spencer* v. *Lapsley*, 20 How., 264; *Williams* v. *Gibbes*, Id., 535; *Cheang-Kee* v. *United States*, 3 Wall., 320. See *Slicer* v. *Bank of Pittsburg*, 16 How., 571; *Sheets* v. *Selden*, 7 Wall., 416.

THIS cause was brought up by writ of error from the Circuit Court of the United States for the southern district of Alabama.

In 1818 and 1820, the following promissory note and due-bill were given:—

$3,428.18. *30th September*, 1818.

Four months after date I promise to pay Grant and McGuffie, or order, three thousand four hundred and twenty-eight dollars eighteen cents, value received. WM. MATHESON.

Endorsed,

GRANT and MCGUFFIE.

Charleston, *25th February*, 1820.

Due Grant and McGuffie, or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date.

$344.66. WILLIAM MATHESON.

In 1838, Angus Stewart as the administrator of Grant, who was alleged to be the surviving partner of Grant and McGuffie, brought a suit in the Circuit Court of the United States for the southern district of Alabama against Murphy and Darrington, administrators of Matheson.

The record (as brought up by a *certiorari*) showed that the declaration contained the two following counts, first:—

*Angus Stewart, who is a citizen of the state of South Carolina, and administrator of all and singular [*265 the goods and chattels, rights and credits, of Alexander Grant, deceased, who was survivor of McGuffie, late merchants and partners, trading under the name and firm of Grant & McGuffie, who at the time of their death, and at the time of the execution of the contract herein set forth, were also citizens of the state of South Carolina, complains of John Murphy and John Darrington, administrators, with the will annexed, of William Matheson, deceased, citizens of the state of Alabama, in custody, and so forth, in a plea of trespass on the case, and so forth; for that, whereas the said William Matheson, in his lifetime, on the 30th day of September, 1818, at Charleston, to wit, in the district aforesaid, made his promissory note in writing, by which he promised to pay said Grant & McGuffie, or order, four months after the date thereof, $3,428.18, value received, and then and there delivered said note to said Grant & McGuffie; and also, on 25th February, 1820, said Matheson executed his due-bill, or promissory note, at Charleston, to wit, in district aforesaid, by which he promised to pay said Grant & McGuffie, or bearer, on demand,

$344.66, with interest from the date of said note; which periods have long since elapsed; and being so liable, he, the said Matheson, in his lifetime, and his said administrators since his death, promised and assumed to pay to said plaintiff the said sums of money, to wit, the sums of $3,428.18 and $344.56, according to the tenor and effect of said notes; yet neither the said Matheson, in his lifetime, nor his said administrators since his death, have paid the said several sums of money, according to their several promises and assumptions, and the tenor and effect of the said notes, either to said Grant & McGuffie, in their lifetime, or to said administrator since their death, to the damage of said administrator $16,000.

The second count was as follows:—

And whereas, also, the said Angus Stewart complains of said defendants, administrators as aforesaid, in custody, &c.; for that whereas the said William Matheson, on the 30th September, 1818, at Charleston, &c., made his certain promissory note, in writing, whereby he promised to pay, four months after date thereof, to one Grant & McGuffie, or order, $3428.18, and then and there delivered the said note to Grant & McGuffie; and the said Grant & McGuffie, to whose order the said note was payable, then and there endorsed and delivered
*266] the same to the said plaintiffs, of all which *the said Matheson had full notice; which period has now elapsed. And the said Matheson also, on the 25th February, 1820, at Charleston, aforesaid, &c., made his note in writing, whereby he promised to pay to Grant & McGuffie, or bearer, on demand, $344.66, with interest from the date of the said note, and then and there delivered the same to said Grant & McGuffie, who then and there delivered the same to the said Angus Stewart. And the said note being due and demanded in the lifetime of the said Matheson, he was liable to pay the same; and being so liable, the said Matheson, in his lifetime, undertook and promised to pay the same, and his administrators since his death; but neither did the said Matheson, in his lifetime, nor have his administrators since his death, paid the said sums of money, according to their several promises, and the tenor and effect of the said notes, although said Matheson in his lifetime was, and his administrators have been, since his death, frequently requested to do so, to the damage of the said plaintiff $16,000; and thereof he brings suit, &c.

To this declaration the plaintiffs in error, Murphy and Darrington, put in two pleas, viz.: the general issue and the statute of limitations.

The case was tried at November term, 1840, when the jury found for the plaintiff, and assessed his damages at $8,250.

At the same term, a motion for arrest of the judgment was made and granted, on the ground of a misjoinder of counts and causes of action in the declaration.

At March term, 1841, nothing was done in the case; but in the November term, 1841, on motion of the counsel for the plaintiff, the order of the November term, 1840, arresting the judgment was vacated, the verdict was ordered to be amended so as to apply to the first count in the declaration, the plaintiff was permitted to enter a *nolle prosequi* on the second count in the declaration, and judgment was directed *nunc pro tunc* upon the verdict, applying it to the first count in the declaration; and judgment was entered accordingly.

The ground upon which the court set aside the order arresting the judgment, &c., was the following affidavit, which was filed, accompanied by the deposition of Chapman Levy, which was the same that was read upon the trial. The deposition is too long to be inserted, but stated in substance that the notes and due-bill were handed to Levy for collection in 1821 or 1822, and that long afterwards he, Levy, had a conversation with Matheson, which was supposed to take the case out of the statute of limitations.

**Affidavit.* [*267

Personally appeared before me, P. Phillips, an attorney of this court, who, being duly sworn, says: that on the trial of the cause of *Angus Stewart* v. *John Murphy* and *John Darrington*, in which a verdict was rendered for the plaintiff at the November term, 1840, of this honorable court, the plaintiff offered the depositions of Chapman Levy, Jacob Axon, and —— McKenzie, and the notes, all of which are now on file; that this was the only evidence offered by plaintiff, and that no evidence was offered by the defendants, and that the cause went to the jury upon the above depositions of the plaintiff alone.

P. PHILLIPS.

Sworn to and subscribed in open court, 3d December, 1841.

DAVID FILES, *C. C. C. S. D. Ala.*

To review the decision of the court in setting aside the order for arresting the judgment, &c., the writ of error was brought.

Ogden, for the plaintiffs in error.
Nelson, (attorney-general,) for the defendants in error.

Ogden, for the plaintiffs in error, contended that the motion

to amend the verdict, by making it apply to the first count in the declaration, should have been made during the same term in which the verdict was rendered, or at any rate at the next term: and that the court below should not have ordered the amendment at the second term after the verdict was rendered. He stated that he had been able to find no case where such a motion has been granted or made after the term in which the postea was returned to the court in bench. See 12 Pet., 492; 1 Sid., 162.

But, secondly, if it was competent for the court at so late a day to order the verdict to be amended, by making it applicable to the first count in the declaration, then we contend that there was not sufficient in that count to justify a judgment in favor of the plaintiff upon it; because,

1. This count of the declaration does not sufficiently allege a partnership between Grant & McGuffie, nor that Grant was the survivor of them, which allegation is necessary to entitle the plaintiff to recover.

2. It alleges a promise by Matheson in his lifetime, and by his administrators since his death, to pay the plaintiffs the money according to the promises made to Grant & McGuffie in their lifetime; and that yet neither the said Matheson in his lifetime, nor his said *administrators since his death, *268] have paid the said sums of money, either to Grant & McGuffie in their lifetime, nor to the said administrator since their death, to the damage of the said administrator $16,000.

The allegation is, that Matheson in his lifetime, and his administrators since his death, promised to pay the plaintiffs the sums of money mentioned in the declaration. Now, who is meant by the plaintiffs? Not Grant and McGuffie, for they are both dead. The only plaintiff is Angus Stewart, the administrator. There is, then, no allegation of a promise to pay Grant & McGuffie, nor the survivor of them; without such a promise no action can be brought by the administrator.

3. There is no profert of the letters of administration. This defect is, however, probably cured by the verdict.

But independent of the defects in the declaration, there was no evidence in the case justifying a verdict for the plaintiff upon this count in the declaration.

1. There is no sufficient proof of the partnership between Grant & McGuffie.

The only evidence upon this subject is found in the deposition of Chapman Levy.

He says, I was acquainted with McGuffie, of the firm of Grant & McGuffie, "who were said to have a mercantile house in Charleston, South Carolina."

And "Matheson told him, the witness, that he would not forget the kindness of Mr. McGuffie, and the assistance he had received from the firm through him."

The plea of the general issue puts all the material allegations in the declaration in issue.

If, therefore, there be not sufficient proof of a partnership between Grant & McGuffie, the plaintiff is not entitled to recover under this count.

Again, there is no proof of the death of Grant & McGuffie, or of either of them.

The only evidence upon this point is contained in the deposition of Levy; he says, "I believe I was then informed of the death of one or both Grant and McGuffie."

It is confidently believed that this is no evidence of the death of Grant and McGuffie, or of either of them, and certainly it is no proof of the fact which was the survivor of them.

*I submit, then, that there was no evidence to support [*269
the verdict upon the first count of this declaration.

But, secondly, if any count was supported, it was the second count—

1. The notes offered and read in evidence.

The large note payable to Grant and McGuffie, or order, is charged in this count to have been endorsed by them to the plaintiff Angus. The note is produced and read in evidence, and is endorsed by Grant and McGuffie. This endorsement is in law an assignment to the plaintiff, and after such endorsement Grant and McGuffie had no interest in the note.

This second count states that the smaller note payable to Grant and McGuffie, or bearer, was afterwards delivered by them to the plaintiff, who thereupon became the bearer thereof, and, as such, entitled to the moneys due upon the said note.

It is manifest that the evidence in the case was sufficient to maintain this second count, if either count was supported by the evidence.

If I am right here, the court below erred in ordering the verdict to be amended so as to make it applicable to the first count in this declaration—under the evidence in the case, the verdict cannot be applied to the first count in the declaration.

But it is contended that this case does not come within the rule by which a plaintiff is permitted to enter the verdict as upon one count in his declaration, and to enter a *nolle prosequi* upon the other counts.

This is a declaration stating two separate and distinct grounds of action, in two distinct and different parties. First,

in the administrator of Grant, as the surviving partner of Grant and McGuffie, and second, in Angus Stewart, in his own right. The counts are wholly inconsistent with each other; if the administrator of Grant has a right to recover, Augus Stewart, in his individual capacity, can have no such right. This is not like the case of an action of slander, in which the declaration contains several counts upon different words spoken, the words in some of the counts being actionable, in others not; and where evidence was given only upon the counts on the actionable words.

Upon this point, I refer the court to the following cases, with only one single observation upon them: the evidence in this case being the notes upon which the suit was founded, was evidence under both counts in the declaration. *Holt* v. *Scholefield*, 6 T. R., 691.

*270] *In an action for slander, the declaration contained three counts upon the general issue being pleaded; the cause was tried, and the jury found a general verdict for the plaintiff for fifty pounds.

The first count in the declaration was for words not actionable in themselves; the words in the other counts were actionable.

A motion was made to arrest the judgment, because the damages were general upon all the counts.

The counsel for the plaintiff insisted that the judgment could not be arrested *in toto* but there must be a *venire de novo*, or the verdict may be amended by the judge's notes, and entered upon the good counts.

The court were of opinion that there should not be a *venire de novo*, and that as the damages were entire, the judgment must be arrested *in toto*.

Lawrence, Justice, said "that the plaintiff ought not to be at liberty to amend by the judge's notes in the case, because the evidence applied as well to the bad as to the good counts." *Edwards* v. *Hopkins*, Doug. 361.

In *assumpsit*, the declaration contained several counts—some upon promises made by the testator, others on promises made by the defendants themselves. To the first set of counts *plene administravit* was pleaded, and the general issue as to the others.

The jury found for the plaintiffs with £147 damages, and a general verdict was entered.

The solicitor-general obtained a rule to show cause why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered—viz.: judgment *de*

bonis testatoris on those where the promises were said to be by the testator; and *de bonis propriis* on the others. Baldwin, for the plaintiffs, afterwards obtained a cross-rule for the defendants to show cause why the postea should not be amended by the judge's minutes, and a verdict entered for the plaintiffs only on the counts to which the evidence given at the trial applied, and for the defendants on the other counts.

Buller, Justice, said that there was this distinction, that if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on these counts; but, if there was any evidence which applied to the other bad or inconsistent counts, (as if, for instance, in an action for words, where some actionable words *are laid, and some not actionable, and evidence given [*271 of both sets of words, and a general verdict,) then the postea would not be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them; that, in such a case, the only remedy is by awarding a *venire de novo*.

The rule to arrest the judgment was discharged, and the other rule made absolute, but upon the payment of costs, including those on the motion in arrest of judgment.

The case of *Bois* v. *Bois*, 1 Lev., 134, was an action for slander. The declaration contained two counts. The words laid in one of the counts were actionable, in the other not.

The damages being entire, judgment was stayed.

Petrei, executor of Stuble v. *Hannay*, 3 T. R., 659.

This was an action for money paid by the plaintiff as executor, and also for money paid by the testator to the use of the defendant, for money had and received by the defendant to the use of the plaintiffs as executors, and for money had and received to the use of the testator, in separate counts; there were two pleas, the general issue and the statute of limitations. A verdict having been found for the plaintiff generally on the first issue, and no notice taken of the last, the defendant brought a writ of error to the House of Lords on two grounds, that no verdict was given on the second plea, and that two separate demands could not be joined in one action.

The plaintiff then obtained a rule to show cause in the King's Bench, why he should not be at liberty to amend according to the judge's notes, by adding a verdict for him upon the second plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their use.

Buller, Justice, in delivering the opinion of the court, said,

such amendments have frequently been permitted. The entering the verdict was a slip of the clerk in not entering the verdict for the plaintiffs on the second plea. As to the second objection, he said he was clearly of opinion that it was not error, for though an executor when suing for a debt due to the testator, would not join a debt due to himself in his own right, yet it was the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor as made.

*272] In the case of *Hooker* v. *Quilter*, 2 Str., 1271, there were three *counts in the declaration as executrix, and the fourth was for the use and occupation of the plaintiff's house. Judgment by default in K. B. and reversed in error.

Per curiam. There being no verdict, we can presume nothing, but that the fourth count is, as it appears, in her own right, which cannot be joined with the others, and the damages are entire.

This case of *Hooker* v. *Quilter* is more fully and better reported in 2 Wils., 171, *vide* this report.

Nelson, (attorney-general,) for the defendants in error.

It is objected:

1st. That the case does not fall within the rule by which a plaintiff is permitted to enter the verdict as upon one count in his declaration, and to enter a *nolle prosequi* upon the other counts.

2d. That conceding the case to be within the rule, the court below erred in vacating the order to arrest the judgment of November term, 1840, because of the lapse of time; and

3d. That there was no evidence in the case by which a verdict on the first count in the declaration, upon which the final judgment was rendered, could be supported.

As to the first objection: There are two classes of cases in which a verdict may be amended by the notes of the judge, or other evidence, so as to avoid the objection to the sufficiency of the declaration of the plaintiff. The first, where there is a general verdict, and the counts are consistent, although some be bad; the second, where the counts are inconsistent, although severally good. In the one case, all that is necessary to be shown to make the rule applicable is, that the evidence applied to the good as well as to the bad counts. In the other, it must be shown that the evidence applied exclusively to the count upon which the verdict is sought to be rendered. 19 Wend. (N. Y.), 628, *Lusk* v. *Hastings*.

The present is a case falling within the second class—of

inconsistent counts—in which the judgment was arrested for misjoinder. To justify the order of the court, therefore, all that is necessary to bring the case within the rule, is to show that the evidence offered below was exclusively applicable to the first count of the plaintiff's declaration.

This will be done in the discussion of the 3d objection. Assuming for the present that it is so, the following cases will make it clear that the case under review falls within the rule.

**Eddowes et al.* v. *Hopkins et. al., executors of Harris*, 1 [*273 Doug., 376, which establishes the principle that "where there is a general verdict on a declaration consisting of different counts, some of which are inconsistent or bad in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes."

Williams v. *Breedon*, 1 Bos. & P., 329, "where evidence has been given on a bad count as well as on a good count, if it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only."

The cases of *Knightley* v. *Briel*, 2 Mau. & Sel., 533, and *Doe* v. *Perkins*, 3 T. R., 749, maintain the same well-established doctrine.

As to the second objection: The character of the case having been thus shown to be such as to bring it within the rule for amendment, the second inquiry is, whether the lapse of time interposed any obstacle to the exercise of the power by the court.

That it did not, will be demonstrated by the following cases:

Doe v. *Perkins*, 3 T. R., 750, in which the court use this strong language, "for that, according to the practice of amending by the judge's notes, which was of infinite utility to the suitors, and was as ancient as the time of Charles the First, the amendment might be made at any time."

Addington v. *Allen*, 11 Wend. (N. Y.), 421, and Chancellor Walworth's opinion in the same case, 384, 385.

Same case 12 Wend. (N. Y.), 215.

So also in the case of *John Barnard* v. *John Whiting et al.*, 7 Mass., 358, the same principle is directly affirmed.

And in the case of *Noah Clark* v. *Ezekiel Lamb, executor, &c.*, 8 Pick. (Mass.), 415, Wilde, Justice, satisfactorily reviews the English and American authorities upon this question, and in a strong case maintains the existence of the power asserted by the court below in rendering the present judgment.

As to the third objection: The authority to vacate the order therefore existing, the remaining inquiry is, whether,

upon the matter appearing in the record, the verdict was properly applied, and the judgment rendered upon the first count of the declaration.

The first objection taken by the plaintiffs in error on this point is to the form of the declaration. To this it is only neces-
*274] sary to reply, that the irregularities to which exception is taken, if they exist, which *is by no means conceded, are cured by the verdict. There is enough apparent upon the first count of the declaration to show the nature and extent of the demand.

The partnership is expressly averred between Grant and McGuffie—the survivorship of Grant—the promise to pay Grant and McGuffie—the promise to pay the plaintiff, administrator of Grant, not plaintiffs, (see amended record returned with *certiorari*,) and the very instruments recited in the declaration contain the promise of Matheson to pay Grant and McGuffie, &c.

But it is said that there is no profert of the letters of administration. None such was necessary; and if it was, it is conceded that the omission is cured by the verdict.

It is likewise said that there was no evidence in the case justifying a verdict for the plaintiff upon this count in the declaration—

1st. Because there is no sufficient proof of the partnership between Grant and McGuffie; the only evidence, it is said, being that found in the deposition of Chapman Levy.

If this were so, it is submitted that it would be abundantly sufficient; at any rate, it was testimony to go to the jury, who by their verdict have affirmed its sufficiency.

But is it true that this is the only evidence? The note and due-bill executed by Matheson were given to Grant and McGuffie jointly, and whether general partners or not is a matter of not the slightest importance. Matheson himself, by the execution of the instruments, admits them to be jointly entitled to their contents, and that admission, coupled with the declaration deposed to by Levy, conclusively shows them to have been partners.

2. It is alleged that there is no proof of the death of Grant and McGuffie, or either of them, and the testimony of Chapman Levy is again referred to as being insufficient. To this objection the answer given to the last may be repeated—the evidence was for the jury, and their verdict excludes all inquiry into its sufficiency.

But was the question, in the state of the pleadings, open before the jury? Or, was it incumbent upon the plaintiff below to offer any evidence to show the death of Grant

and McGuffie. He sued, as the administrator of Grant, the survivor of McGuffie. To his declaration, in that character, the defendants plead the general issue, and they thereby admitted the character in which the plaintiff sued. 1 Pet., 450; Peake's Evidence, 342; 2 Ld. Raym., 824; 3 Day, (Conn.), 303; 2 Dall., 100; 4 Bibb, (Ky.), 391; 6 Mon. (Ky.), 52, 59.

*Besides, the grant of administration to the plaintiff [*275 was evidence of the death. Greenleaf's Evidence, 587; 10 Pick. (Mass.), 515.

It is further objected, that if any count in the declaration was supported, it was the second count, and that because of the averments of the plaintiff in the second count of his declaration. But these averments are not evidence. They are but the mode of stating the plaintiff's cause of action, and the proper subject of inquiry is, what was the state of the proof as shown by the record.

In reference to this it is said, that the note produced in evidence is endorsed by Grant and McGuffie. But that endorsement is in blank, and transfers no property in the note. Until the blank is filled up, which a holder for value might at any time do, the legal title to the note remained in the payees. The motive of the endorsement too is apparent, having been doubtless made when it was transmitted to Mr. Levy for collection; and the possession of the due-bill payable to bearer, by the plaintiff, was in virtue of his character as administrator.

To negative the idea of a legal transfer by a blank endorsement, the counsel for the defendant in error refers to the following cases: 2 Str., 1103; 1 Ld. Raym., 443; 1 Comyns, 3111; 2 Burr., 1227; 5 Har. & J. (Md.), 115; 6 Id., 140, 527.

But it is insisted by the defendant in error that the amendment allowed, assuming, what is supposed to be unquestionable, that the evidence supports the judgment rendered, is nothing more than the exercise of a discretion by the court, and therefore not a fit subject of review in a court of error. *Marine Insurance Co. of Alexandria* v. *Hodgson*, 6 Cranch, 206; *Welch* v. *Mandeville*, 7 Cranch, 152; *Walden* v. *Craig*, 9 Wheat., 576; *Chevrac* v. *Rheinecker*, 11 Id., 280; *Ex parte Bradstreet*, 7 Pet., 647; *Life Insurance Company* v. *Wilson's heirs*, 8 Id., 306; the same, (Jones *arguendo*,) 302.

Ogden, in reply.

It is contended, on the part of the plaintiffs in error, that there was no sufficient proof of the partnership betwee1

Grant and McGuffie, and that there is no proof of the death of Grant and McGuffie, or of either of them; that this partnership and death and the survivorship of Grant are material allegations in the declaration, and are all put in issue by the plea of the general issue.

*276] To this it is answered by Mr. *Nelson*, that there was evidence enough * "to go to the jury, and by their verdict they have affirmed its sufficiency."

It is contended that there was no legal evidence of a partnership between Grant and McGuffie upon which the jury would be warranted to find its existence.

In page 12 of the case, Levy says: "I was acquainted with Mr. McGuffie, of the firm of Grant and McGuffie, who were said to have 'a mercantile house in Charleston.'" This is no evidence of the existence of any such house in Charleston. It is at best mere hearsay, and does not amount to a general reputation, which might have been sufficient evidence to have justified the verdict of the jury. But the attorney-general seems to suppose that the note having been given by Matheson to Grant and McGuffie jointly is an admission of the co-partnership between those gentlemen.

The note being given to Grant and McGuffie may amount to an admission that he was indebted to such a firm, but it by no means amounts to an admission as to who were the persons composing that firm. The general issue denies that the persons who are alleged in the declaration were the persons composing the firm; it was necessary, therefore, for the plaintiff below to have proved his allegation upon that point.

But it is contended that in order to maintain the plaintiff's declaration it was incumbent upon him to prove the death of Grant and McGuffie, the survivorship of Grant, and the death of Grant.

It is said by the attorney-general that the plea of the general issue admits all these facts.

This is a great mistake; it admits that the plaintiff is the administrator of Grant, but it admits nothing else.

The case of *Conrad* v. *The Atlantic Insurance Company*, cited from 1 Peters' Reports of cases decided in this court, decides most properly that it is too late upon the trial to insist upon proof of the plaintiff being a corporation. That it should have been taken advantage of by a plea in abatement.

And Mr. Peake, in his Law of Evidence, 342, in the passage cited by the attorney-general, says, "When an action is brought by an executor or administrator on a cause of action arising in the lifetime of the deceased, and the defendant pleads only the general issue, it is sufficient for the plaintiff to

prove the same facts as must have been adduced in evidence by the testator or intestate, had the action been brought by him."

*Now, suppose Mr. Grant had brought this action, must he not have proved that he had been a partner with McGuffie at the time the note was given? Must he not have proved that McGuffie was dead, and that he had survived him? [*277

Mr. Peake lays down the law upon this subject with great accuracy, and he is supported by all the adjudged cases. The defendant cannot, under the general issue, controvert the fact that the plaintiff is the administrator of Grant, and the letters of administration may be evidence of the death of Mr. Grant. Every other material allegation in the declaration must be proved.

It is contended by the attorney-general, in his argument, that the name of Grant & McGuffie endorsed upon this note transferred no property in it, and that, therefore, the note was no evidence under the second count of the declaration. With great deference to the attorney-general, I contend that the endorsement in blank accompanied by a delivery of the note to the endorsee, is an absolute transfer of the note. The second count in this declaration states in express terms the endorsement and delivery of the note to Stewart, the endorsee. I understand the law as being now perfectly settled that a blank endorsement upon a bill of exchange or promissory note payable to A. B. or order transfers the note to the endorsee. See Chitty on Bills, 173. See the case of *Linbarrow* v. *Macon*, cited in note in 6 East, 21.

In the case now under consideration, the plaintiff, in his declaration, states this transfer to him, and his right to recover under it; he cannot, therefore, be permitted to deny that such transfer was *bona fide*.

As I understand the law, an endorsement in blank is an absolute transfer of the note, from the original payee, who by that endorsement passes his whole interest in it. But the endorsement being in blank gives the endorsee a right to restrict its effect, by making it (the note) payable to some particular person or order.

As to the question whether this liberty to amend the verdict was not given upon an application which could not be made at so late a day, I shall not add anything to what was said in my opening argument, except to examine some of the cases which have been cited by the attorney-general.

The case of *Doe* v. *Perkins*, 3 T. R., 750.

No motion had been made to arrest the judgment. It was

a motion to set aside an order which had been made by a judge to amend *the postea, and a judgment which had been entered thereon, and upon which error had been brought, and for a new trial. The court said, "that according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles the First, the amendment might be made at any time."

Suppose, in that case, that a motion had been made by the defendant to arrest the judgment, which motion had been argued by counsel, and the judgment had been ordered to be arrested. Did the court, when they said this motion to amend may be made at any time, mean to say that after waiting two terms thereafter, and until another judge comes to hold the court, that it was time enough to call upon that judge to review what had been done in the court two terms before, for the purpose of setting aside what had been then done? I forbear to make any observations upon the contest in which such a case would have a tendency to involve the judges of the same court. If the court below were wrong in arresting the judgment, the remedy of the party was by writ of error.

In the case of *Barnard* v. *Whiting*, 7 Mass., 358.

There no order had been made to arrest the judgment; a motion was made to arrest the judgment, and upon the hearing of that motion it was denied, and leave was given to amend.

In the case cited from 11 Wendell it will be found that a motion to arrest the judgment and for a new trial had been made by the defendant and denied by the court, and judgment was entered for the plaintiff.

The defendant brought a writ of error to the Court of Errors, upon the ground that the judgment ought to have been arrested, and the motion to arrest was the very question brought up on the record in that case.

However that question was disposed of, the judgment was arrested, and there was an end of it.

The question here is not what a superior court, upon a writ of error, might do; the question is, can the same court review and reverse its own decision after the term in which it is made.

Not having 8 Pickering's Reports in my library, I have not been able to examine the case cited from it; and as I am desirous of sending this argument by the mail of this afternoon, I have not time to get the book.

One word as to the rule permitting an amendment of a verdict. The cases will all be found to be cases where the counts are all laid *in the same right, and where

*279]

the amounts claimed are claimed by the same person in the same right. This is not the case of good and bad counts; the counts may be all good, but it is a case where a man brings an action in his name as administrator, and another action in his own individual right. No such action can be maintained, and no amendment was ever permitted in such a case. But we are told that the amendment is matter of discretion in the court, and that no error lies in such a case.

The motion to arrest a judgment is made upon purely legal grounds, and never is a matter of discretion in the court whether they will grant it or not.

The time when a motion to amend is to be made, in the court where the judgment has been arrested, is not matter of discretion, but of law.

But if this order to amend is a mere matter of discretion, how does it happen that, in the case cited from 11 Wendell, a writ of error was brought in a case where the Supreme Court of the state had exercised their discretion on the subject.

Mr. Justice STORY delivered the opinion of the court.

This is the case of a writ of error to the Circuit Court of the United States for the southern district of Alabama.

The original action was assumpsit brought by Stewart (the defendant in error) as administrator of Alexander Grant, who was the surviving partner of the firm of Grant & McGuffie, against Murphy and Darrington as administrators of Matheson upon a certain note and due-bill made and signed by Matheson in his lifetime. The note was as follows: "Charleston, 30th Sept., 1818. Four months after date I promise to pay Grant & McGuffie, or order, three thousand four hundred and twenty-eight dollars eighteen cents, value received." The due-bill was as follows: "Charleston, 25th February, 1820. Due to Grant & McGuffie, or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date." The note was endorsed in blank, "Grant & McGuffie."

The declaration contained two counts. The first count is by Stewart as administrator, upon both instruments, and upon promises made by Matheson in his lifetime, and by his administrators since his decease, to pay him (Stewart) as administrator. The second is upon both instruments, stating the note to have been endorsed by Grant & McGuffie to him (Stewart), and the due-bill to have been transferred *to [*280 him by delivery. So that in legal effect he claimed in the first count as administrator, and in the second in his own personal right. At the trial (for it is unnecessary to state the pleadings) the jury found a general verdict for the plaintiff,

upon both counts, at the November term of the court, 1840. And at the same term a motion was made in arrest of judgment for the misjoinder of the counts, which motion was sustained, and thereupon it was ordered by the court that the judgment be arrested. At the November term of the court, 1841, a motion was made to set aside the order in arrest of judgment, and for leave to amend the verdict so that the same might be entered upon the first count, and a *nolle prosequi* entered upon the other count. In support of this motion, an affidavit was made by the plaintiff's counsel, that the only evidence offered at the trial by the plaintiff was the deposition of Chapman Levy, Jacob Axon, and —— McKenzie, and the note and due-bill which were on the files of the court; and that no evidence was offered by the defendants; and that the cause went to the jury upon the above depositions of the plaintiff alone. Upon this evidence after notice to and hearing the counsel for the defendants, who offered no evidence in opposition to the motion, the court made an order, vacating the order in arrest of judgment, and allowing the verdict to be amended by entering the same on the first count, and that judgment be entered upon that count *nunc pro tunc* for the plaintiff. Judgment was accordingly entered thereon; and from that judgment the present writ of error has been brought.

The main question which has been argued is, whether the court had authority to make the amendment at the time and under the circumstances stated in the record. It is observable that there was no judgment in the present case originally entered, that the plaintiff takes nothing by his writ, *non obstante veredicto;* but a simple order passed arresting the judgment, which suspended all further proceedings until the court should put them again in motion, but still left the cause pending in the court. It is a case, therefore, in a far more favorable position for the exercise of the power of amendment, than it would have been if final judgment had passed against the plaintiff, or if judgment had passed for the plaintiff, and a writ of error had been brought to reverse it; for in the latter case not only is the writ of error deemed in law a new action (*a*); but in contemplation of law the record itself is supposed to be removed from the court below.

*281] *And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or at the farthest at the next succeeding May term of the court; and

(*a*) 2 Tidd's Practice, 1141; 9th edition, 1828.

it was too late to make it a whole year afterwards. But there is no time absolutely fixed, within which such an amendment should be moved. All that the court requires is that it should be done within a reasonable time; and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions to amend the record after a writ of error has been brought; nay after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff, such applications, when made within a reasonable time, are usually granted after error brought and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. This is most usually done upon the judge's notes of the evidence at the trial, establishing upon what counts the evidence was in fact given or to which it was properly addressed or limited. But it may be done upon any other evidence equally clear and satisfactory, which may be submitted to the consideration of the court. In the present case we know from the most authentic sources contained in the record itself, and not disputed by any one, the whole evidence which was given at the trial. The case, therefore, falls directly within the range of the principles above stated. The practice is a most salutary one, and is in furtherance of justice and to prevent the manifest mischiefs from mere slips of counsel at the trial, having nothing to do with the real merits of the case. The authority to allow such amendments is very broadly given to the courts of the United States by the 32d section of the Judiciary act of 1789, ch. 20, and quite as broadly, to say the least, as it is possessed by any other courts in England or America; and it is upheld upon principles of the soundest protective public policy.

Without citing the authorities at large, which are very numerous upon this point, it will be sufficient to state a few only, which are the most full and direct to the purpose. In *Eddowes* v. *Hopkins*, 1 Doug., 376, there was a general verdict on a declaration consisting *of different counts, [*282 some of which were inconsistent in point of law, it was held that as evidence had only been given upon the consistent counts, the verdict might be amended by the judge's notes at the trial. The same point was decided in *Harris* v. *Davis*, 1 Chit., 625. In *Williams's Exec.* v. *Breedon*, 1 Bos. & P., 329

where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes that the jury calculated the damages in evidence applicable to the good count only, the court allowed the verdict to be amended and entered on the good count only, though evidence was given applicable to the bad count also. In *Doe* v. *Perkins*, 3 T. R., 749, the court allowed the verdict to be amended after error brought and joinder in error by striking out certain words from the postea. An objection was on that occasion taken that the amendment could not be made after the expiration of one term after the trial. But the court said that there was no foundation for this objection; for that according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles the First, the amendment might be made at any time. In *Henry* v. *The Mayor &c. of Lyme Regis*, 6 Bing., 100, a verdict had been taken by consent on two counts, and upon application the court amended the postea, by entering it in one count to which the evidence applied, there being in fact but one cause of action, although the judge, who presided at the trial, declined to interfere. In *Richardson* v. *Mellish*, 3 Bing., 334, S. C. in error, 7 Barn. & C., 819, where a general verdict was given on a declaration, some of the counts of which were bad, the court allowed the postea to be amended, and entered up judgment upon a single count after argument in error; and the court in error sanctioned the proceeding. In *Harrison* v. *King*, 3 Barn. & Ald., 161, there was a general verdict for the plaintiff, and an application was made to the court to amend the verdict on the judge's notes after the lapse of eight years, and after the judgment had been reversed upon error; but the court refused it upon the ground of the long delay. In *Clarke* v. *Lamb*, 8 Pick. (Mass.), 415, the Supreme Court of Massachusetts, after a general review of the authorities, allowed the verdict to be amended upon the judge's notes.(*a*.)

We think then that the objection taken at the bar to the amendment and entry of the judgment is not main-
*283] tainable, and that the *court acted within its rightful authority and jurisdiction in the allowance thereof.

Another objection, rather suggested than insisted on, is, that there is no profert of the letters of administration. Whether that would constitute any objection whatsoever, in the state of Alabama, is a matter purely of local practice and proceedings. It is well known that in many states of the union no profert of such letters is ever made, as, for example, in Massachusetts

(*a*) See also 2 Tidd's Prac., 901, 9th ed., 1828.

and other New England states. But the objection, if it has any foundation, is undoubtedly cured by the verdict.

Another objection is, that the first count does not sufficiently allege a partnership between Grant and McGuffie, nor that Grant was the survivor of them. We think otherwise. The first count in the amended record brought upon the *certiorari* is by Stewart as administrator of Grant, and it states in the introductory part that he was the survivor of McGuffie, late merchants trading under the firm of Grant and McGuffie; and alleges promises by Matheson to them in their lifetime, and by Matheson in his lifetime, and by his administrators, to the plaintiff, to pay the sums of money stated in the count, and alleges as a breach the non-payment thereof, either to Grant and McGuffie in their lifetime or to the plaintiff since their decease. The count certainly is not drawn with entire technical precision and accuracy; but after verdict it must be taken to be sufficient for all the purposes of substantial justice.

But then it is said, that if the first count is good, still the evidence offered at the trial was not sufficient to establish any partnership between Grant and McGuffie; and if the evidence did establish any case, it was a case within the scope of the second count and not of the first. We think neither branch of the objection is maintainable. There was certainly evidence enough to go to the jury on this point, and the very instrument on which the suit was brought, *primâ facie*, imported a partnership at least in these transactions; and the jury, by their verdict, must be presumed to have found the fact in the affirmative. In the next place, although the note was endorsed in blank by Grant and McGuffie, that endorsement was no proof that the interest on the same had passed to Stewart, as alleged in the second count, and the possession of the due-bill by Stewart was no necessary proof that he held it as owner in his own right. For aught that appears, he may have held them both solely in his capacity as administrator; and he had a right, and the sole right, to say in which *capacity he elected to [*284
hold, as owner, or as administrator. He has elected the latter; and the evidence is sufficient to establish that right, *primâ facie*. Besides, it can be of no concern to the plaintiff in error on which count the verdict is taken, for in either case it is equally a good foundation for a valid judgment against him, to the extent of the sums due thereon.

There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we

know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court.

Upon the whole, in our opinion there is no error of the court below in the amendment and proceedings complained of, and the judgment is therefore affirmed with costs.

ORDER.

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 Alabama, and was argued by counsel. On consideration whereof, it is now here 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 cent. per annum.

SIMEON STODDARD, CURTIS STODDARD, DANIEL STODDARD, ANTHONY STODDARD, WILLIAM STODDARD, JOSEPH BUNNELL AND LUCY HIS WIFE, JONAS FOSTER AND LAVINIA HIS WIFE, LUCY HOXIE, DANIEL MORGAN AND AVA HIS WIFE, PLAINTIFFS IN ERROR, *v.* HARRY W. CHAMBERS.

A deed of land in Missouri, in 1804, attested by two witnesses, purporting to have been executed in the presence of a syndic, presented to the commissioners of United States in 1811, and again brought forward as the foundation of a claim before the commissioners in 1835, must be considered as evidence for a jury.

If it was not objected to in the court below, it cannot be in this court.[1]

A confirmation under the act of 1836 to the original claimant and his legal representatives, enured by way of estoppel, to his assignee.[2]

*285] *To bring a case within the second section of the act of 1836, so as to avoid a confirmation, the opposing location must be shown to have been made "under a law of the United States."[3]

The holder of a New Madrid certificate had a right to locate it only on "public lands which had been authorized to be sold." If it was located on lands

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[1] CITED. *DeSobry* v. *Nicholson*, 3 Wall., 423.

[2] APPLIED. *Landes* v. *Brant*, 10 How., 374. EXPLAINED. *Field* v. *Seabury*, 19 How., 332. See *Bryan* v. *Forsyth*, Id. 337; *Morehouse* v. *Phelps*, 21 How., 305; *Dickerson* v. *Colgrove*, 10 Otto, 583.

[3] FOLLOWED. *Mills* v. *Stoddard*, 8 How., 362, 366. REVIEWED. *Bryan* v. *Shirley*, 53 Tex., 451—454. See *Menard* v. *Massey*, 8 How., 309; *Bissell* v. *Penrose*, Id. 331, 339.

which were reserved from sale at the time of issuing the patent, the patent is void.[4]

There was no reservation from sale of the land claimed under a French or Spanish title between the 26th of May, 1829, and the 9th July, 1832. A location under a New Madrid certificate, upon any land claimed under a French or Spanish title, not otherwise reserved, made in this interval, would have been good.[5]

If two patents be issued by the United States for the same land, and the first in date be obtained fraudulently or against law, it does not carry the legal title.

A patent is a mere ministerial act, and if it be issued for lands reserved from sale by law, it is void.[6]

THIS case came up by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an ejectment brought by the plaintiffs in error (who were also plaintiffs in the court below) against the defendant. The title of the plaintiffs was derived through their ancestor, Amos Stoddard, from an old Spanish concession, granted in 1800; and that of the defendant, to forty-seven acres and twenty-one hundreths of an acre, from what is called a New Madrid patent, issued to one Peltier under the act of Congress passed on the 17th February, 1815, ch. 198. The defendant also claimed one acre and sixty-three hundreths under a certificate granted, under the same act, to one Coontz, for which a patent had not issued. Beyond these forty-eight acres and eighty-four hundreths of an acre, the defendant set up no claim.

The historical order of the facts in the case is this:

On the 21st of January, 1800, Mordecai Bell a resident of Louisiana, presented a petition to Don Carlos Dehault Delassuse, lieutenant-governor and commandant-in-chief of Upper Louisiana, praying for a concession of 350 arpens of land.

On the 29th of January, 1800, Delassuse made the concession and instructed the surveyor, Soulard, to put the petitioner in possession of the land conceded.

On the 29th of May, 1804, Bell conveyed the concession and order of survey to James Mackay. The original deed was in French, and purported to be executed before Richard Caulk, syndic of the district of St. Andrew. The names of two attesting witnesses are also subscribed.

*On the 2d of March, 1805, Congress passed an act [*286

[4] DISTINGUISHED. *Mackay* v. *Easton*, 19 Wall., 632, 633. See *Hot Springs Cases*, 2 Otto, 713; *Cady* v. *Eighmey*, 54 Iowa, 618.

[5] FOLLOWED. *Delaurier* v. *Emison*, 15 How., 538. REVIEWED. *Barry* v. *Gamble*, 3 How., 53.

For further decisions of the Supreme Court relating to New Madrid certificates, see *Bagnell* v. *Broderick*, 13 Pet. 436; *Lessieur* v. *Price*, 12 How., 59; *Hale* v. *Gaines*, 22 Id., 144; *Rector* v. *Ashley*, 6 Wall., 143.

[6] CITED. *Best* v. *Polk*, 18 Wall., 117. See also *Easton* v. *Salisbury*, 21 How., 431; *Sherman* v. *Buick*, 3 Otto, 216.

"for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," the general purport of which was to recognize all existing grants. It further provided for the appointment of three persons, who should examine, and decide on, all claims submitted to them, and report the result to the secretary of the treasury, who was directed to communicate it to Congress.

On the 26th of September, 1805, James Mackay conveyed the grant and order of survey to Amos Stoddard, who was at that time civil commandant, under the government of the United States at St. Louis. It may here be remarked that evidence was given on the trial below that as early as 1817, Stoddard was in possession under this deed, and that the facts of his death before the suit and of the plaintiffs being his heirs at law were also given in evidence.

In January, 1806, Soulard, the surveyor-general of the territory of Louisiana, but not so under the authority of Congress, made a plat and certificate of the survey of the above land.

On the 3d of March, 1807, Congress passed another act relating to land-titles in Missouri, explanatory and corrective of the act of 1805. It also extended the time limited for filing the claims to the 1st of July, 1808.

On the 29th of June, 1808, all the papers relating to the claim were presented to the recorder of the district, viz.: 1. The concession. 2. Deed to Mackay. 3. Deed to Stoddard. 4. Certificate of survey in favor of Stoddard.

On the 15th of February, 1811, Congress passed an act, by which the President was authorized, (section 10,) "whenever he shall think proper, to direct so much of the public lands lying in the territory of Louisiana as shall have been surveyed in conformity with the eighth section of this act, to be offered for sale;" and further, "That all such lands, with the exception of the section number sixteen, which shall be reserved for the support of schools within the same; with the exception, also, of a tract reserved for the support of a seminary of learning, as provided for by the eighth section of this act; and with the exception, also, of the salt springs and lead mines, and lands contiguous thereto, which, by the direction of the President of the United States, may be reserved for the future disposal of the said states, shall be offered for sale to the highest bidder, under the direction of the register of the land-office and the receiver of public moneys, and of the principal deputy-surveyor, and on such day or *days as *287] shall, by public proclamation of the President of the United States, be designated for that purpose;" "Provided,

however, that, till after the decision of Congress thereon, no tract shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land-titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

On the 3d of March, 1811, Congress passed another act, in which the same reservation is made as is above stated.

On the 10th of October, 1811, the board of commissioners rejected the claim.

On the 17th of February, 1815, Congress passed an act declaring that any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the tenth day of November, 1812, and whose lands had been materially injured by earthquakes, should be and they were thereby authorized to locate the like quantity of land on any of the public lands of said territory authorized to be sold.

On the 28th of November, 1815, Frederick Bates, recorder, &c., issued a certificate that a lot of one arpent, in the village of Little Prairie, in the county of New Madrid, owned by Eustache Peltier or his legal representatives, was materially injured by earthquakes, and that said Eustache Peltier, or his legal representatives, was entitled to locate any quantity of land not exceeding 160 acres, on any of the public lands in the territory of Missouri, the sale of which was authorized by law.

On the 24th of October, 1816, an entry was made of land in conformity with the above certificate. This entry covered forty-seven acres and twenty-one hundreths of the concession to Bell; and the defendant claimed under it.

In 1817, 1818, and 1819, the township in which the land in controversy lies, was surveyed under the authority of the United States, and not offered at public sale by the authority of the President until 1823.

In March, 1818, the certificate which had been issued in favor of Peltier was surveyed by Brown, the deputy-surveyor, and the location made. It may here be remarked that evidence was given upon the trial, showing the possession of Peltier's location to have been in him and his assignees from 1819 down to the occupancy of the defendant, accompanied by deeds.

*On the 29th of May, 1818, Martin Coontz made an entry under a New Madrid certificate, which was surveyed in July, 1818. This survey clashed with Bell's conces- [*288

sion, and included one acre and sixty-three hundredths, which the defendant, Chambers, claimed under Coontz's title. Coontz did not obtain a patent for it.

On the 26th of May, 1824, Congress passed another act, "enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old grants or surveys, under certain circumstances, to present a petition to the District Court of the state of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the Supreme Court of the United States. The 5th section provided that a claim not before the District Court in two years, or not prosecuted to final judgment in three years, should be forever barred both at law and in equity; and the seventh section directed that where a claim, tried under the provisions of the act, should be finally decided against the claimant, or barred by virtue of any of the provisions of the act, the land specified in such claim, should, forthwith, be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district.

On the 26th of May, 1826, an act was passed continuing the above act in force for two years.

On the 24th of May, 1828, another act was passed, by which the act of 1824 was continued in force for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims until the 26th day of May, 1830.

On the 9th of July, 1832, Congress passed an "act for the final adjustment of private land-claims in Missouri," which authorized commissioners to examine all the unconfirmed claims to land in that state, which had been filed prior to the 10th of March, 1804. The commissioners were directed to class them, and at the commencement of each session of Congress, during said term of examination, lay before the commissioner of the general land-office a report of the claims so classed. The first class was to include the claims which ought, in their opinion, to be confirmed according to the laws and usages of the Spanish government; the second, those which ought not to be confirmed. The third section provided that the lands included in the first class should continue to be reserved from sale, as heretofore, until the decision of Con-
*289] gress should be made against *them; and those in the second class should be subject to sale as other public lands.

On the 2d of March, 1833, Congress passed another act,

directing the commissioners to embrace every claim to a donation of land held in virtue of settlement and cultivation.

On the 16th of July, 1832, a patent was issued to Peltier for the land described in his survey.

On the 8th of June, 1835, the commissioners decided that 350 arpens of land ought to be confirmed to Mordecai Bell, or his legal representatives, according to the survey.

On the 4th of July, 1836, Congress passed an act confirming claims to land in the state of Missouri, by which it was declared that the decisions in favor of land-claimants, made by the above commissioners were confirmed, saving and reserving, however, to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice; and the 2d section declared, that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase.

The cause came on for trial at April term, 1842, in the Circuit Court. After the evidence was closed the counsel for the defendant prayed the court to instruct the jury,

1. That the plaintiffs are not entitled to recover in this action any land included in the patent issued to Eustache Peltier or his legal representatives.

2. That the plaintiffs are not entitled to recover in this action any land which the jury may find, from the evidence, to be embraced in the location made in favor of Martin Coontz, or his legal representatives.

Both of which instructions the court gave. Whereupon the counsel for the plaintiff excepted.

Lawless (in writing) and *Ewing*, for the plaintiffs in error.
Jones, for the defendants.

Lawless referred to the facts in the case and the acts of Congress bearing upon them, and then proceeded thus:

The plaintiffs in error respectfully contend, that the instructions *given by the Circuit Court of the United [*290
States in this case are erroneous.

The counsel for the plaintiffs in error will assume, as a proposition, self-evident, that the title of the plaintiffs, under Amos Stoddard and Mordecai Bell, is good as against the United States, and would, if no antagonist private title existed, or were set up, entitle the legal representatives of Amos Stod

dard, under Mordecai Bell, to the possession of 350 arpens granted to Bell, surveyed for Amos Stoddard under Bell, and confirmed by the act of Congress of the 4th July, 1836, to Mordecai Bell and his legal representatives.

The validity of the claim of Amos Stoddard and Bell to the 350 arpens has been fully established by the decision of the commissioners, and the act of 1836.

If the land included in the grant to Mordecai Bell, and the survey under it in favor of Amos Stoddard, had never been located by the New Madrid speculator, or entered in the United States land-office, there would be, it is presumed, no doubt, after the act of 1836, of the right of Amos Stoddard or his legal representatives to enter upon that land, and use the same as their fee-simple estate and absolute property.

The question, then, that presents itself is, whether the title of Amos Stoddard and his heirs to the land surveyed for Amos Stoddard has been divested, since the date of the survey, and between that time and the 2d July, 1836, confirming the claim under Mordecai Bell.

The defendant did not seriously, in the court below, contend that the title of the plaintiff was not good against the United States, putting out of view the defendant's patent and the location and survey which formed the basis of that patent. But it was insisted on the part of the defendant, that the plaintiffs were only entitled to a right of re-location of the quantity contained in the survey made in favor of Amos Stoddard under Bell, because, by the second section of the act 4th July, 1836, the first section of which confirms the grant and survey of Stoddard under Mordecai Bell, it is provided, that where the land included in the confirmed claim has been entered or located, or otherwise disposed of by any act of Congress, then the confirmee shall only be entitled to a re-location of the same quantity on any public land theretofore authorized to be sold, and which has been actually offered for sale and remains unsold in the state of Missouri.

*291] The defendant then contends that the land in question has been *disposed of by the United States within the terms and meaning of the second section of the act of 4th July, 1836, and concludes,

That, therefore, the plaintiffs cannot recover it in this action under the title by them shown.

Thus, as has been already submitted to this court, the question resolves itself into this, to wit:

Has the title of Amos Stoddard and his legal representatives to the land in dispute been superseded, or destroyed, or divested, previous to the 4th July, 1836.

If the title of Amos Stoddard under Bell was still in being on the 4th July, 1836, it is manifest that it must be still in being, inasmuch as no act of Congress can, constitutionally, deprive a citizen of his lawful estate in land by a mere enactment. The second section of the act of 1836 pre-supposes that the sale or location, or other disposition of the land included in the grant confirmed by the first section, were such sales, locations, or other disposition as the act of Congress and the law in force at this date justified.

This position cannot be assailed, unless by assuming the unconstitutional doctrine that Congress could enact the destruction of a citizen's title to his land, and dispense with the action of a court and jury.

It would seem to be exceedingly disrespectful to the Congress of the United States to attribute to that body any such intentions; and not less disrespectful to this high court to imagine, that, if Congress so enacted or so intended to enact, this court would sustain such spoliatory and unconstitutional legislation.

The counsel for the plaintiffs in error will, therefore, take his stand on his above constitutional position, and from that elevated ground examine the defendant's title.

The title, as has been seen, consists of—

1. A New Madrid certificate, issued in favor of Eustache Peltier, for 160 acres of land.

2. A location filed in the office of the surveyor-general, at St. Louis, by a purchaser, under Peltier, of said certificate.

3. A survey of said location, made at the instance of said purchaser and locator, by the surveyor-general.

4. A patent issued to said Eustache Peltier, and his legal representatives, for said 160 acres, as located and surveyed, and by virtue of said location and survey.

The counsel for the plaintiff, for the purpose of his argument, will *assume, as *res adjudicata*, that, if it be [*292 shown that the United States had no title to the land described in the patent to Eustache Peltier, that patent is void as against the confirmee, under the act of 4th July, 1836.

In the case of *Polk's Lessee* v. *Wendell*, 9 Cranch, 99, the Supreme Court of the United States lays down the doctrine, "that there are cases in which a grant is absolutely void, as when the state has no title to the thing granted, or when the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law."

The facts upon which the Supreme Court decided, in Polk's case, showed that the state of North Carolina attempted to

grant lands to which she had no title or authority to grant. The court therefore pronounced her patent to be void.

If, in the case now before the court, the patent to Eustache Peltier and his legal representatives conveyed the land described in it, it must be because this land had been previously divested out of Amos Stoddard, under Mordecai Bell, and had become merged in the public domain, and part thereof.

If the land had not been so reunited to the public domain, it is contended, that neither Eustache Peltier nor his assigns could have lawfully located upon it, or have caused their location to be surveyed; or, if the location and survey were to be made on their mere demand, by the instrumentality of the surveyor-general of the United States, at St. Louis, without any discretion on his part to refuse the location and survey, then, although, strictly speaking, the location and survey were made according to the letter of the second section of the law of 1815, yet it must have been at the risk of the locator, and those claiming under him.

The counsel for plaintiff in error will now, therefore, proceed to demonstrate that, at the date of the location under Eustache Peltier, the title was not divested out of Amos Stoddard, under Bell, in the land so located, but was actually reserved from sale or disposition by the United States, until the claim to it of Amos Stoddard, under Bell, was finally passed upon by the proper authority.

It is in evidence in this case, that the claim of Amos Stoddard, under Bell, to the land in Peltier's location had been duly filed long previous to the act of 15th February, 1811. By reference to that act, section 10 (2 Story's Laws United
*293] States, p. 1178), it will be seen that the President of the United States was authorized, "whenever *he shall think proper, to direct so much of the public lands," &c. [Here the counsel quoted that part of the act, which is set forth in the statement of the case by the reporter.]

By the act of Congress of 17th February, 1818, (3 Story's Laws, p. 1659,) sect. 3, it is provided, "that whenever the land-office shall have been established in any of the districts aforesaid, (created by the first section,) and a register and receiver of public moneys appointed for the same, the President of the United States shall be, and is hereby, authorized to direct so much of the public lands lying in such district as shall have been surveyed according to law, to be offered for sale, with the same reservations and exceptions, in every respect, as was provided for the sale of public lands in the territory of Louisiana by the tenth section of an act entitled, 'An act providing,' &c., being the same act above referred to."

As has been observed, it is in evidence in this case, that the land located and patented under Peltier was included in a claim which was in due time, and according to law, presented to the recorder, and filed in his office, and therefore was reserved specially from sale, by the acts of 1811 and 1818.

It is also in evidence, that the claim was actually included in a list printed and published, at the instance of the recorder at St. Louis, in pursuance of instructions from the United States land-department, of lands reserved from sale in the district of St. Louis. It was not contended by the defendant's counsel that if the land in dispute had constituted part of a lead-mine tract, or included, or was adjacent to, a salt-spring, or formed part of land reserved for public schools or state seminaries, the location by Peltier's vendee could have held the land, or that a patent could have cured the defect of the location.

Nor, as the counsel for the plaintiff understands their argument, do they contend that the land included in Amos Stoddard's claim was not reserved under the acts of 1811 and 1818.

But, to get rid of the difficulty, they contend, that the words in the New Madrid act of 1815, section 1, "Any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the tenth day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized, to locate the like quantity of land on any of the public lands of said territory authorized to be sold," ought to be construed to mean lands which, at any time after *the New Madrid location was made, should become [*294 public land, and as such might be authorized to be sold.

And then the counsel for defendant endeavor to show, that subsequent to the date of the location under Peltier, the land did, in fact, become public land, and might have been authorized, by the President of the United States, to be sold.

The plaintiff's counsel will now proceed to demonstrate, in refutation of the above doctrine of the defendant, that—

1. The location, or the right of location, was confirmed by the act of 1815 to the owner of the lands injured, whoever he might be at the date of the passage of the act, and not to his assignee or vendee after the date of the act, as in the case before the court.

2. That the words in the act, "the sale of which is authorized by law," mean, not land the sale of which, after the location made, might be authorized by law, but land, and that, too, public land, which, in conformity to the acts of 1811 and

1818, before adverted to, were actually authorized by the President to be sold.

3. That the land included in the claim of Amos Stoddard, under Bell, upon which the locations under Eustache Peltier, and also under Martin Coontz, have been made, never has become, at any time, public land authorized to be sold.

In support of our first objection, namely, that the act does not authorize a location by an assignee whose assignment bears date subsequent to the passage of the act, the court is referred to the specific provision in the first section, which confines the right to locate to the owner of the land injured. The court will see, by reference to the record, that the locator under the certificate to Peltier, and also to Coontz, was not the owner of the land injured at the date of the passage of the act.

It is true, that in many, perhaps most cases, those locations have been made by persons who were not the owners, but it is submitted that this practice cannot have the effect of changing a positive law, particularly when it is considered that this practice was introduced for the benefit of mere speculators.

It is matter of record, and we may add of authentic history, that, under this abusive practice, the New Madrid law has been perverted to the purposes of gross fraud upon the government of the United States, and to the spoilation (as in the present case is attempted) of private owners. The counsel
*295] for the plaintiffs in error respectfully submit, that when the act of 1815 is sought to be converted into a *species of penal law operating a forfeiture as against private owners whose titles and claims were, at the date of that act, matters of record, that ought to be construed strictly.

If the question were now between the United States and locator, there might, perhaps, be some ground for a liberal construction. It might be contended, that the surveyor-general, who filed the location and surveyed it, being an officer and agent of the United States, his act as against his principal ought, if possible, to be binding. But this sort of reasoning surely cannot be endured where the question is between a total stranger to the surveyor-general and a tortious locator who, at his own risk, has thought proper to file a location calling for land not public, and not authorized to be sold, and availing himself, for manifestly tortious and unjust purposes, of the instrumentality of a purely ministerial officer.

In support of the position, that the words in the act, "the sale of which is authorized by law," must be taken to mean, 1st, public lands; 2d, lands authorized to be sold according to the provisions, and "with the same reservations and excep-

tions in every respect," contained in the 10th section of the act of 1811, and in the act of 1818, before referred to, the plaintiff's counsel beg to call the attention of the court to the specific terms of those two acts, and to their manifest object.

The counsel for plaintiff would also refer to the New Madrid act, in which, besides the words, "the sale of which is authorized by law," specifically provides, that "no such location shall include any lead mine or salt spring."

By those acts of 1811 and 1818, it seems too clear for argument, that until the sectional lines were run, the President was not authorized to sell the land. The survey is directed to be made by those acts, in conformity with the established system of public surveys. The general object of that system is to designate, beyond all doubt, in all future time, the boundary lines and the quantity of land included within them. The special object in Missouri was, besides, to ascertain the location and quantity of all those lands reserved and excepted from sale in those acts.

It was impossible that the objects, therefore, in view could be attained without a survey having been previously made by the United States.

It was impossible, with any accuracy, to ascertain the location or quantity of mineral land—of salt-spring land. It was also impossible *to know where the 16th section [*296 fell, without survey. It was equally impossible to know the ground covered by claims "duly filed with the United States recorder," without such survey.

It is manifest, that the act of 1815 (New Madrid act) provides for all this by requiring the location to be made, not only on public land, but public land authorized to be sold.

By the terms of the acts of 1811 and 1818, (and as to lead mines and salt-springs, the New Madrid act itself,) a great extent of public land was excepted from sale. The President had no power to proclaim such lands for sale. But the act of 1815 requires that the location be not made on those lands. How, then, was the locator, or the officer who filed the location to know when it was made, whether it interfered with lands which, though public, were not to be sold?

While on this part of the subject before the court, the counsel for the plaintiff in error would refer the court to the opinions of a distinguished attorney-general of the United States, the late William Wirt. They are to be found in the "Opinions of the Attorneys-General of the United States from the beginning of the Government to March 1st, 1831;" (published under the inspection of Henry D. Gilpin, in 1841.) In this letter of the 11th May, 1820, to the secretary of the

treasury, (page 263,) Mr. Wirt says: 1st, That "the act attaches no assignable quality to the charity it bestows," or "to make those charities a subject of speculation;" 2d, That "it was not the intention of Congress, in authorizing the sufferers 'to locate the like quantity of land on any of the public lands of the said territory which is authorized by law,' to change or affect in any manner that admirable system of location by squares, which had been so studiously adopted in relation to all the territories."

In his letter of the 19th June, 1820, (page 273,) Mr. Wirt specifically gives it as his opinion, that the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by those sufferers (New Madrid) are unauthorized.

The counsel for the plaintiff in error begs leave to refer to those letters of Mr. Wirt, as strongly in support of the objection taken to the location in this case, because of its having been made by an assignee. It does not appear that the person who signed the locations filed in this case with the surveyor, had any power of attorney so to do. He acted for himself
*297] and for his own benefit, and not for that of the "sufferer." The opinion of Mr. Wirt as to the necessity *of a previous survey of the township, is clear and explicit, and, besides, has been assented to by Congress.

By the act of 26th April, 1822, it is enacted, by section 1, "that the locations heretofore made, of warrants issued under the act of the 15th February, 1815, if made in pursuance of that act in other respects, shall be perfected into grants in like manner as if they conformed to the sectional or quarter sectional lines of the public surveys;" and by section 2, "That hereafter holders and locators of warrants shall be bound, in locating them, to conform to sectional lines as nearly as the respective quantities will admit."

The above act would not have been necessary if Mr. Wirt's opinion was not adopted by Congress, or if it had been erroneous. The act was obtained, as many acts unfortunately have been, to suit the purpose of speculators, and to cure defects in their locations.

This act, however, cannot operate beyond its import and terms. It cannot make a location valid against a private owner, when, in its origin it was void. The only effect that, according to principles of sound justice and jurisprudence, ought to be given to this act, is merely to make good a location and survey, notwithstanding that it did not originally, or did not at date of the act, coincide with sectional lines. But it is contended by plaintiff's counsel that, whenever it shall appear

that the location in other respects did not conform to the terms of the act, it shall not become available under the above act.

Mr. Wirt, in his above opinion, only adverted to one object in view of Congress, but he might also, with equal propriety, have urged the necessity of survey, in order to ascertain the location and quality of those public and private lands which were excepted or reserved from sale, and which could not be ascertained until the public surveys had been made, returned, and approved.

As has been observed, it is in evidence in this case, that the surveys of the township in which the land in dispute is situated were not returned till 1822, and that, at the date of those locations under Peltier and Coontz, respectively, no survey at all had been made by the United States.

The court is also referred to the opinion of the attorney-general, Wirt, in his letter of the 10th October, 1825, (p. 558,) which is adverse to the legality of locations on land included in a claim duly filed. Mr. Wirt, it will be seen in this letter, refers, in aid of his opinion, to an official letter, dated 10th June, 1820, of the then *secretary of the treasury, [*298 Mr. Crawford. The construction put by Mr. Wirt upon the words, "the sale of which is authorized by law," in the act of 1815, has been adopted by the United States' land department, and has been reiterated in divers letters and opinions of the solicitor of the United States' land-office, and by the attorney-general of the United States.

For the opinion of Attorney-General Butler, the court is referred to ("Opinions," page 1199,) the letter of the attorney-general, of 11th August, 1838, in which he adopts the views of Mr. Wirt, and in this very case of Mordecai Bell uses these words: "In the case of Mordecai Bell, whose claim to 350 arpens is confirmed by the act of July 4, 1836, I am of opinion, that the tract of six acres and twenty-eight hundredths, included in the survey, and previously confirmed by the old board of commissioners, must be regarded as clearly held by a prior title; but that Bell's claim will be valid for the residue, notwithstanding the survey includes two tracts located, and another patented, under the New Madrid law. These cases must stand on the same ground as those noticed in the case of Mackay, because the lands embraced in the act of 1836 were equally reserved from sale."

The above opinions, though not judicial authorities, are referred to in aid of the humble argument of the plaintiff's counsel, and, in particular, are referred to as repelling any conclusion that may be drawn in favor of those locations, from

what has been (very erroneously, as it is conceived) denominated contemporaneous construction and practice.

Those opinions of the law officers of the United States, of the commissioner of the general land-office, and of the secretary of the treasury, can alone be referred to, to ascertain the construction that was in fact given to the New Madrid law. The acts done under that law in Missouri were *ex parte*, and interested acts, or purely ministerial acts done by an officer whom the law rendered a mere instrument of the locator. Acts of this sort can claim no respect as demonstrating contemporaneous construction, or as establishing a lawful custom.

The court will see, on reference to the second section of the New Madrid law, that—

1. The recorder was bound to issue the certificate on the oath or affirmation of a competent witness, that any person was entitled to a tract under the provisions of the act.

*299] 2. That, upon such certificate being issued, and the location made, *on the application of the claimants, it was made the duty of the principal deputy-surveyor to cause the survey to be made thereof, and to return a plat of each location to the recorder.

3. That the recorder was directed to record the location and plat in his office, and was to receive from the claimant the sum of two dollars for receiving proof, issuing the certificate, and recording the plat as aforesaid.

4. By section 3, the recorder was obliged to issue a patent certificate to the claimant.

5. The executive of the United States was bound, upon the exhibition of the patent certificate, to issue the patent.

Thus, in each of those five stages of the locator's title, the locator or claimant is "*actor reus, et judex.*"

He first designates the land by his location, which designation was filed as of course. He then demands a survey of that location, which the surveyor-general is obliged to make. He then demands, upon the strength of the location and survey, a patent certificate; and, armed with this certificate, he proceeds to Washington city, and demands his patent, which, by the terms of the third section of the act, the executive of the United States is bound to give him.

It is true, that Mr. Wirt, in his letter of the tenth of October, 1825, gives it as his opinion, that the issuing of the patent was not so purely ministerial an act as to dispense with, on the part of the President, all consideration of the location and survey on which it was founded; and therefore opposed the issuing of a patent to Mr. Bates, who demanded it under the provisions of the New Madrid act for land included in a

claim duly filed, or which was then before a court of competent jurisdiction: but this opinion of Mr. Wirt, although the department was not in favor of the New Madrid location, does not appear to have prevented the issuing of the patent; doubtless, because the executive considered the act too imperative, or that, as a ministerial officer, he preferred to leave the whole question of title, as between the New Madrid locator and the claimant, to be decided by a court of justice. In this view, it would, perhaps, be difficult to establish that the executive of the United States was in error.

Having thus endeavored, it is hoped satisfactorily, to demonstrate, that the whole of the proceedings on which the patent to Eustache Peltier was based were not only not in pursuance of the New Madrid law, but in direct violation of it, the counsel for the plaintiff in error *submit, as a logical [*300 and legal conclusion, that those proceedings, and a patent based on them, could not, in the least degree, weaken the claim of the plaintiff under Mordecai Bell, or divest the title, whatever it was, which at the date of the New Madrid act was in Bell and his legal representatives.

It has been urged at bar in the court below, on behalf of the defendant, and may be reiterated before the Supreme Court, that, admitting, for argument's sake, that the location was not good and valid at its date, it yet has become so by operation of certain acts of Congress, and that therefore the claimant under Bell can at most be entitled to a re-location under the second section of the act of 1836, under which he contends that his claim is confirmed. It has been strenuously argued, that he must take the title or the confirmation *cum onere*, or not at all;—that he cannot control the mode in which Congress has thought proper to extend their charity towards him, nor escape from the conditions under which that charity has been bestowed. The counsel for the plaintiff might retort this argument on the defendant. Surely, if the claimant under a Spanish grant and survey be charged with mendicancy at the door of Congress, the New Madrid sufferer has, *à fortiori*, had charity—absolute alms, bestowed upon him. Surely it is he that must be bound by the strict terms and conditions of the gift, and not seek to enlarge it at the expense either of the United States or of private proprietors. There is nothing in the position of the defendant, who rather represents a New Madrid speculator than a New Madrid "sufferer," to call for any liberality of construction in his favor, especially when that liberality is avowed to be called for in order to effect a forfeiture, as against a party whose original right to his land

has been solemnly recognised, first, by a board of commissioners, and afterwards by the Congress of the United States.

This argument of the defendant's counsel assumes as proved, what we contend has no existence, namely, that the land included in the claim of Amos Stoddard, under Mordecai Bell, confirmed by the act of 4th July, 1836, has been sold, located, or disposed of, according to law. If it has not been so "disposed of," it is manifest, that the confirmation by the first section of the act of 1836, carries the whole title, and that the second section of that act has no application, no subject-matter, to operate on.

We come now to the ground above adverted to, as taken by *301] defendant's counsel, namely, that the location, though not good when *made, has become good by operation of certain acts of Congress on the claim of the plaintiff, and the land included in it.

The counsel for defendant, in support of this position, referred to the acts of May 26, 1824, May 26, 1826, and May 24, 1828.

They contend, that, by the 5th section of the act of 1824, "a claim to land within the purview of that act, which shall not be brought before that court, or through neglect or delay of the claimant, shall not be prosecuted to a final decision within three years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to said claims."

To this, the plaintiff replies, that this section of the act of 1824 (renewed, as we admit, by the acts of 1826 and 1828) can have no bearing whatever on the plaintiff's case or claim.

1. Because this section could not react on the proceeding, under the New Madrid law, and render legal and valid a location and survey that were void *ab initio*.

2. That the section, if it ever could operate to exclude the plaintiff in his claim from a court of justice, has been repealed by Congress, and the plaintiff remitted to all his right and title under the grant to Bell, by the acts of 1832 and 1833, which authorized him to place his claim before a board, in the same state of vitality and vigor in which it was when first filed with the recorder.

3. That the act of 4th July, 1836, has confirmed the claim and recognized it as entitled to protection by the treaty, and good and valid to all intents and purposes.

This third reason, brings us to the paramount character of the plaintiff's title; and, it is respectfully submitted, exhibits

it as a title, which Congress could not violate, even if they had so declared their intention to do.

The commissioners under the acts of 1832 and 1833 accompanied their decisions on the respective cases with a very full report and exposition of their views of the claims and titles which they were authorized to take under consideration, and the principles upon which their classification was made.

The principles thus laid down, by those commissioners, have not only been sanctioned by the act of Congress of the 4th July, 1836, but have been affirmed by the Supreme Court of the United States. In their report of the 31st September, 1835, the commissioners particularly refer to the case of *Chouteau* v. *United States*, and also to *the case of *Delassus*, [*302
under *Deluzieres* v. *United States*. The commissioners, in their report of 1833, adopted the principle, that when the grant, or the grant and survey, created a right of property, the claim ought to be placed in the first class as entitled to confirmation. In their second report of 1836, they reiterate this doctrine, and refer to the Supreme Court of the United States in support of it. They cite the very words of this court in the above cases. "In the first case," say they, "the Supreme Court lays it down that 'orders of survey, made by the lieutenant-governor of Upper Louisiana, are the foundation of title, and are capable of being perfected into complete titles; that they are property capable of being alienated; and is, as such, to be held as sacred and inviolate as other property.'" They also cite the language of the Supreme Court in the former case of *Delassus* v. *United States*, as follows: "The right of property is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to land is property: independent of treaty stipulations, this right would be held sacred. The sovereign who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring lands which have been severed from the royal domain."

The question of the inviolability of the right of Amos Stoddard, under Mordecai Bell, is settled by the highest possible authority, legislative and judicial. It follows, as a clear consequence, that the New Madrid law ought to receive such a construction as is consistent with the above view of Congress and of the Supreme Court. It has been endeavored to be shown, that, by a fair interpretation of the New Madrid act, no collision could take place between it and the treaty of

cession on those principles, which, as the Supreme Court observes, independent of the treaty, would have protected the property of the plaintiffs in error; but it is respectfully, and confidently also, contended, that if the terms of the New Madrid act, or any other act of Congress, specifically purported to annul, or to violate the right of the plaintiffs, those terms must be disregarded, as unconstitutional.

It is not supposed, by plaintiff's counsel, that the merits of the claim of Stoddard, under Bell, can now become the subject of re-examination as against the United States, and with *303] reference to the *validity of that claim when it was filed with the recorder. All that has been already passed on and settled in favor of the claim. The proceeding under the New Madrid law, passed in 1815, can have no bearing on the original merits of a claim filed under an act of Congress passed in 1805. It would seem that the counsel for the defendant have abandoned the objection to original validity of plaintiff's title, inasmuch as the instructions asked for by the defendant, and given by the Circuit Court, are predicated on the patent to Eustache Peltier, and on the location under Coontz. The *prima facie* title of the plaintiff was not seriously disputed.

In addition to what has been already submitted by plaintiff's counsel, on the subject of Peltier's patent, and the grounds on which it may be successfully avoided in an action of ejectment, much more might be said, drawn as well from the decisions of this court as from the doctrine in England on the subject of royal grants of land. The court must be well aware, that in England a king's grant may be got rid of, by showing that, at the date of it the king had no title. It is contended, on behalf of plaintiff in error, that this doctrine should be, *à fortiori*, the law of the United States. The President of the United States is, as respects public land, a purely ministerial officer; whereas the title to public lands in England is vested in the king. There is no law, at least the counsel for plaintiff in error have not been able to find one, which imparts to a patent for land any peculiar virtue, or any greater efficacy in operation than that of an ordinary deed of quit-claim, signed, sealed, and delivered by an attorney in fact for and in the name of his principal. The counsel for the plaintiff in error, while they admit that a United States' land-patent constitutes a *prima facie* title, and that a party cannot at law get behind it, and avoid it on the ground of irregularity in the previous formalities, do respectfully contend, that, when the proceedings on which the patent is founded are utterly void, or where it is shown that the United States had

no estate in the land, or no right to grant the land, the *prima facie* case made by the patent is rebutted.

In conclusion, the counsel submit that—

1. It appears from the record, that the plaintiffs in error claim a right, title, and estate, under a confirmation of a grant and survey vested in them as heirs-at-law of Amos Stoddard.

2. That their right and title is protected and consummated by treaty, and by act of Congress.

3. That the decision of the Circuit Court of the United States *has been against their title, so derived, guaranteed, and consummated. [*304

4. That this decision of the Circuit Court of the United States is erroneous, and ought to be reversed.

Jones, for the defendants in error, said he would inquire,

First, As to the instrument by which the plaintiffs attempt to connect the title of Amos Stoddard with the original title (whatever it was) of Mordecai Bell, under the concession from the Spanish governor of Upper Louisiana; and upon which instrument necessarily depended any sort of right, at law or equity, in Stoddard to claim the rights vested in Bell by that concession.

This instrument purports to be executed by one Richard Caulk, styling himself syndic of the district of St. Andrews, and certifying that Mr. Bell was present before him, &c. It is produced as a record, upon its own authority. It cannot be set up as a private act; it is enough to say, that it is actually brought forward as a record. If so, it is invalid, unless it possesses the necessary requisites. Article 1132, of the Civil Code of Louisiana, changes the common law in this respect, and says, that an act not authentic from defect of form, &c., may avail as a private paper, if signed by the party. In 10 La., 304, there is the case of a mortgage signed by a married woman, and some of the witnesses did not see her sign. The court set it aside, because it was produced as an authentic act. See, also, article 2233, adverted to in the case in 5 Mart. (La.), N. S., 68, 69. The distinction between authentic acts and private writings is shown in Partidas, title 18, p. 222, 235.

All the decisions of this court in Florida cases, show that persons must prove the authenticity of the paper under which they claim, and that local laws must be proved below, as foreign laws.

The office of syndic is explained in 6 Pet., *Strother* v. *Lucas*: he was only a subordinate police officer.

The preface to the translation of the Partidas, p. 20, shows

that a proclamation of O'Reilly established syndics. There is no evidence in the case that they acted as notaries.

As to powers of commandants, see 3 Mart. (La.), 115. If this is not valid as an authentic paper, will the lapse of time make it so, as a private paper? It is true, that time is of great value in sustaining the muniments of title, where the property has been for a long time enjoyed: but in this case, the party who claims under this instruction never was in possession.

*305] *Secondly. As to Mordecai Bell's claim, which was confirmed by the board of commissioners on the 8th June, 1835, the plaintiffs, in their statement, say it was that identical claim which had been filed by Soulard with the recorder of land-titles, on the 29th June, 1808, laid before the board for their action, and rejected by them on the 10th October, 1811; as if the first decision against the claim had been subject to some condition or reservation, that kept the claim alive during all the twenty-four intervening years, and still pending before the board, for their further consideration and final decision.

This is a clear mistake. Mordecai Bell's claim was never filed with the recorder of land-titles, nor was it ever laid before the board for adjudication, till March 30, 1835; near nineteen years after Peltier's location, seventeen years after his survey, and two years and eight months after his patent; sixteen years and ten months after Coontz's location, and sixteen years and eight months after his survey. It was Amos Stoddard's claim alone, as assignee of Mackay, the pretended assignee of Bell, that was filed by Soulard, on the 29th June, 1808, with the recorder of land-titles, and definitively rejected by the commissioners, on the 10th October, 1811; and which, ever since that time to the commencement of the present action, a period of twenty-eight years, had lain quiet and silent under a judicial condemnation, unconditional and absolute in its terms—final in its effect.

But the claims of assignees and grantees are very different. An assignee, as such, might establish his claim before the commissioners, who might, very properly, have confirmed the claim of Bell, as original grantee, without at all recognizing the chain of title by which it is alleged that the present claimants hold Bell's right. In such a case, the plaintiffs would have no title; and the facts in this case leave it entirely doubtful, whether the commissioners did not intend so to decide. 10 Pet., 334; 6 Pet., 766.

What title did Bell acquire under the Spanish concession? He is called a grantee, but there was no land described by metes and bounds. The concession was nothing but an order

of survey, but no estate vested. 12 Wheat., 599; 6 Pet., 200.

On 10th March, 1804, Spanish authority ceased, and that all the steps to acquire title were taken after that time. On the 29th of May, 1804, Bell conveyed the concession to Mackay, but the Spanish law had then entirely ceased. A survey, made by private authority, after the change of flags, is void. 10 Pet., 234.

*Thirdly. As to the supposed confirmation of M. Bell's [*306 claim, itself, by the act of Congress of the 4th July, 1836, the plaintiffs produced no evidence whatever, of that claim's being among "the decisions in favor of land-claimants, laid before Congress by the commissioner of the general land-office," prior to the passing of that act; unless they rely on presuming that fact from another fact, certified on the 27th March, 1840, by F. R. Conway, recorder of land-titles in the state of Missouri; namely, that "said claim was included in the transcript of favorable decisions transmitted by the recorder of land-titles, and the two commissioners associated with him, to the commissioner of the general land-office."

The title alleged by the plaintiffs, as it appears on their own showing, is held utterly vicious and untenable; and if the defendant were stripped of all right and title, still the full right and title to the land in question would remain in the United States, without any sort of right in the plaintiffs to claim the land, either at law or equity. In support of this proposition, the following objections to the plaintiffs' title are held demonstrative and insuperable.

1st. The pretended act of sale and exchange from Bell to Mackay was utterly inoperative and void *ab initio;* and therefore the commissioners were fully sustained by the law and the fact of the case when they decided, as they must have decided, since they rejected Stoddard's claim and admitted Bell's, that Stoddard had failed to make out any valid claim in himself, derived through Mackay from Bell; and it is a fair if not a necessary presumption, under all the circumstances, that the specific defect, for which his derivative claim was rejected by the commissioners, was found in this broken link in the chain by which he attempted to connect his claim with the original title of Bell.

This instrument, throughout its whole frame and tenor, and in the manner of its execution, pursues the form and claims the authenticity and effect of a "public or authentic act" executed under official sanction, and equivalent to record evidence, as contradistinguished from a "private writing," to be proved in the ordinary way. Like all such acts, it speaks

in the name and character of the officer who executed it, not of the parties. It was produced as such an act; as an act that "proves itself;" that is "full proof" in itself, without any proof of execution in the ordinary way. It must, therefore, be shown to be the very thing it professes and is claimed to
*307] be, or nothing; failing as an authentic act, it cannot, according to the known *laws of Louisiana, be set up as a private writing, nor was it attempted to be so set up.

The validity and effect of this instrument wholly depends on the legal competency of R. Caulke styling himself syndic of a district, to execute an authentic act in relation to contracts, and there is nothing to show, either that he was such syndic as he describes himself, or, being such, that he had any authority, in virtue of that office, to execute authentic acts. On the contrary, from all that is known of the office of a syndic, he was merely a municipal police officer, of very subordinate authority and functions; and is clearly excluded from every description of officer ever recognized by the laws and customs of Louisiana as having authority to execute such acts.

2d. But whatever may be now thought or said of the intrinsic force and effect of the instrument, if it were *res integra*, the decision of the commissioners against Stoddard's claim (unreversed and unquestioned as it has stood for so many years) is conclusive against the title now set up by the plaintiffs.

3d. If there had been no decision of the commissioners against the claim, it would have been equally beyond the cognisance of the court. No title derived from an imperfect Spanish grant, like that to Bell, could be set up, or in any manner recognized in any court of the United States, or of any state, till it had passed the tests provided by the acts of Congress; that is, till confirmed, first by the commissioners, then by Congress, and then regularly located and identified by survey, and lastly carried out into grant by a patent from the United States.

4th. Whatever title, whether an inchoate or a complete legal title, be vested by the decision of the commissioners, the confirmation of that decision by Congress, and the subsequent survey locating and identifying the land to which the claim was so confirmed, that title was vested in Bell exclusively.

But it is said by the counsel on the other side, that the deed of exchange between Bell and Mackay is a mutual warranty, which is an estoppel, and that an estoppel will support an ejectment. But this is not a case of estoppel, which is binding only on the donor and his heirs. If one makes a deed when

he has no title and afterwards acquires one, he is estopped; but if he acquires a lesser estate than he has conveyed, there is no estoppel. 4 Cruise's Digest, 271, sect. 58, New York edition of 1834; 4 Kent's Commentaries, 98, 260, 261; 8 Barn. & C., 497.

*In 1804, the assignee stood in the place of the original grantee, and had only a right to acquire land. [*308 What, then, is the warranty in the exchange? Only that the warrantor will not claim contrary to the grant; he does not warrant that the grantee shall have the land, because he could not warrant the faith of the Spanish or American government. 2 Barn. & Ad., 278.

The act of Congress interferes with the estoppel. As to the effect of an act of Parliament upon an estoppel, see 2 T. R. 169.

5th. Even Bell's claim is in no way shown to have been included in "the decisions in favor of land-claimants," which are referred to in the act of Congress of July 4, 1836, as being within its purview, and which are to be identified by reference *aliunde*.

II. The title vested in Bell himself is but inchoate and incomplete, and wholly incompetent to support the action of ejectment. The legal estate in fee, if not vested in the defendant, still remains in the United States.

As to the title of the plaintiffs, if they could set up any derivative claim under Bell; if they could establish the validity of the intermediate assignments under which they attempt to derive their claim from Bell; and if the Circuit Court could have taken original cognisance of any title so derived, and not having passed the tests aforesaid, (each and every of which hypotheses we deny,) still the plaintiffs show nothing more than an equitable right to call the legal estate out of Bell's hands, if such legal estate be vested in him, or otherwise to affect and appropriate such inchoate title as may be found vested in him.

III. As to the two objections taken to the defendant's title.

Objection 1. That the locations and surveys of Peltier and Coontz were on lands not then for sale.

Answer. The description of the lands on which the entries and locations of the New Madrid land-warrants were allowed, was not limited to lands offered for sale, but to such lands as were not reserved from sale by the land laws of the United States.

Objection 2. That a claim for the land in dispute, under the Spanish grant or concession to Bell, was already before the commissioners for adjudication when those entries and loca-

tions were made, and so within the express exception of the act of Congress which authorized such entries and locations.

Answer 1st. The claim before the commissioners was for no
*309] particular tract of land, distinguished by metes and bounds, or otherwise, *from the mass of public lands subject to the claim but simply for 350 arpens of land; to be afterwards duly laid off and surveyed. The survey by Stoddard, in 1808, was wholly unauthorized and void; and if he took any possession of the land so surveyed, it was but a naked and tortious possession of so much of the public lands. No special location of the land so claimed could be pretended till it came to be officially surveyed, May 26, 1837, "in conformity, as it is said, with the decision of the late board of commissioners, and in virtue of the confirmation thereof by the act of Congress approved on the 4th July, 1836."

Answer 2d. No claim for the land in dispute, or for any other land under the Spanish concession to Bell, was before the commissioners, either at the inception or consummation of the two titles vested in the defendant, and derived from Peltier and Coontz; nor till the lapse of many years thereafter, when Bell's claim was first laid before the board, in March, 1835. As to Stoddard's claim, it had been definitively rejected by the board six years before the very inception of those titles by the New Madrid land-warrants, and has never been, for an instant, *sub judice*, since its final rejection by the board in October, 1811, till the commencement of this suit.

Ewing, for the plaintiffs in error, and in reply.

We contend that the plaintiffs have the better title, and ought to have recovered against both the patent of Peltier, and the survey of Coontz.

The claim of Mordecai Bell was duly filed with the recorder of land-titles for the proper district on the 29th of June, 1808, pursuant to the provisions of the act of March 2d, 1805, ch. 86, sect. 4, and the act of April 21st, 1806, ch. 39, sect. 3, and the act of March 3d, 1807, ch. 91, sect. 5.

The concession was good. It is settled that Delassus had a right to grant. Land Laws, 542; 9 Pet., 146.

The defendant cannot now go behind the confirmation by the commissioners and by Congress. The claim was guaranteed by treaty, and although no survey had taken place, Congress indirectly required us to make it. The act of March 2, 1805, ch. 86, directs all grantees from the Spanish government, including orders of survey, to file a plat, &c. It is true that
*310] there was no public *survey made under the authority of Congress, for there was no public officer to do it.

Soulard, who calls himself surveyor-general, was not so under the authority of the United States. This is admitted. But he was recognized by existing legal authorities. He was the most proper man to make a private survey, which he did. The Supreme Court of Missouri has held his to be semi-official acts. There are hundreds of cases in the reports of the commissioners, of surveys by this same man, and the commissioners took from his records a transcript for their own government. This claim is confirmed as having been surveyed. The act of 3d March, 1807, ch. 101, sect. 1 to 5, saves Spanish claims. In 1808, the commissioners refused to confirm this claim, but Congress continued to pass other laws, and no claim was considered to be finally disposed of because it was refused. This one remained on file until Congress should pass upon it.

By the act of February 15th, 1811, ch. 81, sect. 10, it is enacted, "That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land-titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." The same provision is contained in the act of March 3d, 1811, ch. 113, sect. 10, and it is referred to and continued in the act of February 17, 1818, ch. 11, sect. 3.

The act of March 26th, 1824, ch. 173, which provides for the trial of Spanish claims in the district courts, and the supplementary act of May 24th, 1828, ch. 92, superseded and suspended this saving from the 26th day of May, 1829, until it was revived by the act of July 9, 1832, ch. 180, sect. 3.

As to our title before the confirmation.

The concession was in 1800, the assignment in 1804, the survey in 1806, which shows all the papers to have been in the hands of the surveyor. In 1808, Stoddard filed his claim before the commissioners. By the Spanish law the delivery of papers is equivalent to the delivery of the land itself. But the deed is formal enough. It was not the public act of a notary, but that was not necessary. One mode of conveyance is for a notary with two others to summon the parties before him and make up a record, which is itself a transfer of title; but another mode is by the party signing a deed. The Spanish laws are not accurately carried out in remote countries. Even in our distant settlements, a record is sometimes made up partly by parol. In 1769, O'Reilly says there were no lawyers in the country except *at New Orleans. In [*311

1802, there were no notaries except at the same place. The people had been transferred often from one power to another, and must have been uncertain sometimes to whom they belonged. They executed deeds before any high officer whom they could find. Moralez implies that commandants might take acknowledgments of deeds. The syndic was next in authority to the commandant, with whom he acted sometimes as judge. 2 Land Laws, 204, 210, index.

By comparing O'Reilly, 2, 5, 12, with Moralez, 4, 5, 15, it will appear that the syndic was a judicial officer. The Partidas says that proof must be given that the officer was a public one, unless after a long lapse of time. In the preface to the Partidas, the syndic is mentioned after the alcaldes and before the attorney-general. If, therefore, the deed from Bell was not exactly in a regular form, it was in the customary way.

The claim was prosecuted by Stoddard and not Bell until it was rejected. But this decision was not final, as the act of 1832, ch. 180 (4 Story, 2305), authorized the commissioners to proceed on all rejected claims standing on the records of the former commissioners, with or without a fresh presentation. The claim was confirmed to Bell or his legal representatives. Ten or twelve other cases are just in the same way. Senate Doc. for 1835–6, vol. 2, doc. 16, pp. 7, 15, 33, 69. In these cases the claim is made by the assignee, and the confirmation is to the original party or to his legal representatives. As to the meaning of this expression, see 12 Pet., 458, Strother and Lucas.

Bell is estopped, or rather rebutted from saying that the confirmation is not to Stoddard, for he had conveyed to Stoddard with warranty, which amounts to an estoppel. Co. Litt., 174 a, 384 b; 12 Johns. (N. Y.), 201; 13 Id., 316; 14 Id., 193; 1 Miss., 217. Title by estoppel is sufficient to maintain an ejectment. 1 Salk., 276; 2 Ld. Raym., 1554; 6 Mod., 257, 259, same case as Salk., 3 P. Wms., 372.

Bell's deed is sufficiently proved before this court, because it was not objected to below. No one can allege an outstanding title in Bell, because he could not do so for himself.

This case, therefore, came within the acts of Congress which have been mentioned, and this land was reserved from sale. Congress looked only to the fact that the claim was legally filed, and not to the validity of the claim itself. Between 1829 and 1832, when the *reservation was withdrawn, entries were made and have been sustained by courts in Missouri. But these defendants did nothing in this interval. It is the same case as Bobeani and the Fort a Chicago. The land was reserved and the entry was void. See opinions of

*312]

the law-officers of the government in the following volumes: "Opinions and Instructions," part 2, p. 12, sect. 3; p. 16, sect. 15; p. 25, sect. 23; p. 29, sect. 30. "Opinions of Attorneys-General," Gilpin's Compilation, p. 1200, for the opinion of Mr. Butler, examining this very claim, dated August 8, 1838.

That a confirmation is a grant of the legal title, see 12 Pet., 454.

The defendant claims title under the act of February 17th, 1815, ch. 198, which authorizes a sufferer by earthquakes, in the county of New Madrid, having obtained his certificate to locate it "on any public land of the territory, the sale of which is authorized by law."

At the time of the locations of Peltier and Coontz, the sale of the land which they located was not authorized by law.

1st. Because the land was not surveyed, as it must be, before the sale was authorized; but if this be cured by the act of April 26, 1822, ch. 40—

2d. Because it was specially reserved from sale to abide the final decision of Congress on the claim of Mordecai Bell, which was duly filed, and then not finally decided by Congress.

The law reserving this land from sale was in full force at the time of the locations and surveys of both Peltier and Coontz, and also at the time of issuing the patent to Peltier.

The act of July 4th, 1836, ch. 361, which confirms the claim of Bell, also enacts, "that if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof had been previously located by any other person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such land in opposition to the rights acquired by such location or purchase."

We contend that the location, "under any law," must be a location authorized by such law. That this location was not so authorized, but, on the contrary, forbidden; that no rights were acquired by such location; and that, therefore, the saving does not protect the defendant's claim. *Wilcox* v. *Jackson*, 13 Pet., 510, 511, 513.

As to the mode of proceeding, we contend:

That the act of July 4th, 1836, is a grant, and confers a complete legal title on Bell, or his legal representatives. It is a confirmation *of a title before imperfect; that [*313 an action of ejectment may be sustained upon it on general principles. *Rutherford* v. *Green's heirs*, 2 Wheat., 196, 205; 12 Pet., 454.

And especially by the laws of Missouri. Revised code of 1835. 13 Pet., 441, in note.

That the patent to Peltier having issued against law, for land reserved from location and sale, it is void. 13 Pet., 511.

If there was no incipient right, the patent does not vest a title. 1 Wash. C. C., 113, case of *Alton Wood*, 1 Co., 45.

That the plaintiffs having a valid legal title, the inception of which was prior to that of defendant, and which is the better title, it will overcome the elder patent at law. *Ross* v. *Doe, ex d. Barland*, 1 Pet., 662; *Bagnell* v. *Brodrick*, 13 Id., 450, 454.

This point does not arise in that part of the case which depends upon the location and certificate of Coontz.

Mr. Justice McLEAN delivered the opinion of the court.

This case is from the Circuit Court of Missouri, and was brought here by a writ of error.

The plaintiffs brought an action of ejectment for 350 arpens of land, situated near St. Louis. Their title was founded on a concession by Delassus, lieutenant-governor, to Mordecai Bell, the 29th of January, 1800. Bell conveyed the same to James Mackay, the 29th of May, 1804, and on the 26th September, 1805, he conveyed to Amos Stoddard. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as surveyor-general, the 29th of January, 1806.

The above papers were presented to the recorder of the district of St. Louis, the 29th of June, 1808. And the claim was duly filed with the board of commissioners for their action thereon, who, on the 10th of October, 1811, rejected it. But afterwards on the 8th of June, 1835, the board decided that 350 arpens of land ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey. And on the 4th of July, 1836, an act of Congress was passed, confirming the decision of the commissioners. The land was surveyed as confirmed. The plaintiffs proved the death of Amos Stoddard, before the suit was commenced, and that they are his heirs-at-law. The defendant was proved to be in possession of forty-eight acres and eighty-four hundredths of the land in controversy, one acre and sixty-three hundredths
*314] of which were in the *location and survey of Martin Coontz, and the residue within the patent of Peltier.

The title of the defendant was founded on an entry made by Peltier of 160 acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued the 16th of July, 1832. Possession has been held under this title since 1819. The title was conveyed to the defendant.

On the 29th of May, 1818, an entry was made, which authorized the survey of Coontz, but no patent has been issued on it.

The township in which the above tract is situated was surveyed in 1817, 1818, and 1819, and was examined in 1822. Since 1804, a certain mound on the land has been called Stoddard's mound. In 1823 the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

On the above evidence the court instructed the jury,

1. That the plaintiffs were not entitled to recover the land embraced in Peltier's patent.

2. That they were not entitled to recover the land embraced in Coontz's survey.

The decision of this controversy mainly depends on the construction of certain acts of Congress. By the act of the 2d of March, 1805, all persons residing in the territory of Orleans, who had claims to land under the French or Spanish government, were required to file their claims for record with the register of the land-office or recorder of land-titles, and provision was made for confirming them.

The time limited in the above act was extended by the act of the 3d of March, 1807, as regards the filing of claims with the register or recorder, until the 1st of July, 1808. By the act of the 15th of February, 1811, the President was authorized to have the lands which had been surveyed in Louisiana offered for sale; "provided, however, that till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land-titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming land in the territory of Louisiana." The same reservation was repeated in the act of the 3d of March, 1811.

The act of the 26th of May, 1824, authorized claimants "under French and Spanish grants, concessions, warrants, or orders of surveys" *in Missouri, issued before [*315
the 10th of March, 1804, to file their petition in the District Court of the United States for the confirmation of their claims. And every claimant was declared by the same act to be barred, who did not file his petition in two years." By the act of the 24th of May, 1828, the time for filing petitions was extended to the 26th of May, 1829. On the 9th of July, 1832, an act was passed, "for the final adjustment of land-titles in Missouri," which provided that the recorder of land-titles,

with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, prior to the 10th of March, 1804. And they were required to class the claims so as to "state in the first class what claims, in their opinion, would in fact have been confirmed, according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities under them. And secondly, what claims in their opinion are destitute of merit, law, or equity." And by the third section it was provided, "that from and after the final report of the recorder and commissioners, the lands contained in the second class shall be subject to sale as other public lands; and the lands contained in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be against the claims of any of them; and the lands so decided against shall be in like manner subject to sale as other public lands."

These are the facts and statutory provisions which are material in the case. The defendant, under the entry and survey of Peltier, holds the elder legal title to the land in controversy, except the one acre and sixty-three hundredths, which is covered by the entry and survey of Coontz. Until the confirmation of the plaintiff's title by the act of 1836, the legal title to the land claimed was not vested in the plaintiffs.

Objections are made to the intermediate conveyances under which the plaintiffs claim. And first, it is insisted, that the deed from Bell to Mackay was not proved. It is stated on the record, that there was no proof that R. Caulk, the syndic, before whom the deed was signed and acknowledged, had authority to act as such.

The deed was executed in 1804. It was attested by two witnesses, and purports to have been acknowledged in the presence of a syndic. There was no exception to the admis-
*316] sion of this deed in evidence; and, consequently, the objections now made to its execution *are not before the court. But if the execution of the instrument were now open to objections, they could not be sustained. Forty years have elapsed since this deed purports to have been executed. From that time to this, a claim under it seems to have been asserted. It was presented to the commissioners in 1811, having been filed with the recorder of land-titles, in 1808. And again, it was brought before the commissioners in 1835, it having remained on file until that time. Under these circumstances, the regular proof of the instrument might well be dispensed with. Possession, under this deed, was held by

Stoddard for a time, and became so notorious that a certain elevation on the land was called Stoddard's mound.

Independently of the lapse of time, the unsettled state of the country at the time this instrument was signed, the transfers of the country from one sovereignty to another, the rude and defective organization of the government—the civil and military functions being blended, are facts which no court can disregard in acting upon transfers of property between individuals. If some degree of regularity and form were observed in regard to public grants, technical and legal forms cannot be required in the transmission of claims to land, among a people, the great mass of whom were ignorant of the forms of titles, and indeed, of almost every thing which pertained to civil government.

A syndic was not, in that country, an appointed officer, as he is in a regulated government; but the duties devolved upon the commandants of military ports, as occasion might require. There is nothing on the face of this deed to excite suspicion. It was attested by two witnesses, and contains the signature and certificate of the syndic. The genuineness of these attestations was not objected to on the admission of the deed as evidence, or on a motion to overrule it. The deed must, therefore, be considered as evidence to the jury, without exception. And, under all the circumstances, we think, that full effect should have been given to it, as a muniment of title. The deed from Mackay to Stoddard, the ancestor of the plaintiffs, is not objected to. Bell made the conveyance to Mackay, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and enured, by way of estoppel, to his grantee, and those who claim by deed under him. A confirmation, by act of Congress, vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence *of this. On a [*317
title by estoppel, an action of ejectment may be maintained.

If the claim of the defendant had not been interposed, no one could doubt the validity of the plaintiffs' title. It has the highest sanction of the government, an act of legislation. But the 2d section of the act of 1836, which gave this sanction, provided, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title to such lands, in opposition to the rights acquired by such location or purchase."

This provision, it is insisted, covers the case, and defeats the

title of the plaintiffs. But, it must be observed, that a location, to come within the section, must have been made "under a law of the United States." Now an act under a law, means in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs.

The holder of a New Madrid certificate had a right to locate it only on "public lands which had been authorized to be sold." Peltier's location was made in 1816, and his survey in 1818. The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all lands claimed under a French or Spanish title, which claim had been filed with the recorder of land-titles—as the plaintiffs' claim had been—were reserved from sale by the acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of the 9th of July, 1832, and was continued until the final confirmation of the plaintiffs' title, by the act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears, that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiffs' survey, was not "a part of the public land authorized to be sold."

On the above facts, the important question arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery, will not be controverted. That the elder legal title must prevail in the action of ejectment, is undoubted. But the inquiry here is, whether
*318] the defendant has any title, as against the plaintiffs. And there seems to be no difficulty in answering *the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate.

No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been argued, that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be

performed according to law. A patent is utterly void and inoperative, which is issued for land that had been previously patented to another individual. The fee having been vested in the patentee by the first patent, the record could convey no right. It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law it is void. It would be a most dangerous principle to hold, that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiffs' title. For the foregoing reasons, we think the instructions of the court to the jury were erroneous; and, consequently, the judgment must be reversed at the defendant's cost and a *venire de novo* is awarded.

ORDER.

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 Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause be, and the same is hereby reversed with costs; 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*.

*LESSEE OF ROBERT GRIGNON, PETER B. GRIGNON, AND MORGAN L. MARTIN, PLAINTIFFS IN ERROR, *v.* JOHN J. ASTOR, RAMSAY CROOKS, ROBERT STUART, AND LINNS THOMPSON. [*319

By a law of Michigan, passed in 1818, the County Courts had power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies. *Held*, that it was for that court to decide upon the existence of the facts which gave jurisdiction; and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved.[1]

[1] APPLIED. *Griffith* v. *Bogert*, 18 How., 164. APPROVED. *Erwin* v. *Lowry*, 7 How., 181. FOLLOWED. *Florentine* v. *Barton*, 2 Wall., 216; *Comstock* v. *Crawford*, 3 Wall., 406; *McNitt* v. *Turner*, 16 Wall., 366; *Til-*

The distinction examined between courts of limited jurisdiction, where the record must show that jurisdiction was rightfully exercised; and courts of general jurisdiction, where the record being silent upon the subject, it will be presumed that jurisdiction existed.[2]

A title to land becomes a legal title when a claim is confirmed by Congress. Such confirmation is a higher evidence of title than a patent, because it is a direct grant of the fee, which had been previously in the United States.[3]

THIS case was brought up by writ of error from the Supreme Court of the territory of Wisconsin, under the 25th section of the Judiciary act of 1789.

It was an ejectment to recover certain lands in the possession of Linns Thompson, the tenant in possession, at Green Bay, in the county of Brown and territory of Wisconsin. The plaintiffs in error were also plaintiffs below.

Both parties derived title from Pierre Grignon, deceased, who was one-eighth Indian and seven-eighths French. He died in March, 1823, leaving Robert, born in 1803, and Peter, born in 1805 or 1806, his only children by an Indian woman, to whom it was alleged he had been married. They made a conveyance of one-third of the lands to Morgan L. Martin, by deed, 15th November, 1834, who together with the two sons of Pierre, were the lessors of the plaintiff below.

A patent was issued by the United States, on the 21st day of December, 1829, to Pierre Grignon and his heirs, reciting, that by the 3d section of the act of Congress, approved on the 21st of February, 1823, Pierre Grignon was confirmed in his claim to the tract of land containing 230 acres, bounded, &c., and granting said land accordingly.

This was the case made out for the plaintiffs in the court below.

The defendant's title was this.

*320] Pierre Grignon died intestate in March, 1823. Letters of administration *upon his estate were granted by the judge of probate of Brown county, on the 21st June, 1824, to Paul Grignon, who applied under the laws of Michigan, to the County Court of Brown county for power to sell the real estate of the deceased. The authority was

ton v. *Cofield*, 3 Otto, 165; *Davis* v. *Gains*, 4 Otto, 390—393; *Mohr* v. *Manierre*, 11 Otto, 420, 424, 426. CITED. *West* v. *Smith*, 8 How., 412; *Parker* v. *Kane*, 22 How., 14; *Gray* v. *Brignardello*, 1 Wall., 634; *Holmes* v. *Oregon &c. R. R. Co.*, 6 Sawy., 285; S. C. 9 Fed. Rep., 232; *Tant* v. *Wigfall*, 65 Ga., 417; *McGowen* v. *Zimpelman*, 53 Tex., 483. See also *Beauregard* v. *New Orleans*, 18 How., 503.

[2] FOLLOWED. *Sergeant* v. *State Bank of Indiana*, 12 How., 385; *Harvey* v. *Tyler*, 2 Wall., 345; *Miller* v. *United States*, 11 Wall., 300. CITED. *Nations* v. *Johnson*, 24 How., 203; *Cooper* v. *Reynolds*, 10 Wall., 316; *Hay* v. *R. R. Co.*, 4 Hughes, 355; *Lorch* v. *Aultman*, 75 Ind., 166; *Coolman* v. *Fleming*, 82 Ind., 123.

[3] APPLIED. *Murchison* v. *White*, 54 Tex., 83. RELIED ON. *Doe* v. *Estava*, 9 How., 446. CITED. *United States* v. *Varela*, 1 New Mex., 600.

granted and the sale made, under which the title passed through Augustine Grignon to Astor, Crooks, and Stuart, the defendants in the court below. The case turned on the validity of these proceedings, to which sundry objections were made. Before stating them, it is proper to insert so much of the law of Michigan as bears upon the various points.

Act July 27, 1818, sect. 1. "Be it enacted, &c., that, when the goods and chattels belonging to the estate of any person deceased, or that may hereafter decease, shall not be sufficient to answer the just debts which the deceased owed, &c., upon representation thereof, and the same being made to appear to the Supreme Judicial Court, at any term or sitting of said court, or to the County Court in the county where the deceased person last dwelt, or in the county in which the real estate lies, the said courts are severally and respectively authorized to empower and license the executors or administrators of such estate, to make sale of all or any part of the houses, lands, or tenements, of the deceased, so far as shall be necessary to satisfy the just debts which the deceased owed at the time of his death, and legacies bequeathed in and by the last will and testament of the deceased, with the incidental charges.

"And every executor or administrator being so licensed and authorized, shall and may, by virtue of such authority, make, sign, and execute in due form of law, deeds and conveyances for such houses, &c., as they shall so sell; which instrument shall make as good a title to the purchaser, his heirs and assigns for ever, as the testator or intestate, being of full age, of sane mind and memory, in his or her lifetime, might or could for a valuable consideration.

"Provided always, that the executor or administrator, before sale be made as aforesaid, give thirty days' public notice, by posting up notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the county, &c.

"Sect. 2. Whereas, by the partial sale of real estate for the payment of debts or legacies as aforesaid, it often happens that the remainder thereof is much injured: Be it therefore enacted, &c., that whenever it shall be necessary that executors and administrators *shall be empowered to [*321 sell some part of the real estate of testators or intestates, or for guardians to sell some part of the real estate of minors or persons *non compos mentis*, for the payment of just debts, legacies, or taxes, or for the support or legal expenses of minors or persons

non compos mentis, and by such partial sale the residue would be greatly injured, and the same shall be represented and made to appear to either of the aforesaid courts, on petition and declaration, filed and duly proved therein by the said executors, administrators, or guardians, the aforesaid courts respectively may authorize and empower such executors, administrators, or guardians, &c., to sell and convey the whole, or so much of said real estate as shall be most for the interest and benefit of the parties concerned therein, at public auction, and good and sufficient deeds of conveyance therefor to make and execute: which deed or deeds, when duly acknowledged and recorded in the registers of deeds for the county where the said real estate lies, shall make a complete and legal title in fee to the purchaser or purchasers thereof.

"Provided the said executors, administrators, &c., give thirty days' public notice of such intended sale, in manner and form hereinbefore prescribed.

"And provided, also, that they first give bonds, with sufficient sureties, to the judge of probate for the county where the deceased testator or intestate last dwelt and his estate was inventoried, that he or she will observe the rules and directions of law for the sale of real estate by executors or administrators; and the proceeds of such sale, after the payment of just debts, legacies, taxes, and just debts for the support of minors, and other legal expenses and incidental charges, shall be put on interest, on good securities, and that the same shall be disposed of agreeably to the rules of law.

"Sect. 3. That every representation to be made as aforesaid, shall be accompanied with a certificate from the judge of probate of the county where the deceased person's estate was inventoried, certifying the value of the real estate and of the personal estate of such deceased person, and the amount of his or her just debts, and also his opinion whether it be necessary that the whole or a part of the estate should be sold; and if part only, what part.

"And the said courts, previous to their passing on the said representation, shall order due notice to be given to all par-
*322] ties concerned, or their guardians, who do not signify their assent to such sale, to *show cause at such time and place as they shall appoint, why such license should not be granted.

"And in case any person concerned be not an inhabitant of this territory, nor have any guardian, agent, or attorney therein, who may represent him or her, the said justices may cause the said petition to be continued for a reasonable time; and the petitioners shall give personal notice of the petition to

such absent person, his or her agent, attorney, or guardian, or cause the same to be published in some one of the newspapers in this territory three weeks successively.

"And the said courts, when they think it expedient, may examine the said petitioner on oath, touching the truth of facts set forth in the said petition, and the circumstances attending the same.

"Sect. 7. That real estate is and shall be liable to be taken and levied upon by any execution issuing upon judgments recovered against executors or administrators in such capacity, being the proper debts of the testator or intestate; and that the method of levying, appraising and recording, shall be the same as by law is provided respecting other real estates levied upon and taken in execution, and may be redeemed by the executor, administrator, or heir, in like time and manner."

Act to direct Descents, sect. 17. "Whereas, it sometimes happens, that for want of prudent management in executors, administrators, &c., who are empowered to sell real estates, such estates are disposed of below their true value, to the great injury of heirs and creditors: therefore every executor, administrator, &c., who may obtain a legal order for selling real estate, shall, previous to the sale, before the judge of probate, or some justice of the peace, take the following oath: 'I, A. B., do solemnly swear, that in disposing of the estate belonging to —— ——, now deceased, I will use my best skill and judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors to dispose of the same in such manner as will produce the greatest advantage to all persons interested therein, and that without any sinister views whatever.'

"And the said executor, administrator, &c., shall return to the judge of probate a certificate of the same, under the hand of the justice before whom such oath was taken."

The defendants then called Charles C. P. Arndt as a witness, who testified that he was the judge of probate for the county of Brown, and produced the record of letters of administration granted by John Lawe, judge of probate of said county, to Paul Grignon, on the 21st *day of June, A. D. [*323
1824, on the estate of Pierre Grignon, deceased; and also the record of the bond given by the administrator, filed and approved by the said judge of probate on the 21st day of June, 1824, which were read in evidence.

The defendants then offered to read in evidence the following extract or order from a book purporting to be the book of the minutes of the proceedings of the County Court for the county of Brown, which book, Gardner Childs, the clerk of

this court, testified that he had received as the record of said County Court, viz.:

"At a session of the County Court for the county of Brown, begun and held at the township of Green Bay, in the school house, on Tuesday, the tenth day of January, one thousand eight hundred and twenty-six.

"Present; the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice. The court was opened by George Johnston, sheriff.

"The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of Brown, (deceased,) was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

"In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

"Minutes read, corrected, and signed by order of the court.

"ROBERT IRWIN, Jun., *Clerk.*

The reading of which said extract or order in evidence was objected to by the lessors of plaintiff on the ground that it does not appear that there was any petition presented to the court, nor any certificate of the judge of probate certifying as to the value of the property and the necessity of the sale; nor is there anything to show the reasons by which the court could be invested with power to order the sale of the real estate of the intestate according to the statute; and that no notice was given to the parties concerned to show cause according to the requisites of the statute; nor does the order specify what lands of the intestate were to be sold; which objections were overruled by the court, and the said extract or order was read in evidence. To which decision the lessors of the plaintiff excepted.

The defendants then offered in evidence a bond and oath of said administrator to make sale of the real estate of the intes-
*324] tate according to the statute, dated and filed in the pro- *bate office of the 20th of *April, 1826, which were objected to by the lessors of the plaintiff. The objection overruled by the court, who decided that the same might be read in evidence. To which decision the lessors of the plaintiff excepted.

The defendants then introduced Henry S. Baird as a witness, who, being sworn, says, he thinks the notice of sale by the administrator was written and printed. The printed notice

is in court, contained in a newspaper called the "Michigan Herald," printed at Detroit, in seven weekly numbers, commencing on the 16th of March, 1826, and ending on the 26th of April, in the same year. Defendants offered to read the notice from the papers, and to prove by parol that notice of sale was also given in writing, all which evidence was objected to by lessors of plaintiff; which objection was overruled by the court, and the testimony admitted. To which decision the lessors of the plaintiff excepted.

The witness then testified; "I cannot state that I put up any notices of sale, but that I drew the notices, I am positive. I think, I am positive, I drew five copies of the notice which has been read from the newspaper. I cannot say that they were put up in the township at this distance of time—13 years. I cannot recollect. There was, at that time, but one township in this county of Brown, and two counties in what is now the Territory of Wisconsin."

John P. Arndt was called again by the defendants, and testified that he saw a notice of sale of lands of Pierre Grignon posted up in the township, and thinks it was at his house in Green Bay, in the fore part of the season of 1826.

The foregoing testimony of the witnesses, Baird and Arndt, was objected to by lessors of the plaintiff at the time the same was offered. The objection was overruled by the court, and testimony admitted. To which decision the lessors of the plaintiff excepted.

The defendants then offered in evidence a deed from Paul Grignon, as administrator on the estate of Pierre Grignon, deceased, to Augustus Grignon, dated the 13th day of June, A. D. 1826, and recorded on the 5th of February, 1828, in the register's office of Brown county, in book B, page 34, for land covering the land in dispute, which was objected to by the lessors of the plaintiff on the following ground, viz.:

1. No title appeared to be in Pierre Grignon, at the time of his death, or at the date of the deed, to the lands in question.

2. There was no certificate of the judge of probate, as required by *the statute, to the County Court of the [*325 necessity of the sale of said lands for the payment of debts, and the order for sale, by the County Court, was void.

3. There is no evidence on record that the property was sold, or ordered to be sold, for the payment of the debts of the intestate.

4. The sale was not advertised according to law, nor is there any record that the County Court made any order how the estate should be advertised.

5. No order was made by the County Court to show cause why the sale should not be made before granting the order.

In connection with the above deed from Paul Grignon, the defendants offered in evidence the following license, the reading of which was objected to, on the ground that it could have no greater effect than the order upon which it purported to be founded, but the court overruled the objection and permitted it to be read.

TERRITORY OF MICHIGAN, } ss.
Brown County. }

The United States of America, to Paul Grignon, administrator of Pierre Grignon, deceased:

Be it known to all to whom it may concern, that at a term of the County Court of the county of Brown, continued and held at the township of Green Bay, on Tuesday, the tenth of January, A. D. 1826, before the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice, Paul Grignon, administrator of all and singular the goods, &c., &c., lands and tenements of Pierre Grignon, deceased, late of the county of Brown aforesaid, represents to this court, then and there in session, that the said Pierre died intestate at Green Bay, in said county of Brown, on the 4th day of March, A. D. 1823.

That at the time of his death the said Pierre was seised in his demesne as of fee, in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit.:

(Here follows a description of the land.)

And it has been ascertained by the petitioner, that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that his estate will be insolvent; and therefore prays that leave may be granted to him to dispose of the tracts and lots of land aforesaid.

*326] Now, therefore, for the causes aforesaid, and for divers other *good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you, the said administrator, to dispose of all the right, title, and interest of the deceased, in and to the above described tracts and lots of land, in such manner as will best serve the interest of all concerned in said estate: requiring of you a due observance of the statute in such case made and provided.

WITNESS, James Porlier, chief justice of the County Court of the county of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826.

ROBERT IRWIN, Jun., *Clerk, B. C.*

The counsel for the lessors of plaintiff thereupon requested the court to give the jury the following instructions, viz.:

Instruction 1st. If the jury believe from the evidence that the lessors of the plaintiff are the heirs-at-law of Pierre Grignon, or have shown a regular conveyance from the heirs-at-law to themselves of the premises in question, before the commencement of this suit; that then the defendants can claim no title under the sale of the premises in question, made by Paul Grignon, as administrator of the estate of Pierre Grignon, by virtue of the order made by the County Court of Brown county, made on the 10th day of January, 1826; unless the jury are satisfied that the representation made by the said administrator to the said court to obtain the order for license of the said court for the sale of the said premises was accompanied by a certificate of the judge of probate of the county where the said deceased person's estate was inventoried, certifying the value of the real estate, and the value of the personal estate of the said deceased person, and the amount of his just debts, and also his opinion whether it be necessary that the whole or a part of the estate should he sold, and, if a part only, what part, as directed by the third section of an act entitled "An act directing the settlement of the estates of persons deceased, and for the conveyance of real estate in certain cases," as adopted by the governor and judges of the Territory of Michigan, on the 27th day of July, 1818.

Instruction 2d. That the said order or license of the said County Court, for the said sale, unless the said court had been furnished with the said certificate of the said judge of probate, is null and void as against the heirs-at-law of Pierre Grignon, who have not acquiesced in the said sale made by the administrator, under and by virtue of the said order.

*To the two preceding instructions the court decided [*327
and directed the jury as follows, to wit.:

"The two preceding instructions are answered, as the County Court had jurisdiction of this subject, we are bound to infer that these things were shown to said court."

Instruction 3d. That the said County Court had no power or jurisdiction to make said order for sale, without the said certificate of the said judge of probate.

To which said instruction the said court decided and directed the jury as follows, viz.:

"The court answer that the certificate of the judge of probate was not necessary to give the court jurisdiction. It was required as evidence."

Instruction 4th. It must appear affirmatively to the jury that the said County Court at the time of the making the said

order for sale of the said premises, had before them the said certificate of the said judge of probate at the time of making the said order, or granting the said license for the sale of the premises in question, or the said order for sale is void as against the heirs-at-law of Pierre Grignon, deceased, who had not acquiesced in the sale, and those claiming under them.

To which said instruction the court decided and directed the jury as follows, viz:

"This is answered. The judgment of the County Court having jurisdiction is conclusive upon this point."

Instruction 5th. Unless it appears affirmatively to the jury that the said County Court, previous to their passing on said representation for the sale of said premises, ordered due notice to be given to all parties concerned, or their guardians, who did not signify their assent to such sale, to show cause, at such time and place as the court appoint, why such license should not be granted agreeably to the provisions of the said third section of said act in the first instruction referred to; that then the said order or license for sale was void as against the heirs of Pierre Grignon, who have not acquiesced in such sale, and the defendants can acquire no title by virtue of the sale made by the administrator, under the said order, as against the heirs-at-law of the said Pierre Grignon, deceased.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is answered. We state that the County Court having jurisdiction on the subject, their judgment is conclusive."

*328] *Instruction 6th. Unless the jury believe from the evidence that the said administrator, before the sale of the said premises, gave thirty days' public notice, by posting up notifications of such sale, in the township where the lands lie, as well as where the said deceased last dwelt, and in the two next adjoining townships, or caused the printing of such notifications for three weeks successively in such gazette or newspaper as the court who authorized the sale ordered and directed, the said sale was void as against the heirs of the deceased, and those claiming under them.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is a fact for the jury, and you must find that the advertisement given substantially complied with the law, or the sale is void."

Instruction 7th. That the publishing of said notice of sale in a newspaper, without the order or direction of the court who authorized the sale, was a nullity.

To which said instruction the court decided and directed the jury as follows, to wit:

"This is answered in the affirmative."

Instruction 8th. That it must appear affirmatively that the administrator, before making sale of the said premises, did literally and strictly comply with the provisions of the said statute in relation to the posting up or publishing the said notice of sale, or the said sale was void as against the heirs of Pierre Grignon, who have not acquiesced in the same.

To which said instruction the court decided and directed the jury as follows, viz.:

"A substantial compliance with the requisites of the law on this subject is sufficient."

Instruction 9th. If the jury believe from the evidence that Peter B. Grignon, one of the lessors of plaintiff, is one of the heirs-at-law of the deceased, and was a minor at the time of the making of the said order for sale, and at the time of the said sale, a guardian should have been appointed to represent him, according to law; and if no such guardian was appointed, the said sale was void as to him and those claiming under him.

To which said instruction the court decided and directed the jury as follows, to wit:

"It was necessary and proper that, if a minor, he should be notified *by guardian, but in this issue the [*329 presumption is, that he was. This is a fact that he might controvert on appeal."

Instruction 10th. Unless the defendants in this case have proven affirmatively to the jury that the administrator of the said deceased strictly complied with all the provisions of the said statute, in obtaining the order for sale, and in making the said sale, that the defendants in this suit can acquire no title to the premises in question under said sale, as against the lessors of the plaintiff, if the jury believe from the evidence that the lessors of the plaintiff are the heirs-at-law of the said Pierre Grignon, deceased, or derived title from the heirs-at-law.

To which said instruction the court decided and directed the jury as follows, to wit:

"Answer. That the court charge the jury that they are bound to consider, in this collateral issue, that the judgment or order of the County Court of Brown county, ordering the sale, was made upon sufficient and proper evidence, and that they had every thing requisite before them to authorize them to make the order for the sale, and that the judgment of that court is conclusive until reversed."

To all which foregoing decisions and answers, given by the said court to each and every of the said instructions, and for refusing to give the said instructions, respectively, as the same were asked, and to the said charge to the jury, and every part thereof, the said lessors of the said plaintiff except, and tender this bill of exceptions to the court for its signature, and bill sealed. ANDREW G. MILLER, *Judge*, *&c.* [L. S.]

October 21, 1839.

Choate, for the plaintiffs in error.

Crittenden and *Lord*, for the defendants in error.

Choate, for the plaintiffs in error, made the following points:

1. The plaintiff contended first, and now contends, that the defendants did not offer competent proof, sufficient to show, even *prima facie*, that the said County Court, under whose alleged order the said administrator made the sale, ever acquired jurisdiction of the matter in relation to which it was alleged to have made the order; and that, therefore, the order was a nullity.

*330] The jurisdiction of that court depends on a law of the territory of *Michigan, made on the 27th day of July, A. D. 1818. (Laws Michigan, vol. i., p. 37.) By that law it is enacted, in section 1, that when the goods and chattels of a person deceased shall not be sufficient to pay his debts, then, "upon representation thereof, and the same being made to appear, to the Supreme Judicial Court, or to the County Court in the county where the deceased last dwelt, or where his real estate lies," the said courts are authorized to license the executor or administrator to sell his real estate, "so far as shall be necessary to satisfy the just debts of the deceased."

The same law enacts, in section 3, "that every representation made as aforesaid shall be accompanied by a certificate from the judge of probate." The contents of which certificate are particularly prescribed.

It also enacts in the same section, that "the said courts, previous to their passing on the said representation, shall order due notice to be given to all parties or their guardians, to show cause against the granting of the license. And in case any person concerned be not an inhabitant of this republic, nor have any guardian, agent, or attorney therein, who may represent him or her, the said justices may cause the said petition to be continued for a reasonable time; and the petitioner shall give personal notice of the said petition to such absent person, his agent, attorney, or guardian, or cause the same to be

published in some one of the newspapers in this territory three weeks successively."

And it enacts, in the first section, in these words: "Provided always, that the executor or administrator before sale made, give thirty days' public notice, by posting up notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the county."

To prove the jurisdiction and order of the Court of Common Pleas, the defendants offered in evidence an extract from a book purporting to be the book of the minutes of the proceedings of the said court.

To this the plaintiff objected as incompetent; and he contends that it was incompetent and inadmissible for any purpose.

1st. Because it was not such a record, nor parcel of such a record, as by the law of Michigan, passed April 21, A. D. 1825, and by the law of evidence, is competent and admissible to prove any act of a court. The 24th and 25th sections of that law are as follows:

An act concerning the Supreme and County Courts of the territory of Michigan, defining their jurisdiction and powers, and directing the pleadings and practice therein in certain cases. [*331

Sect. 24. And be it further enacted, that for preventing errors in entering the judgments, orders, and decrees, of the Supreme and County Courts, the judges and justices of the said courts respectively, before every adjournment, shall cause the minutes of their proceedings during the preceding day to be publicly read by the clerk, and corrected when necessary, and then the same shall be signed by the presiding judge of the said court; which minutes, so signed, shall be taken in a book, and carefully preserved among the records.

Sect. 25. And be it further enacted, that whenever any civil cause, of whatever nature it be, shall be finally determined, the clerk of any of said courts shall, during the next vacation, enter the warrants of attorney, original writ or writs, declaration, pleadings, proceedings, and judgment, in such cause, so as to make a complete record thereof, in a separate book to be kept for that purpose, with a complete alphabetical index to the same; which records, after being examined and compared with warrants of attorney, writ or writs, declaration, pleadings, proceedings, and judgment, and being found correct, shall, at the next term, be signed by the presiding judge of the court.

Sect. 70. And be it further enacted, that this act shall take effect from and after the third Monday of September next.

Approved April 21, 1825.

The said extracted passage is not signed by the presiding judge; it is not, therefore, even legally authenticated minutes of the proceedings of the court; and if it were, it is not a record, or parcel of record, nor admissible in evidence.

2d. Because, even if it were unobjectionable in point of formal authentication, it does not prove, nor tend to prove, that the court have jurisdiction, or that the order was made by a court having jurisdiction, or that it was an order relating to the lands described in the declaration. It does not record or recite the making of a representation by petition, or otherwise, alleging any indebtment of the said Pierre, nor any other ground for asking or granting the license on which the court had jurisdiction to act, as was necessary in point of law. It does not record or recite any certificate of the judge of probate, nor any notice to anybody, to show cause against the grant of the license, nor does it point out which, or how much, estate is to be sold, as was necessary in point of law.

*332] *The District Court, however, admitted this evidence, and this decision was erroneous.

And if the said extracted passage be competent and admissible evidence, the plaintiff contends, for the reasons aforesaid, that it is wholly inoperative and ineffectual, and insufficient to prove that the court had any jurisdiction to act, or that the order was the act of a court having any jurisdiction, or that it was of any legal validity or effect whatever, or communicated any authority whatever to the administrator.

The District Court decided against the proposition, and that decision was erroneous.

3d. He contends that the paper purporting to be a license, issued by the clerk of the said court, was incompetent and inadmissible as evidence; and that, if competent, it was inoperative and ineffectual, and communicated no authority to the administrator.

It is not a record, nor evidence of any fact. It is not signed by the presiding justice. It is not recorded. It is the mere act of the clerk in vacation. It presupposes and requires, as a condition of admissibility and validity, a valid order of a court having jurisdiction, of which there is no evidence.

It was not issued nor made during a session of the court, yet the District Court admitted this evidence, and declared it to be effectual and sufficient to prove jurisdiction.

This decision was erroneous.

4th. The plaintiff contends, that even if the evidence afore-

said was competent and admissible, and even if it were sufficient to show, *prima facie*, that the court ever had or began to have jurisdiction, yet that it was competent for him on the trial to encounter it by proof; that no certificate of the judge of probate was furnished to the said court; that no notice was ordered by the court, previous to the making of the alleged order of sale, to any person to show cause against the grant of the license, or that an application for leave to sell was pending; that no notice was given to, or had, by either of the heirs of said Pierre, or any one acting for them, that such application was pending; that one of the heirs was a minor at the time of the sale, and had no guardian; and that proof of these facts, or of either of them, would have disproved or put an end to, and ousted the jurisdiction of the court, and would have shown in point of law that the order of sale, and the alleged license, were wholly invalid, and ineffectual and inoperative.

*But the said District Court decided, that the judgment or order of the County Court was conclusive evidence of the jurisdiction of the court, and of all proofs and things necessary to the making of the said order of sale, and is a valid and effectual order of sale. [*333

This decision, the plaintiff contends, was erroneous.

5th. The plaintiff contends, that in order to give to the administrator's deed any legal validity and effect, it was necessary to prove that notice of the notifications described and required in the said 1st section of the laws of Michigan, and that the evidence to prove this of Baird and Arndt, was incompetent and wholly insufficient for the purpose. And he contends, that the decisions of the District Court upon this matter were erroneous on several grounds.

1. In admitting incompetent proof.

2. In deciding as matter of law a mere point of evidence, to wit: that the proof aforesaid established a substantial compliance with the law, instead of declaring to the jury what the law required to have done; and then submitting the question of fact and evidence to the jury whether it had been done.

3. In refusing to instruct the jury that the administrator must literally and strictly comply with the provisions of the statute in the matter, by posting up notifications, and instructing them that a substantial compliance with the requests of the law was sufficient, without instructing them what acts would constitute a substantial compliance therewith.

6th. The plaintiff contended at the trial, and contends here, that the lands claimed in the action could not legally be sold by the administrator under any order or judgment of any

court, as the real estate of Pierre Grignon, for the payment of his debts. And that the patent passes a perfect title to plaintiff's lessors.

The law of Michigan above referred to, and in part set forth, authorizes the sale of the "houses, lands or tenements, of the deceased." The estate in question was not such. The title of Pierre Grignon at his death, if any, was equitable only, resting on the pleasure or justice of government, and could not be taken in execution or sold for his debts. The patent of 21st December, 1829, vested the title directly in the heirs. But the District Court decided otherwise.

7th. The plaintiff contends that if the license has any effect, it proves that the administrator represented that the *334] said Pierre was seised, at the time of his death, as in his demesne, as of fee of the *estate claimed in the action; that the said representation was untrue; that the order of sale was founded in part upon that representation, and affirms it; and is for that cause erroneous and invalid, and does not support the administrator's deed.

Lord and *Crittenden*, for the defendants in error, made the following points:

1. By the act of Michigan, of July 27, 1818, the County Court of Brown County had jurisdiction to order the sale of the lands of an intestate for payment of debts, whenever the goods and chattels should not be sufficient to answer the same: and such jurisdiction was to be exercised upon representation of such insufficiency, and the same being made to appear to the County Court.

2. The court thus having jurisdiction, the want of evidence, however necessary and essential that evidence, to warrant its order, was merely error: and it cannot be shown by strangers to the order, to overturn the title of a purchaser. The order cannot be impeached collaterally.

3. The license, which is the order exemplified for the purchaser's protection, and the minutes, show every fact on which the jurisdiction of the court rests, and show such an order as the court was by law authorized to make.

4. The jurisdiction being shown, not only is the order unimpeachable collaterally for errors in making it, but every proper requisite to the act of jurisdiction is to be presumed as a conclusion of law; and it is to be presumed, in every collateral suit, that there was no error or irregularity; no want of citation, notice or evidence.

5. There is no express saving of the rights of infants. The statute authorizes the sale as a proceeding *in rem*. The lands

were liable to be sold under judgments recovered against the administrator for the intestate's debt, so that the sale by the administrator was merely a conversion from real to personal estate; in reference to the sale of which, in either mode, he was accountable. There is, therefore, no ground to impeach the order, on the supposition that infants were interested, and were not notified, even if such supposition was not precluded by the presumption of law.

6. The acts *in pais*, after the order of sale, were left by the court to be found by the jury, considering all the evidence. Such acts could not be required to be established, at the distance of thirteen years, except by showing a substantial compliance with the law. *A substantial compliance is [*335 all which is at any time necessary in carrying out a sale by order of a court.

7. The plaintiff did not attempt by any evidence directly to impeach the proceedings, by showing want of notice, want of evidence, want of strict conformity to law, although Paul Grignon, the administrator, and Augustine Grignon, the purchaser, had both united to defeat the sale under the order by a subsequent conveyance, and were both produced as witnesses for the plaintiff. The plaintiff must therefore fail if the order and license are evidence at all, although not conclusive: as a presumption subject to contradiction, it must be taken against the plaintiff, who might contradict it if false, and does not.

8. The interest of Pierre Grignon in these lands, at the time of his death, was an interest existing at the date of the act of Congress of February 21, 1823, and so liable to be sold by his administrator, as goods, chattels, lands, or tenements. The purchaser, by the administrator's sale, acquired as good a title as the intestate could in his lifetime convey for a valuable consideration.

The patent issued after his death enured to the benefit of his assigns, the defendants deriving their title under him.

Numerous authorities were cited by the counsel upon each side, in support of their respective points: but the reporter was necessarily absent during the argument of the cause, and is therefore unable to cite them.

Mr. Justice BALDWIN delivered the opinion of the court.

This case comes here on a writ of error from the Supreme Court of the Territory of Wisconsin, the premises in controversy were formerly owned by one Peter Grignon, to whom they were confirmed by an act of Congress, passed 21st February, 1823, to be found in 3 Story's Laws, 1877. He died in

March following, intestate, indebted, and leaving two sons who are lessors of the plaintiff, one born in 1803, the other in 1806. They conveyed one-third to Martin, the other lessor, in 1834. The lessors claim as heirs-at-law of Peter Grignon, and the conveyance from them to Martin.

In 1824, letters of administration on the estate of Peter Grignon were duly granted to Paul Grignon, the brother of the deceased, who gave bond for the performance of the trust, according to law. In January, 1826, he presented his petition to the County Court of Brown county, then in the [*336 Territory of Michigan, praying for an *order from the court, to authorize him to dispose of the real estate of the said Peter, which was granted, a license issued to the administrator to sell in March, 1826. A sale was accordingly made to Augustin Grignon, to whom a deed was executed by the administrator in June, 1826, and duly recorded. The defendants claim title under this sale, by sundry mesne conveyances from the purchaser.

The law of Michigan is set forth in the statement of the case by the reporter.

In the County Court the following proceedings were had:

"At a session of the County Court for the county of Brown, begun and held at the township of Green Bay, in the schoolhouse, on Tuesday, the 10th day of January, one thousand eight hundred and twenty-six.

"Present: the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice. The court was opened by George Johnston, sheriff.

"The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of Brown, (deceased,) was filed by his attorney, H. S. Baird, praying for an order from the court to authorize him to dispose of the real estate of said Pierre.

"In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid.

"Minutes read, corrected, and signed by order of the court.

ROBERT IRWIN, Jun., *Clerk.*"

TERRITORY OF MICHIGAN, } ss.
Brown county, }

The United States of America, to Paul Grignon, administrator of Pierre Grignon, deceased.

Be it known, to all whom it may concern, that at a term of the County Court of the county of Brown, continued and held at the township of Green Bay, in said county, on Tuesday, the

tenth day of January, in the year of our Lord, one thousand eight hundred and twenty-six, before the Hon. James Porlier, chief justice, and John Lawe, Esq., associate justice, Paul Grignon, administrator of all and singular the goods and chattels, rights and credits, lands and tenements of Pierre Grignon, deceased, late of the county of Brown aforesaid, represents to this court, then and there in session, that the said Pierre died intestate, at Green Bay, in said county of Brown, on the fourth day of March, A. D., 1823; that at the time of his death, *the said Pierre was seised in his demesne as of fee in and to the following tracts or lots of land, situated at Green Bay aforesaid, to wit: [*337

Lot number three, on the east side of Fox river, bounded north by land claimed by the estate of Dometile Longevin, south by Augustin Grignon, and four-and-a-half arpens in front, and eighty arpens rear.

Also, lot number five, on the same side of said river, bounded north by Augustin Grignon's claim, and south by land claimed and occupied by John Lawe, Esq., being four acres and sixteen feet wide, and extending back eighty acres.

Also, lot number three, in dispute between said deceased and George Johnston, on the west side of said Fox river, lately occupied by said George Johnston, bounded north by Louis Grignon, and south by land of said deceased, being eight chains and sixty-two links wide, and eighty arpens deep.

Also, lot number four, on the same side of said river, bounded north by the last mentioned claim, and south by land claimed by John Lawe, Esq., being eight chains and fifty links wide, and extending back eighty arpens.

And that it has been ascertained by the petitioner that the goods and chattels belonging to the estate of the said deceased are insufficient to pay all the just debts which he owed at the time of his death, but that the estate will be insolvent; and therefore prays that leave may be granted him to dispose of the tracts and lots of land aforesaid.

Now, therefore, for the causes aforesaid, and for divers other good and sufficient reasons, the court thereunto moving, they do hereby authorize and empower you the said administrator, to dispose of all the right, title, and interest of the deceased in and to the above described tracts and lots of land in such manner as will best serve the interest of all concerned in said estate, requiring of you a due observance of the statute in such case made and provided.

WITNESS, James Porlier, chief justice of the County Court of the county of Brown, at the township of Green Bay, on the 28th of March, A. D. 1826.

321 ROBERT IRWIN, Jun., *Clerk B. C.*

At the trial numerous questions of evidence arose, and many instructions were asked of the court, to whose opinion the plaintiffs excepted; but we do not deem it necessary to notice them in detail, as in our opinion the whole merits of the controversy depend on one *single question had the County Court of Brown county jurisdiction of the subject on which they acted?

*338]

Jurisdiction has been thus defined by this court.

"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 presents such a case in his petition, that on a demurrer the court would render a 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 a petition containing all the requisites, and in the manner required by law." 6 Pet., 709. "Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial, or extra-judicial, with, or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." 12 Pet., 718; S. P., 3 Id., 205. It is a case of judicial cognizance, and the proceedings are judicial. 12 Id., 623.[1]

This is the line which denotes jurisdiction and its exercise. in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land, (11 Serg. & R., (Pa.), 432;) they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the Orphans' Court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate, a purchaser claims not their title, but one paramount. 11 Serg. & R., (Pa.), 426. The estate passes to him by operation of law.

[1] *See Holmes* v. *Oregon, &c. R. R. Co.*, 7 Sawy., 391.

11 Serg. & R., (Pa.), 428. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties, (11 Serg. & R., (Pa.), 429,) which directs the title of the deceased. 11 Serg. & R., (Pa.), 430.

As the jurisdiction of such courts is irrespective of the parties in *interest, our inquiry in this case is [*339 whether the County Court of Brown county had power to act in the estate of Peter Grignon, on the petition of the administrator under the law of Michigan, providing, that where the goods and chattels of a decedent are not sufficient to answer his just debts, on representation thereof, and the same being made to appear to the County Court where he dwelt, or where his real estate lies, it may license the executor or administrator to make sale of so much as will satisfy the debts and legacies.

No other requisites to the jurisdiction of the County Court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the County Court where he dwelt or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not; it was a subject on which there might be judicial action. The record of the County Court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were such as to justify their action. 14 Pet., 458. But though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. 3 Pet., 202; 2 Id., 165. We all know that even in the old states, the records of these and similar proceedings are very imperfectly kept, that where it consists of separate pieces of paper, they are often mislaid or lost by the carelessness of

clerks and their frequent changes; regular entries of the proceedings are not entered on the docket as in adversary cases, nor are the facts set forth in the petition entered at large; and
*340] it is no matter of surprise that in so new and remote part of the country as * the place where these proceedings were had, this state of things should exist. Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on files, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence, or decree. 2 Pet., 165. The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale, unless in a case under the 3d section. The subsequent provisions of the act of Michigan relate exclusively to acts and proceedings in the execution of the order of sale or are directory to the administrator to accompany the representation with a certificate of the judge of probate, and to the court, before passing on such representation, to order notice to be given to the parties concerned, to show cause why the license should not be granted; but these provisions do not affect the jurisdiction of the court, they apply only to its exercise. After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that or any fact which was necessary to give them power to make it, and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter.

The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having

power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet., 729. A purchaser under it is bound to look beyond the decree; if there is error in it, of the *most palpable kind, if the court which [*341 rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Pet., 205. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The Circuit Court of this district has original, exclusive, and final jurisdiction in criminal cases, its judgment is a sufficient cause on a return to a writ of *habeas corpus;* "on this writ this court cannot look behind the judgment and re-examine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and

pronounces the law of the case. The judgment of a court of
*342] record, whose jurisdiction is final, is as conclusive on
* all the world as the judgment of this court would be. It is as conclusive in this court as it is on other courts. It puts an end to all inquiry into the fact by deciding it." 3 Pet., 204, 205.

"To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its (the Circuit Court) powers and duties; the decision of the question is the exercise of jurisdiction, whether the judgment be for or against the prisoner, it is equally binding and remains in full force until reversed." 3 Pet., 204, 205.

If the jurisdiction of the court in a civil case is not alleged in the "pleadings, the judgment is not a nullity, but though erroneous, is obligatory as one, (3 Pet., 206,) and in a proceeding *in rem*, an erroneous judgment binds the property on which it acts, it will not bind it the less because the error is apparent, and the judgment is of complete obligation." 3 Pet., 207. The judgment of the Circuit Court, in a criminal case, "is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decision." 3 Pet., 207.

These principles have been applied by this court to sales made under the decrees of Orphans' Courts: where they have power to judge of a matter of fact, "they are not required to enter on record the evidence on which they decided that fact. And how can we now say but that the court had satisfactory evidence before it, that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court depended on that fact, it is by no means clear, that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question in this collateral way, is certainly not warranted by any principle of law." 2 Pet., 165, *Thompson* v. *Tolmie*.

"If the purchaser (under a decree of the Orphans' Court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." 2 Pet., 169, cited 11 Serg. & R. (Pa.), 429.

"The purchaser is not bound to look farther back than the order of the court. He is not to see whether the court were mistaken in the facts of debts and children. The decree of an Orphans' Court in a case within its jurisdiction is reversi-

ble only on appeal, and not *collaterally in an other suit. A title under a license to the administrator to sell real estate, "is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstance of the case."

"The license was granted by a court having jurisdiction of the subject: if it was improvidently exercised, or in a manner not warranted by the evidence from the probate courts; yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a court of competent jurisdiction." 2 Pet., 169, and 11 Mass., 227, cited.

In that case the jurisdiction of the court was held to attach, "when the acceptor dies intestate, and any of the persons entitled to his estate is a minor," (2 Pet., 165;) so in this case it attaches on the decease of any person indebted beyond the personal estate he leaves, and when jurisdiction is once attached to a subject, or exists over a person, this court has adopted as a rule applicable to all courts of record that their decisions are conclusive; "it has a right to decide every question which occurs in a cause, and whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court." 1 Pet., 340. In *Voorhees* v. *The Bank of the United States* the same principle is applied to sales on executions under judgments on adversary process, and such must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem*, as *in personam*. 10 Pet., 473.

We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents, by order of those courts to whom the laws of the states confide full jurisdiction over the subjects.

These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner, and the terms of sale; whereas on sales *by a sheriff, all is by com- [*344

pulsion and no credit is allowed; he cannot offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires.

It has been contended by the plaintiff's counsel, that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the County Court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States by the government itself, whereas the patent was only the act of its ministerial officers.

These views of this case decide it, without examining the exceptions to the admission of evidence, the ruling of the court on the instruction prayed, or their charge to the jury. So far as either were unfavorable to the plaintiff, they are most fully sustained by the foregoing principles and cases; the County Court of Brown county had undoubted jurisdiction of the subject; their proceedings are irreversible; the title of the purchaser cannot be questioned; and the judgment of the court below must be affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the territory of Wisconsin, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the territory of Wisconsin in this cause be, and the same is hereby, affirmed with costs.

PIERRE CHOUTEAU, SEN., PLAINTIFF IN ERROR, *v.* WILLIAM ECKHART.

This court has jurisdiction, under the twenty-fifth section of the Judiciary act, in a Missouri land cause, where the title is not to be determined by Spanish laws alone. but where the construction of an act of Congress is involved to sustain the title.[1]

*345] The obligation of perfecting titles under Spanish concessions, which was assumed *by the United States in the Louisiana treaty, was a politi-

[1] FOLLOWED. *Lytle* v. *Arkansas*, 177. CITED. *Gill* v. *Oliver*, 11 Id., 549. 22 How. 203; *Jourdan* v. *Barrett*, 4 Id.,

cal obligation, to be carried out by the legislative department of the government. Congress, in confirming or rejecting claims, acted as the successor of the intendant-general; and both exercised, in this respect, a portion of sovereign power.[2]

The act of Congress, passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages to village lots and commons, gave a title which is paramount to a title held under an old Spanish concession, confirmed by Congress in 1836.[3]

THIS case was brought up from the Supreme Court of the state of Missouri, by a writ of error issued under the 25th section of the Judiciary act of 1789.

The facts were these:

On the 11th of January, 1797, Charles Tayon presented the following petition:

To Don Zenon Trudeau, lieutenant-governor of the western part of Illinois, at St. Louis:

Charles Tayon, sub-lieutenant of infantry, pensioned by the king, captain of militia, commandant, under your orders, of the village of St. Charles, of Missouri, has the honor to pray you to grant him a tract of timbered land of six arpens in width, fronting on the (marcies croche de la prairie basse) Crooked swamp, in the low prairie, and extending to the Missouri, adjoining, on one side, to Mr. Ant. Janis, and on the other side, to lands not heretofore granted; favor which he expects of your justice.

(Signed) CHARLES TAYON.

St. Louis, 11th January, 1797.

On the 23d of January, Trudeau returned the following answer:

St. Louis, January 23, 1797.

Having been informed that the land asked for, in order to procure timber, is in no way fit to be improved, on account of the inundations to which it is subject every year, and that the timber thereon is only good to burn, and will renew itself in a short time, and therefore cannot be ruined, as the timber growing on the hills, which experience has shown will never grow up again; and the said land being in the vicinity of the village of St. Charles and of various farms, in the prairie of its dependency, which would have to go a great deal further

[2] FOLLOWED. *Kennedy* v. *Hunt*, 7 How., 592. REVIEWED. *Berthold* v. *McDonald*, 22 Id., 341. CITED. *United States* v. *Lucero*, 1 New Mex., 447.

[3] APPLIED. *Dent* v. *Emmeger*, 14 Wall., 313. EXPLAINED. *Landes* v. *Brant*, 10 How., 370; *Carondelet* v. *St. Louis*, 1 Black, 189. REVIEWED. *Guitard* v. *Stoddard*, 16 How., 508. See also *United States* v. *King*, 3 How., 787; *Les Bois* v. *Bramell*, 4 Id., 458, 464; *Bryan* v. *Forsyth*, 19 Id. 336.

to procure wood; said tract shall remain (as well as all others adjoining, either in ascending or descending the Missouri, and which have been asked for by sundry petitions, addressed to us, together with the present, by Mr. Tayon) to the royal domain, *and for the common use of the said village of St. Charles, and for the lands already granted in the prairies, or to be granted hereafter: all which Mr. Tayon shall make known to all the inhabitants, and especially to those who have asked for land, and whose petitions I herewith return.

*346]

(Signed) ZENON TRUDEAU.

On the 17th of November, 1800, Pierre Chouteau applied for an augmentation of a previous concession, as follows:

To Don Carlos Dehault Delassus, lieutenant-colonel attached to the stationary regiment of Louisiana, and lieutenant-governor of the upper part of the same province:

Peter Chouteau, lieutenant of militia and commandant of the fort of Carondelet, in the Osage nation, has the honor to represent to you, that formerly he obtained of Don Manuel Perez, lieutenant-governor of this part of Illinois, a concession for a tract of land of 10 arpens in front by as many in depth, to be taken on the left side of the Missouri, at about 20 arpens above St. Charles, upon which concession your petitioner has made all preparatory works for the construction of a water grist-mill, which was to be built on the creek comprised in his concession. The lieutenant-governor, Don Zenon Trudeau, was pleased to grant to your petitioner an augmentation to the said tract of 30 arpens in depth, all which is proven by the authentic documents necessary to this object. The desire of profiting of the favor which the general government granted to all those who presented their titles to obtain their ratification, caused your petitioner to address those same above-mentioned documents to a friend at New Orleans, to whom probably they have not been remitted, since he could not effectuate their presentation; the said original documents having not been registered in the archives of this government, your petitioner would be in great perplexity had he not to offer to you the attestation of Don Carlos Tayon, captain commanding the village of St. Charles, of Missouri, who at that time had a perfect knowledge of the original documents here above-mentioned, by virtue of which your petitioner was authorized to begin an establishment for which he has made considerable sacrifice.

Full of confidence in the justice and generosity of the government, he hopes that after the attestation you may be

pleased to take from the commandant of St. Charles, you will have the goodness to ratify to him, and in the place, the security of a property which he has been enjoying for more than ten years by virtue of the titles to him *expedited [*347 by your predecessors, and of which he should wish that you would be pleased to order the surveyor of the Upper Louisiana to put him in possession in the following manner: to take two arpens below the creek comprised in his concession, and above said creek all the space which is between the said creek and the next plantation, by the depth of forty arpens, in order that, being possessed of the certificate of survey which shall be delivered to him, he may, if needed, have recourse to the superior authorities to obtain the ratification of the said title. The petitioner presumes to hope every thing from your justice in the decision of the case which he has the honor to submit to your tribunal. PIERRE CHOUTEAU.

St. Louis of Illinois, 17th of November, 1800.

On the 18th of November, 1800, Delassus referred the matter to Tayon, who replied as follows:

St. Louis of Illinois, 17*th of November*, 1800.

Cognisance being taken of the foregoing statement, the sub-lieutenant in the royal army and captain of militia, commandant of the post of St. Charles, shall give, in continuation, information of all he knows upon what is here asked.

DELASSUS.

In compliance with the foregoing order, I do inform the lieutenant-governor that the statement of Don Pierre Chouteau is in all conformable to truth, having had full knowledge of the titles mentioned by him in his petition, as well as of the considerable works he has done on said land, of which he has always been acknowledged as the proprietor.

CHARLES TAYON.

St. Louis, 25th November, 1800.

On the next day, the 26th of November, 1800, Delassus issued the following order:

St. Louis of Illinois, 26*th November*, 1800.

Having seen the foregoing information and the just rights stated by Don Pedro Chouteau, to whom an unexpected accident has deprived of his title of concession, and considering that he has been for a long time proprietor of the land in question, the surveyor of this Upper Louisiana, Don Antonia

Soulard, shall put him in possession, in the manner solicited, of the tract of land he petitions for; and the survey being executed, he shall draw a plat of said survey, which he shall deliver to the interested party, to serve to the said party to
*348] obtain the title in form from the general intendency, to which tribunal alone *corresponds, by royal order, the distributing and granting all classes of lands of the royal domain. CARLOS DEHAULT DELASSUS.

On the 18th of January, 1801, the inhabitants of the village of St Charles had a meeting and adopted the following proceedings:

"In the year eighteen hundred and one, on the 18th of January, at the request of Mr. Louis Barrada, syndic for the fences of this parish, we, Charles Tayon, captain-commandant of the said St. Charles, have given notice at the door of this said church, that all the inhabitants of this place should have to assemble this day in our government (house,) in order to determine whether the commons at the lower end should be increased or not. The said inhabitants being then assembled, and the question being under deliberation, they all unanimously agreed, that for the interest of the said parish, the enclosed of the lands shall begin (*acoté*) by the side of Mr. Antoine Lamarche, and it shall be continued in descending to the Crooked swamp, all the way through the woods, to nearly opposite the house of the late Louis Hunault; thence it shall run in a straight line to the Missouri.

"The said inhabitants having thus determined on this head, it was agreed that the syndic on duty this year shall cause to be measured the quantity of arpens of land which are included in the new augmentation of the commons, in order to (*separter*) distribute to each inhabitant what he is to do with it, according to the usages which have always been observed, without wronging any one whosoever in the said distribution.

"It has been further agreed in the said assembly, that if hereafter the commons of the upper end should need to be enlarged, in order to procure more pasturage for the cattle, all the said inhabitants (*s'y porterons*) shall help in doing the same, as this day they bind themselves to do for the lower end, always without prejudice to any one whosoever. And as the said inhabitants will not undertake any thing without the consent of the lieutenant-governor, they have judged proper that the present deliberation should be communicated to him, and that he be supplicated to preserve to the said inhabitants of St. Charles, of Missouri, their upper and lower commons, in their whole and entire state, and they will bind themselves

to enclose the same as they have done heretofore, in order to preserve their grain and other property.

*"Done and agreed upon in our government (house), [*349 day and year as above. And all the said inhabitants have signed or made their customary marks."

On the 26th of February, 1801, Delassus made the following reply:

St. Louis of Illinois, February 26th, 1801.

All concessions and augmentations of property must be granted by the intendant of these provinces, on a petition which is to be presented by those persons claiming lands; but if the commons of the inhabitants of St. Charles is not sufficient for their cultivation, we do permit them, provisionally, to enlarge the same according to their wishes, without insuring to them the right of property, which they are to apply for as above mentioned. And the provisional lines of the said augmentation shall be drawn by Captain Antoine Soulard, surveyor of Upper Louisiana, who is the only person authorized to survey under our orders. It being well understood that nothing shall be done to the prejudice of any person.

(Signed) CARLOS DEHAULT DELASSUS.

On the 23d of February, 1804, Delassus issued another order as follows:

C.—In consequence of the representation of the inhabitants of your post, which appears to me very just and well founded, after my decree of 26th February, in the year 1801, by which the augmentation therein mentioned is granted to them, and for which they have asked a survey by their petition of 27th April of the same year—which petition you have kept to this day without making it known to me, for which I hold you responsible—I apprize you that the surveys made in the said place cannot belong to any individual, but to the commons of St. Charles. Therefore you shall notify those who have had surveys made in the said place of this disposition, and you shall take the necessary measures for the execution of the whole survey asked for by the said petition of 27th April, according to the aforesaid decree of 26th February, in the year 1801.

May God have you in his holy keeping.

Signed in the original, CARLOS DEHAULT DELASSUS.

Mr. Charles Tayon.

St. Louis of Illinois, 23d February, 1804.

I certify that the above is a copy of the original, (official letter,) addressed to Mr. Charles Tayon by the ex-commander-in-chief of *Upper Louisiana, Don Carlos Dehault Delassus, and presented to me by the citizens of note of the village of St. Charles, while I was commandant of the said village.

*350]

(Signed) JAMES MACKAY.

On the 2d of March, 1804, the surveyor-general, Soulard, having made a survey and plat in conformity with the above order, issued the following certificate:

I, Anthony Soulard, surveyor-general of Upper Louisiana, do hereby certify, that a tract of land was surveyed, meted, and bounded for, and in presence of, the syndic and inhabitants of St. Charles, (Missouri,) with the assistance of many of the inhabitants of said village, such as is represented in the plan hereto annexed, according to their petition therefor, dated January 18th, 1801, and the decree of the lieutenant governor, by which I am ordered to put them in possession of a sufficient quantity of land to serve them as a common; which surveys being completed, I find the said tract of land to contain 14,000 arpens, (superficial measure,) the admeasurement being made with the perch of Paris, of 18 pies in length, also Paris measure according to the usages or customs of this country; which tract of land is situate on the left side of the Missouri river, at about twenty-one miles from the town of St. Louis, bounded as follows, viz.: N. E., lands of the royal domain; S. E., the river Missouri; S. W., partly by land of St. James d'Eglise; N. W., by sundries, namely, Francis Duquette, the inhabitants of Marias Croche, lands at the Mamelles, lands of various proprietors, and lastly, by lands of Frs. Duguette, Joseph Tayon, John Tayon, and royal domain. This survey and admeasurement made without noticing the variation magnetic needle, which is (now) 7° 30′, E.; the whole as represented in the plan hereto prefixed, in which the courses, distances, metes, bounds, &c., are noted.

This survey, made in conformity to the decree of the late lieutenant governor, Ch. D. Delassus, dated February 26th, 1801, which is hereto annexed, the whole laid down from the field-notes of my deputy, James Mackay, dated on the 27th (day following) of the month of February, of this present year, which I signed. ANTHONY SOULARD.

St, Louis, March 2d, 1804.

Notes.—All the metes and corners are designated in the plan. All the trees in the lines are blazed, with two notches

below the blaze. The trees on the right and left of the lines are merely blazed. A. is *a tract of land subdivided among several persons, and called the Cul de Sac lands. [*351 C. is a tract also granted to several persons, and called the Grand Prairie.

I, Anthony Soulard, surveyor-general of Upper Louisiana, do hereby certify, that the above plan and notes of a survey agree in every part with the originals, which are filed in my office. ANTHONY SOULARD, *Surv. Gen.*

St. Louis of Illinois, March 2d, 1804.

On the 2d of March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana;" the general purport of which was to recognize all existing grants. It further provided for the appointment of three persons who should examine and decide on all claims submitted to them and report the result to the secretary of the treasury, who was directed to communicate it to Congress.

On the 3d of February, 1806, the inhabitants of the village of St. Charles laid such of the above papers as relate to their title before the commissioners appointed under the act of 1805, and claimed a common for the general benefit of the inhabitants.

On the 3d of March, 1807, Congress passed another act relating to these land-titles, explanatory and corrective of the preceding act.

Both claims, that of Chouteau and the inhabitants of the village, were presented to the commissioners, who rejected Chouteau's and took no notice of the claim of the inhabitants of the village.

On the 13th of June, 1812, Congress passed another act "making further provision for settling the claims to land in the territory of Missouri;" in which, amongst other things, it is enacted, "That the rights, titles and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, &c., &c., &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: provided, that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory." 335

In 1813 another act was passed upon the subject, which does not appear to have any material bearing upon the case.

*352] *On the 26th of May, 1824, Congress passed another act "enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old grants or surveys, under certain circumstances, to present a petition to the district court of the state of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the supreme court of the United States. The 5th section provided that a claim not before the District Court in two years, or not prosecuted to final judgment in three years, should be for ever barred, both at law and in equity; and the 7th section directed that where a claim tried under the provisions of the act, should be finally decided against the claimant, or barred by virtue of any of the provisions of the act, the land specified in such claim, should, forthwith, be held and taken as part of the public lands of the United States, subject to the same disposition as any other public land in the same district.

This act was continued in force by the act of the 26th May, 1826, for two years; and by the act of 24th May, 1828, it was continued in force for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims, until the 26th day of May, 1830.

Neither the claim of Chouteau nor the inhabitants of the village of St. Charles appears to have been presented to the district court under any of these acts.

On the 27th of January, 1831, Congress passed another act, being a supplement to the act of 1812, in which it was declared, "That the United States do hereby relinquish to the inhabitants of the several towns or villages of Portage des Sioux, St. Charles, &c., &c., &c., all the right, title, and interest of the United States, in and to the town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of Congress, entitled, &c., passed on the 13th day of June, 1812."

On the 9th of July, 1832, Congress passed "an act for the final adjustment of private land-claims in Missouri," which authorized commissioners to examine all the unconfirmed claims to land in that state, &c., &c., to class them, and at the commencement of each session of Congress during said term of examination, lay before the commissioner of the general land-office a report of the claims so classed, &c., to be laid

*before Congress for their final decision upon the claims contained in the first class.

On the 9th of November, 1832, Chouteau presented his claim to these commissioners, who, on the 2d of November, 1833, unanimously determined that the claim ought to be confirmed to the said Peter Chouteau, or to his legal representatives, according to the concession. Before this decision was made, Congress, by an act passed on the 2d of March, 1833, had directed the commissioners to embrace every claim to a donation of land, held in virtue of settlement and cultivation.

On the 4th of July, 1836, Congress passed another act confirming claims to land in the state of Missouri, by which it was declared that the decisions in favor of land-claimants, made by the above commissioners were confirmed, saving and reserving, however, to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice; and the second section declared that if it should be found that any tract or tracts thus confirmed, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed or sold by the United States, the present act should confer no title to such lands in opposition to the rights acquired by such location or purchase, &c., &c.

In January and February, 1837, Chouteau had the land surveyed, which he claimed under the above confirmation, and it was admitted upon the trial that this survey included the land in possession of Eckhart, for which the present ejectment was brought.

Chouteau having brought an ejectment, the cause came on to be tried in May, 1840. The defendant, Eckhart, endeavored to show an outstanding title in the inhabitants of the village of St. Charles, under the grant for a common.

Upon the trial, the plaintiff, Chouteau, offered in evidence such of the facts above detailed as bear upon his title, and the defendant, in addition, gave the following evidence:

He then proved by Judge Spencer, that he (witness) came to St. Louis in the winter of 1796; that he came to St. Charles in the winter of 1798; when he came to St. Charles, the town was surrounded by a fence. The witness, looking on the plat of the survey of the commons, said that the claim of Spencer under Rybolt was granted to conform to the fence of the commons, and to have the fence of the commons as its northern line; and, looking upon the plat of survey given in evidence by the plaintiff, says the whole of the land covered *by the plaintiff's claim, as laid down on that plat, was included [*354

in the commons fence, which was standing when he came here, and remained until after 1804.

Mr. Cunningham, another witness of the defendant, said that he was a deputy-surveyor of the United States, and, as such, he has surveyed the exterior lines of the commons of the town of St. Charles; that, in making such survey, he in some places found the lines of the Spanish survey, in others the timber was cut down, and, in prairie land, no lines of courses could be found; and that the Spanish survey conformed to the plat given in evidence in this cause.

This being all the evidence, the court, on motion of the defendant, instructed the jury, that, "if they believed, from the evidence, that the premises in controversy are included in the tract of land surveyed under the authority of the Spanish lieutenant-governor of Upper Louisiana, for the commons of the town of St. Charles, and held by the inhabitants of said town, and enclosed by them as their commons, under the Spanish government, the plaintiff cannot recover in this action;" to which instruction the plaintiff, by his counsel, excepts, and prays the court to sign this his bill of exceptions, which is done, and the same is made part of the record.

Both plaintiff and defendant gave in evidence sundry acts of Congress, and defendant gave in evidence a private act of the legislature of the state of Missouri, which they agree shall not be set out in the bill of exceptions, but may be read, and considered evidence in the Supreme Court, as if here inserted.

The jury, under this instruction found a verdict for the defendant. The case was carried to the Supreme Court of Missouri, where the judgment was affirmed, from which it was brought, by writ of error, to this court.

Lawless and *Bogg*, for the plaintiff in error.
Gamble, for the defendant in error.

The counsel for the plaintiff made the following points:

1st. That his title to the land in question is protected by the treaty of cession of 1803, article 3d, and confirmed by the Congress of the United States as such.

2d. That the title attempted to be shown in the town of St. Charles has not been sustained by any proof of grant by Spain or France, or by any grant or act of Congress since the treaty of cession.

*355] 3d. That the defendant having shown no title in himself, and no *outstanding legal estate, the decision of the Supreme Court of Missouri, overruling a claim, right, and title derived from the Spanish government, guarantied by

the treaty of cession and confirmed by Congress, is erroneous and ought to be reversed.

In support of the first point, they cited the cases of Delassus and Chouteau and Mackay, reported in 9 Pet., and contrasted those cases with the present.

Assuming then, as demonstrated, that the plaintiff's title was *prima facie* good, his counsel will proceed to analyze that set up by the defendant, which the court will have already observed, is simply an attempt to show an outstanding legal estate, in the tract confirmed to Peter Chouteau, in the town of St. Charles, or in the trustees of that town. The defendant has not shown any derivative title in him to the land in question, nor any color for his possession thereof.

The question then, before the court is, whether the title of the town of St. Charles to their commons is paramount to that of the plaintiff, and includes the land which, as has been shown, was granted by the Spanish authorities to Peter Chouteau. If this question be resolved negatively, it must follow, that the decision of the Supreme Court of Missouri has been erroneously given against the title and right of Chouteau specially set up under the treaty of cession and the acts of Congress, and the repeated decisions of the Supreme Court in analogous cases.

The court will please to observe that no specific grant has been given in evidence by the defendant, of land as commons to the village of St. Charles.

The documents which have been given in evidence by the defendant will be seen, not only not to constitute a grant of commons, but specifically to refute the presumption of, and to negative such a grant.

In order to arrive at the conclusion that the town of St. Charles had title to a tract of land as commons, and that the land in question formed part of that tract, and that a legal estate in the whole of that common tract was outstanding against the plaintiff in ejectment, the counsel for the defendant were compelled to contend that the act of Congress of the 13th June, 1812, entitled "an act making further provision for settling the claims to land in the territory of Missouri," had the effect, *proprio vigore*, of confirming to the town (or village) of St. Charles, the title to the whole of the 14,000 acres included in the survey given in evidence by the defendant as common "adjoining and belonging to" that town, (village).

*This interpretation of the act of 1812 has been [*356
adopted by the Supreme Court of Missouri, and, as a corollary or consequence of this construction, it has been decided by

that court that a confirmation by the act of 1812 of commons, necessarily annuls or neutralizes, as against the inhabitants of the town or village, all grants or surveys made under the French or Spanish government, no matter of what date, which previous to the passage of the act of 1812 had not been "confirmed by the board of commissioners for adjusting and settling claims to land" in the then territory of Missouri.

The first section of the act of 1812 is relied on by defendant and by the Supreme Court of Missouri for the above operation. The counsel for the plaintiff in error submits that such a construction of the act of 1812, sect. 1st, is in opposition to the terms of the act itself, and would also be violatory of rights vested at the date of the treaty of cession, and protected by that treaty and by acts of Congress.

The first section of the act (the only part of that law which bears on the subject) enacts, "that the rights, titles, and claims to, in town or village lots, out-lots, common field lots and commons, or adjoining and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis and others in the Territory of Missouri, which lots have been inhabited, cultivated, and possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto, provided that nothing herein shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory."

It is manifest from the terms of this section, that it was not the intention of Congress to confirm any lots or commons which did not on the 20th of December, 1803, belong to the several towns or villages mentioned respectively. The words "in, adjoining, and belonging to the several towns and villages" are surely significant and explicit terms—the words "which lots have been inhabited, cultivated, or possessed prior to the 20th December, 1803," are not more explicit and significant than the former words "in, adjoining and belonging to"—yet the Supreme Court of Missouri have solemnly decided in the case of *Jonas Newman* v. *L. E. Lawless*, Missouri Reports, 279,
*357] that the first section of the act of 1812 could have no *confirmatory operation, in the case of a town lot in St. Louis, unless it were distinctly proved that on the 20th December, 1803, the lot existed as a St. Louis town lot. In that case the plaintiff Newman having failed to prove that essential fact, the judgment rendered against him in the Cir-

cuit Court was affirmed by the Supreme Court of Missouri. The Supreme Court of Missouri based their decision on the terms of the act which manifestly call for the existence of a town lot, and the possession of it as such on the 20th December, 1803, as essential to the confirmatory operation of the law.

It is submitted that precisely the same sound principle of construction ought to have been applied by the Supreme Court of Missouri to the case before the court, and it is contended that if it had been so applied, it would have led the Supreme Court to a decision in favor of the plaintiff. There could be no greater reason or justice for confirmation of a title to a piece of ground as common, which did not belong as common to a village, than for the confirmation of a lot which did not exist or did not belong to anybody on the 20th December, 1803.

The Supreme Court of Missouri, in the present case, observe that there seem to be no questions arising in this case which were not involved in the case of *Byrd* v. *Montgomery*, 6 Missouri Rep., 510.

With great respect for the Supreme Court of Missouri, the counsel for the plaintiff in error contend that the facts in the case of *Byrd* v. *Montgomery* are totally different from those of the present case.

In the case of *Byrd* v. *Montgomery*, there was no grant of the specific tract of land to the person under whom the defendant claimed title. The defendant in that case set up, (as against the title of the town under the act of 1812,) a concession to one Francis Giguiere, dated 14th May, 1800, which was what is termed a floating concession, authorizing a location and survey on any part of the royal domain. No survey was made under this concession during the Spanish government, and the confirmation was reported by the recorder in 1815, on the ground of settlement right arising out of improvement.

The Supreme Court of Missouri were of opinion, that this confirmation in 1815, by the recorder, was subordinate to the confirmation of the commons of St. Charles by the act of 13th June, 1812, section 1st.

It is by no means the intention of the counsel for the plaintiff in *error, to assent to the correctness of the doctrines laid down in the case of *Byrd* v. *Montgomery*. Quite the reverse; but the counsel for the plaintiff in error contend, that the title of the plaintiff in error in this case is totally different from that of Montgomery. [*358

In the present case the grant to Chouteau, as has been observed, was special—it required no survey to locate it or

ascertain its metes and bounds—these were specially described in the grant to Chouteau. Again, in Siguin's case there was no possession—no improvement—no expenditure of money, skill, or labor in compliance with, and upon the condition imposed in the grant. In Giguiere's case there was no severance effected in favor of the grantee, of the land granted from the public domain. The treaty of cession, therefore, did not specially guaranty the land as it clearly did in the present case. The confirmation by the recorder in 1815 was based on cultivation in or prior to 20th December, 1803, and by virtue of the donation law of 1805, and the 3d section of the act of 1812. The report of the recorder of the 1st November, 1815, which embraced Siguin's settlement, was affirmed by the act of 29th April, 1816. It is manifest, therefore, that Giguiere's title emanated from a donation law of Congress, and not from an ancient and paramount Spanish grant, which, as in the principal case, severed the land from the royal domain, and as such was protected by the treaty as private property.

It certainly has not been said or decided in the Supreme Court of Missouri, that a mere claim, without any shadow of right, could be enforced by Congress to the prejudice of an existing right and title—particularly such a right and title as that vested in the plaintiff in error.

The very reverse has been laid down by the Supreme Court of Missouri in the case of the widow and heirs of *Mackay* v. *Dillon*, 7 Mo., 7. The language of that court in that case is unambiguous on this point. They say "that only such claims as were founded on right were designed to be confirmed. A mere claim, unaccompanied by any shadow of right, is clearly not such a claim as any act of Congress could confirm. The force of the term confirmation, of itself, implies some sort of a title in previous existence."

It is true that the Supreme Court of Missouri, in the above case, came to the conclusion that the title of the inhabitants under the 1st section of the act of 1812, June 13th, to com-
*359] mons, was paramount to that of the plaintiff, who claimed under a grant and survey made *under the Spanish government to their ancestor, and a grant and survey recognized by the claimants of the commons, and laid down specially on the plot of survey, made in 1806 by Mackay himself, and submitted in support of the claim.

While the counsel for the plaintiff in error protest against the conclusion to which the Supreme Court of Missouri has arrived in the above case, as illogical, and utterly illegal and unconstitutional, they nevertheless feel justified in availing themselves of the admissions of that court, as above cited, to

demonstrate that the doctrine insisted on by the defendant in this case, namely: that the act of 1812 confirmed to the people of St. Charles 14,000 acres of land, including the tract granted to the plaintiff, cannot be sound unless he previously establish that the tract claimed by the plaintiff constituted a part of the commons of St. Charles, on the 20th December, 1803. The words of the 1st section of the act of 13th June, 1812, would really seem to preclude all doubt on this point. According to those words, no rights, titles, or claims to commons are confirmed but those "to commons adjoining and belonging" to the several towns and villages named, and "according to their right in common thereto." To contend that this act could confirm or grant commons which were "not" adjoining and belonging to those towns or villages, and to which the inhabitants had no "right in common," would be to make a new law, and positively repeal that of 1812.

When we examine the action of Congress on the French and Spanish unconfirmed titles at the date of the passage of the act of 1812, it must be manifest that it could not have been the intention of Congress "to interfere with or transfer" (to use the language of Chief Justice Marshal in the above-cited case of Delassus under Deluzieres) to the town of St. Charles, the tract claimed by Pierre Chouteau. As has been shown, the claim of the plaintiff in error under his grant, had been placed before the first board of commissioners, under the act of 1805, was duly filed with the United States recorder, and had been, previously to the treaty of cession, actually registered among the archives of the Spanish government at St. Louis, as appears by the certificate of the surveyor-general Soulard, and by the book of Spanish record in St. Louis, to which he refers. This court will please direct its attention to the act of Congress, approved February 15, 1811. 2 Story's Laws, 1178.

It will be seen that Congress by the 6th and 10th sections of that act, specially provided that no land should be disposed of at public or *private sale, "the claim to which [*360 has been in due time and according to law presented to the recorder of land-titles and filed in his office, for the purpose of being investigated by the commissioners." The court will also see that in no case was the decision of the commissioners in Missouri final, when that decision was against the claimant. Congress uniformly, in all the acts passed from 1805, to 13th June, 1812, inclusive, reserved the power to pass finally on those claims.

It is not contended that the act of 1812 amounted to a final disposition by Congress of the claim, right, and title, of Pierre Chouteau, Sen., to the land now in question.

The acts of Congress, since passed for the relief of claimants under French and Spanish unconfirmed titles in Missouri and Arkansas, demonstrate that Congress considered Chouteau's title as still in being, and not destroyed or even weakened by any antecedent law.

If this be not so, it must follow that the act of Congress of May 26, 1824, the act of 1828 continuing the act of 1824, the acts of 1832 and 1833, and lastly the act of 4th July, 1836, specifically confirming the title of the plaintiff in error, must have been all of them absurd and without a subject-matter to act upon. If the right, title, and claim of Chouteau to the tract now in question, had been extinguished by the confirmation to the town of St. Charles, it would seem that it, thenceforward, must have ceased to exist. It would be, it is submitted, a solecism, a contradiction in terms, to contend that Chouteau's title, though a nullity as against the title of the town of St. Charles, could have any being or validity as against the United States.

It seems, therefore, manifest that the utmost operation that can be given to the act of 1812 in favor of the towns and villages mentioned is, that of a transfer by the United States to those towns and villages of the right, title, and claim of the United States to all such land adjoining these towns and villages as belonged to these towns or villages as commons, and had not been granted to private individuals, and were not protected by existing laws or treaties.

Having said this much on the general principles upon which the 1st section of the act of 1812 ought to be construed and administered, and having shown, that excluding from our consideration the title set up by the defendant under the town of St. Charles, the plaintiff has established his *prima facie* case,

*361] the counsel for the plaintiff in error will now proceed as summarily as they can, to *examine the grounds, of the claim of the town of St. Charles to the tract in question as forming part of its common, and hope to be able to satisfy the court that the very documents given in evidence by the defendant negative, most positively, the claim of the inhabitants to the land for which this action was brought against the defendant William Eckhart.

(The counsel then examined Tayon's petition and Trudeau's answer, which was set forth in the statement of the case, and contended that the land of the plaintiff was not included, because the Marais Croche was situated below the town of St. Charles, and the grant of the plaintiff above the town; and also that the character of the land did not accord with that claimed by the plaintiff.)

Again, in the response of the lieutenant-governor there is no grant at all of common to the village of St. Charles. There is only a declaration that the wooded and low ground asked for by Tayon shall remain royal domain, and that the inhabitants of St. Charles may use it to obtain fuel. It is manifest that at the date of this answer of the lieutenant-governor to Tayon no grant had ever previously been made or even asked for of common. Tayon in his petition treats the land he asks for as land of the domain, and the lieutenant-governor in his reply affirms this view of it, and at the utmost assents to the use of it, until further order, by the inhabitants. It is difficult to imagine why or how this document can be relied on or used to establish the existence, in favor of the village of St. Charles on the 20th December, 1803, of any common right to the Chouteau tract, or indeed of any definite commons at all, upon which the 1st section of the act of 13th June, 1812, can possibly operate.

(The counsel then examined the proceedings of the inhabitants of the village, as detailed in the statement and observed,)

It is manifest from the above proceedings of the inhabitants of St. Charles, that at its date they had but a small tract which they used as common, or for the purpose of fuel, and that that part must have been the same referred to by Don Zenon Trudeau, in his answer to Tayon, and therefore situated on the Marais Croche below St. Charles. It is also manifest that the inhabitants at the date of said proceedings had no grant of commons from the Spanish government of any land adjoining the village; and that the language of Zenon Trudeau, treating the woodland as royal domain, was assented to by the inhabitants of St. Charles, not only in 1797, but on the 18th of January, 1801, the date of the proceedings.

*It is manifest also, that those simple people never [*362 intended by the extension of the common to interfere with any private vested interest or right. They pledge themselves to exert themselves, but "always without prejudice to the interests of any person." They evidently never intended to deprive Pierre Chouteau of his property. They must all of them have been perfectly acquainted with Chouteau's land. The works executed by Chouteau and his ancient possession must have been notorious, and it is not to be supposed that the inhabitants of the village who were employed by Chouteau on his land, could have been ignorant of his claim to it. This view of those proceedings is submitted in order the better to understand the effect and import of the other documents, and evidence offered in support of the claim of commons in this case.

(The counsel then examined the effect of the meeting of the inhabitants which took place in January, 1801, and the order consequent upon it; and argued that no grant could be inferred from that order. They then examined the survey of Mackay, and contended,

1. This survey is totally unauthorized by the decree in obedience to which it is recited to be made.

2. This survey, admitting its exterior lines to have been correctly run, and in conformity to the order of the lieutenant-governor, does not conflict at all with the grant of the plaintiff in error, but is consistent with its existence and validity.

Which points were argued at length.)

In conclusion, the following were stated as the points which the argument was considered as establishing,

1st. That the title of the plaintiff in error to the tract granted to him on the 25th of November, 1800, by the lieutenant-governor of Upper Louisiana, is protected and guaranteed by the treaty of cession, article 3, and has been specifically confirmed by the act of the 4th July, 1836.

2. That the United States survey, No. 2982, given in evidence by the plaintiff, identifies the land so granted.

3d. That by virtue of said grant and survey so guaranteed by treaty and confirmed by act of Congress, the plaintiff in error is entitled to the possession of the whole of the land included in said grant and survey.

4th. That the act of June 13, 1812, did not operate as a grant of the land, included in the grant and survey of the plaintiff in error, to the town of St. Charles for commons, or for any other purpose.

*363] *5th. That neither the town of St. Charles nor the defendant has shown any title whatever, to the land included in the United States survey, No. 2982, given in evidence on behalf of the plaintiff in error.

6th. That the survey and certificate offered in evidence by the defendant, are erroneous, illegal, and on the face of them void.

7th. That admitting the survey, No. 2982, to be within the exterior lines of the survey given in evidence by the defendant, of the commons of St. Charles, it does not follow that the grant and survey of the plaintiff in error are absorbed and annulled.

8th. That the town of St. Charles is estopped from denying the plaintiff's title.

9th. That the title of the plaintiff in error to the land included in survey No. 2982, is clear, definite, and specific,

and clothed with all possible documentary form, coupled with a possession of upwards of twenty years.

10th. That the title set up by the town of St. Charles is, in its inception, uncertain, illegal, and even fraudulent.

11th. That the instruction given to the jury who tried the ejectment, by the Circuit Court of Missouri, on motion of the defendant, to wit: "That if the jury believed from the evidence that the premises in controversy are included in the tract of land surveyed under the authority of the Spanish lieutenant-governor of Upper Louisiana for the commons of the town of St. Charles, and held by said town, and enclosed by them as their common, under the Spanish government, the plaintiff cannot recover in this action," were illegal and unjust instructions, inasmuch as they assume facts as proved which were not proved, and leave matters of pure law to be decided by the jury, and were calculated to lead the jury into a mistake and misapprehension of fact and of law.

Gamble, for the defendant in error.

It appears that both parties claim the land, under titles originating under the Spanish government in Louisiana. So far as there is a conflict between these Spanish titles, and so far as the court of Missouri have decided between the parties on the relative merits of these titles, it is believed that the Supreme Court of the United States have not the jurisdiction to review the judgments of the state courts.

The courts of Missouri, in deciding upon the rights of parties, as they existed under the Spanish government, are governed by the Spanish law, and neither the treaty of [*364 cession, nor the laws of the United States, are drawn in question in such decisions. If either party, by invoking the treaty as the guaranty of his rights, could draw his case within the cognizance of the Supreme Court of the United States, then all questions which may arise about property in Missouri, Arkansas, or Louisiana, claimed by title originating under the former governments, may be brought before this court. This question may, however, be regarded as settled, by the decision of this court in the case of the *City of New Orleans* v. *De Armas & Cucullu*, 9 Pet., 224. So far, then, as the state courts have decided this case, upon the comparative merits of the two Spanish titles exhibited by the parties, that decision will be regarded as conclusive by this court, unless, in making that decision, the state courts have improperly disregarded the claim of the plaintiff, as it may have been asserted under an act of Congress.

The plaintiff, in this case, exhibits his claim to the land in

question, as commencing under the Spanish authorities, and then produces the act of Congress of the 4th of July, 1836, (4 Story's Laws of the United States, 2515,) as the confirmation of his title.

The defendant exhibits the title of the inhabitants of the town of St. Charles, under whom he claims this same land, as also commencing under the Spanish government, and as confirmed by the act of Congress of the 13th June, 1812. 2 Story's Laws of the United States, 1257.

The court of St. Charles decides, between these two titles, in favor of that set up by the defendant.

If the question were between the titles, only as Spanish titles, the state courts would have the exclusive right to determine it, but here are two acts of Congress, under which the parties severally claim, as the completion of their respective incomplete Spanish titles, and the state courts have supported the title of the defendant, under the confirmation by the act of 13th June, 1812.

The instruction given by the Circuit Court leaves to the jury to decide, from the evidence, "whether the land in question is included in the tract surveyed, under the authority of the Spanish lieutenant-governor, for the common of the town of St. Charles, and held by the inhabitants of said town, and enclosed by them as their common, under the Spanish government;" and pronounces the law, that if the land is embraced in such claim of common, then the plaintiff cannot recover in this action. The jury have found that the *365] land is included *in the tract thus surveyed, thus held and enclosed as a common, under the Spanish government.

The instruction of the court is founded upon a comparison of the Spanish title to the commons, confirmed by the act of 1812, with the Spanish title of the plaintiff, as confirmed by the act of 1836; and is a decision in favor of the commons' title.

As this case fairly presents the question between two confirmations, by different acts of Congress, it becomes proper to consider the effect of such confirmations upon the legal title. It is to be borne in mind, that the act of June, 1812, confirms the claims to commons, as the final act of the government, and contemplates no other evidence of title to be thereafter given by the government; it is not a confirmation in the future, or dependent upon any condition; its language is, "the claims to commons," &c., "shall be, and the same are hereby confirmed."

It is believed to be clear, upon principle and authority, that when an act of Congress of this character has passed, and

nothing remains to be done by any officer of the government to convey the title, the title passes by the act itself, and no shadow of title remains in the government to be conveyed subsequently to another individual.

The Supreme Court of Missouri has uniformly maintained this doctrine, and although the decisions of that court are not of binding authority in this tribunal, when construing an act of Congress, yet they are entitled to much consideration in a case like the present, when we reflect that such acts of Congress operate on a class of land-titles with which that court is familiar, and in which the citizens of the state are largely interested; and that acts of this description are always passed at the instance, and upon the urgent solicitation of the citizens of the state in which the lands to be affected lie. Under such circumstances, the proper meaning and effect of such acts are at once presented to the legal mind of the state, and are kept before that mind, until the acts receive a construction founded upon an acquaintance with the whole subject on which the acts operate. This construction is to be found in the decisions of the courts. While, therefore, this court, in examining a statute designed to operate throughout the United States, or through many of the states, (as do all general laws in relation to the public lands,) will be but little influenced by the authority of a state decision; it will be persuasively influenced by such a decision giving the interpretation of *an act of Congress which is local, and is applicable [*366 to a subject peculiarly within the acquaintance of the state tribunal.

(The counsel here commented on the decisions of the Supreme Court of Missouri in the cases *Vasseur* v. *Benton*, 1 Mo., 296; *Bird* v. *Montgomery*, 6 Id., 515; *Mackay's heirs* v. *Dillon*, 7 Id., 7; and also *Strother* v. *Lucas*, 12 Pet., 454.)

It is submitted to the court, that in whatever light a confirmation by act of Congress is to be viewed, whether as a new grant, or as connecting itself with the original title or claim of the confirmee, it must have the effect of passing the title of the United States, so that no subsequent grant or confirmation can give a legal title to the subsequent grantee.

If this conclusion be correct, the next question for consideration is, whether the confirmation of the common of the town of St. Charles, by the act of 1812, passed the title to the land in controversy? On this question, the counsel for the plaintiff have argued, that the title, or claim, of the town to this land was not such a title as Congress could have intended to confirm by the act of 1812.

As the attempt is made, in this case, to escape from the

obvious meaning of the act, by a critical examination of its language, it is proper to consider its terms with some care. The confirming section enacts, "That the rights, titles, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage de Sioux, St. Charles, St. Louis, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

(The counsel then referred, for the history of the act, to Am. St. Papers, Public Lands, pp. 377, 549, and to the communication of Mr. Penrose to Mr. Gallatin; also that of Mr. Riddick to the chairman of the Committee on Public Lands; and then entered into a comparison of the titles of the plaintiff and defendant respectively.)

I proceed now, to examine the plaintiff's claim, as it has been acted upon by the legislation of the United States.

In the remarks that have been made upon the confirmation of the plaintiff's title by the act of 4th July, 1836, it has been considered as if it were a general confirmation, without any restriction, and it has been attempted to be shown, and it is believed successfully, that *even regarded in that light, it cannot prevail in this action over the confirmation of the commons. But I will proceed to show, from the laws of the United States, that this claim of the plaintiff has at one period been extinguished, as having any color of title to the land, and that the subsequent act of confirmation, which was a mere gratuity, was not intended by the government to interfere with the titles which it had previously granted or recognised.

*367]

From the time the United States took possession of Louisiana, there has always been manifested a strong desire to adjust the claims of individuals to any land in the territory, with great promptitude, and upon the fairest principles. Tribunals have, from time to time, been established, to investigate the claims, with power in some instances, to decide on the merits of the claims upon the most enlarged principles of equity, and in other instances, with authority to report their opinions to Congress for its final action. The desire to have all the claims promptly settled, is shown in the provisions of the various laws imposing penalties on those who should fail to exhibit their claims for investigation within the times prescribed. The following is a brief statement of these enactments:—

The proviso to the 4th section of the act of 2d March, 1805

(2 Story's Laws United States, 967,) declares, "that any incomplete grant, warrant, or order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, shall never after be considered, or admitted as evidence in any court of the United States, against any grant derived from the United States."

The 5th section of the act of 3d March, 1807, (2 Story's Laws United States, 1060,) contains a similar provision.

The 7th section of the act of 13th June, 1812, extends the time for filing notices by actual settlers on the land claimed, under a similar penalty. 2 Story, 1260.

The 1st section of the act of 3d March, 1813, authorizes those who have filed notices to file the evidences of title, under the same penalty.

These earlier acts are referred to, not as having any direct operation on the plaintiff's claim, but to show the uniformity of the legislation in relation to these claims, and to show that the provisions of subsequent acts, which do affect the plaintiff's claim, are not new or extraordinary provisions.

The act of 26th May, 1824, (3 Story, 1959,) which created a special jurisdiction in the courts of the United States, was designed to bring *these claims to a final close. [*368
The 5th section of that act provides, that a claim not brought before the District Court in two years, or not prosecuted to final judgment in three years, shall be for ever barred, both at law and in equity. The 7th section provides, that where a claim is barred, by being decreed against, "or by any of the provisions of the act, the lands shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public lands."

This act was continued in force by the act of the 26th May, 1826, for two years, and by the act of 24th May, 1828, it was continued in force, for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims, until the 26th day of May, 1830.

The record in this case shows no presentation of this claim to the District Court; and for the purpose of the question now under consideration, it is to be assumed, that it was not presented, or if presented, was decided against; the effect being the same in either case. It is certain, that it has not been confirmed by the courts, as the only confirmation relied on by the plaintiff is that of 1836.

Now, the right of the government to require a diligent prosecution of these claims, and to impose penalties upon the claimants for their negligence, is not to be questioned. This court, in speaking of these provisions of law, in *Strother* v.

Lucas, 12 Pet., 448, says: "These are laws analogous to acts of limitation, for recording deeds or giving effect to the awards of commissioners for settling claims to lands under the laws of the states; the time and manner of their operations, and the exceptions to them, depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. Cases may occur where the provisions of a law may be such as to call for the interposition of the courts; but these under consideration do not."

In this case, then, the fifth and seventh section of the act of 1824 had full operation on this claim of the plaintiff, at least from the 26th May, 1830, until the passage of the act establishing the last board, on the 9th July, 1832, and during that period the claim was barred, both at law and in equity; and the land, as far as this claim was concerned, was public land. *369] During that period, while the claim of the plaintiff was thus, by his own neglect, extinguished, the land was *held by the town of St. Charles, as confirmed to its inhabitants by an act of Congress, with no shadow upon its title: and it is now submitted to the court, that no subsequent action of the government could operate to affect the title, thus complete and unclouded, in the town of St. Charles.

If it be said, as it has often been said, that the government can waive any such forfeiture, I am free to admit that the United States are competent to waive any advantage which they might claim under such enactments, but I deny, that the claimant, having neglected to comply with the terms of a law, and being thus barred, "at law and in equity," can, as against an individual citizen, be restored to any right of action by any act of the United States.

At this point, I will call the attention of the court to another act of Congress, which seems designed to cut off all questions between titles of the description of those now before the court.

It has been before observed, that the last day allowed for presenting petitions to the District Court was the 26th May, 1829, and a year was allowed for prosecuting them to final decision. If there was a failure to pursue the action thus offered to the claimant, the 5th and 7th sections of the act of 1824 barred the claim. Now, between the expiration of the time thus given for presenting the claim, and the passage of the act of 9th July, 1832, establishing the last board of commissioners, the Congress of the United States, on the 27th

January, 1831, passed an act, by which the United States relinquished to the inhabitants of St. Charles all the right, title, and interest of the United States in and to the lots and commons. 4 Story, 2220.

If it should be supposed, that after the act of 13th June, 1812, the technical fee still remained in the United States, here is an act of Congress equally efficacious with a patent, to transfer that fee, and this act is passed when the claim of the plaintiff was barred, both at law and in equity, by his own negligence.

There is still another feature in the plaintiff's confirmation which requires notice, although, for the purposes of this defence, I think enough has been already said.

It will seem, by reference to the various acts of Congress in relation to these claims, that while the government was disposed to treat the claimants with the utmost liberality, it was regarded as a duty which the government owed to those who held adverse titles to the land, that they should be protected from any disturbance which might *be attempted [*370 under these later confirmations. The eleventh section of the act of 26th May, 1824, (3 Story, 1963,) provides, "that if, in any case, it should so happen, that the lands, tenements, or hereditaments decreed to any claimant, under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, in each and every such case it shall and may be lawful for the party interested to enter the like quantity of land," &c.

The last clause of the second section of the act of 24th May, 1828, which continues the act of 26th May, 1824, in force, provides, "that the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as relinquishment of the title on the part of the United States, and shall in nowise affect the right or title, either in law or in equity, of adverse claimants of the same land."

These provisions, intended to apply to confirmations which should be made by the decrees of the highest tribunal in the land, show the fixed determination of the government to protect the rights of those holding the land under any title adverse to the confirmations.

In the same spirit, and with the same purpose, a like provision was inserted in the 2d section of the act of 4th July, 1836, under which the plaintiff claims. That section enacts, "that if it shall be found that any tract or tracts, confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States,

this act shall confer no title to such lands, in opposition to the right acquired by such location or purchase, but the individual or individuals, whose claims are hereby confirmed, shall be permitted to locate so much thereof as interferes with such location or purchase, on any unappropriated land," &c.

Although the most obvious application of the words, "previously located under any law of the United States," is, to the class of titles in Missouri which originated in the act for the relief of the inhabitants of New Madrid who suffered by the earthquake, and who were authorized to locate other lands in lieu of those injured; still it is plain, that all titles which had received the sanction of government were equally deserving of protection against disturbance from these confirmations. The language used in the 11th section of the act of 1824, "sold or otherwise disposed of," would have embraced every description of title conferred by the government, by which the land was disposed of, and would have protected the town of St. Charles against the plaintiff's claim, if it had been presented to the court *under that act, and had been confirmed. The spirit of the legislation is to secure these prior titles; and unless there is some absolute necessity to construe the 2d section of the act of 1836 with the greatest strictness, and to exclude from its protection all titles which can by such construction be excluded, it is believed that the title of the town of St. Charles may receive the benefit of this section, as a complete defence against the plaintiff.

*371]

If, then, the commons of the town can with any propriety be said to "have been previously located, under any law of the United States," the act of 1836 confers no title against the claim of the town. On this question it is not thought necessary to remark, as it is to be determined by an examination of the section referred to. The effect of the section is, to leave the claim of the plaintiff unconfirmed, so far as it interferes with the titles designed to be protected.

If I have conveyed my ideas intelligibly, I think I have maintained the following propositions:

1. That between two confirmations by different acts of Congress, where no other evidence of title is contemplated by the confirming acts, the elder confirmation passes the legal title.

2. That the confirmation of the commons of St. Charles, by the act of 13th June, 1812, is a confirmation of the claim as it was spread on the records of the government.

3. That the claim, as evidenced by the survey and by actual possession, was adverse to the claim of the plaintiff.

4. That if the confirmations were to have effect, with relation to the merits of the original Spanish titles, then the title

of the town of St. Charles to the land in question, as part of the common, is an older and better title than that of the plaintiff.

5. That the claim of the plaintiff to the land in question was extinguished by his neglect to present and prosecute it, under the act of 26th May, 1824, as that act was continued in force by the acts of 1826 and 1828.

6. That if the fee did not pass by the confirmation, it did pass by the act of 27th January, 1831.

7. That the confirmation of the plaintiff's claim by the act of the 4th July, 1836, did not operate to confer any title, as against the title of the town.

These points present, as it is believed, several distinct and complete defences to this action.

*Mr. Justice CATRON delivered the opinion of the [*372 court.

For the statement of the facts the report is referred to.

It is insisted this court has no jurisdiction to look into the plaintiff's concession of 1800; or to pass on it, under the 25th section of the Judiciary act—and the case in 9 Pet., 244, of *New Orleans* v. *De Armis*, is referred to as settling the question. If the plaintiff relied alone on a complete Spanish title, then the argument would be sound, but each party claims by force of an act of Congress; the plaintiff under that of 1836, and the defendant under the act of 1812, confirming to the inhabitants of St. Charles the village commons; and which is fortified by another act for the same purpose, of 1831. The decision of the Supreme Court of Missouri was opposed to the title set up under the act of 1836 by the plaintiff. From this decision he prosecuted a writ of error to this court.

Construction is called for on the acts on which both titles are founded; and as no occasion can arise in any instance involving construction, aside from a contest, making a case; the facts giving rise to it must be ascertained before the construction can be applied. To hold otherwise, would render the 25th section a dead letter in a majority of instances. The same question arose in the case of *Pollard's heirs* v. *Kibbie*, 14 Pet., 254, and again in that of *The City of Mobile* v. *Eslava*, 16 Pet., 234, both involving property at the city of Mobile; the first is not distinguishable from the present in its material features, so far as the question of jurisdiction is involved; and the latter covers the whole ground before us. In the cases cited, as in this, the record set out the titles on each side, together with the facts and charge of the court; from which it appeared the decision of the Supreme Court of Alabama

was opposed to the plaintiff's title, the judgment below having been affirmed. This court did not then doubt its powers to look behind the act of Congress, into the Spanish concession of Pollard, for the purposes of construing the act, and comparing it with that under which the defendant claimed: not with the intention of setting up the concession as an antecedent title to the act, that would support an action, but for the purposes of the construction and application of the acts on which the controversy depends. And the same rules apply here.

The plaintiff's title is *prima facie* a good legal title, and will support an ejectment on the act of 1836, standing alone, if the land can be identified, as confirmed, without resort to the patent. This court held, in *Strother v. Lucas*, 12 Pet., 454: "That a grant may be *made by a law as well as a patent pursuant to a law, is undoubted, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained, in terms, a grant *de novo*." And as, according to the laws of Missouri, an action of ejectment could be prosecuted on Chouteau's title, by force of the confirmation, the construction of the acts of Congress, under which the respective parties claim, will decide the controversy.

*373]

The character and nature of the village right, in this country, is somewhat peculiar. The inhabitants of Upper Louisiana resided in villages, almost exclusively, and cultivated common fields, enclosed by only one fence; each person who cultivated the soil having assigned to him, by the syndic of the town, a certain portion of land to cultivate. In this manner the chief tillage of the soil was carried on; the other parts of the country being in the forest state.

The villages also required commons for pasturage for their horned cattle and horses, and for fuel and timber; this part not being enclosed. The quantity included in the field, for pasturage, timber and wood, was regulated by the nature of the soil and timber, and accommodated to the wants of the inhabitants, and conceded at the discretion of the government, usually to very liberal extent.

As the principal support of the population was derived from agriculture and pasturage, the village commons were deemed of primary importance by the people and government, and as a common title more favored than individual titles in cases of conflict.

In this situation the United States found the country when they came into possession of it, in March, 1804, as the successor of France, or rather Spain, in virtue of the treaty of

cession. So great has been the change by the introduction of a population with different habits, and modes of agriculture, that it is difficult to estimate at this day the former importance of the village common to the French inhabitants. It was the basis on which their society was formed to so material an extent, that the early acts of Congress could not be well understood, without a reference to this important circumstance; and especially not the sweeping act of 1812.

The lieutenant-governor of Upper Louisiana, (usually the military commandant,) made concessions for lands founded on such considerations as to him seemed just, and according to the policy of the province; ordered it to be surveyed by the public surveyor, who put the interested party into possession, pursuant to the lieutenant-governor's order, and delivered a plat of the survey to the party, in *order that [*374 he might obtain a title in form from the general intendency at New Orleans; to which tribunal alone appertained, by royal order, the distributing and granting all classes of lands of the royal domain. The intendent-general had the power to adjudge on the equity of the claim, and to exercise the sovereign authority, by making the grant, as the king's deputy.

After the country changed owners, this government had imposed on it as the successor of Spain, the duties previously performed by the general intendency, of perfecting titles to concessions made by the lieutenant-governors of St. Louis, Illinois.

Shortly after the United States came into possession, a tribunal was instituted consisting of a board of commissioners to investigate claims of this description according to the laws and usages of Spain, as they existed among the French population in Upper Louisiana, and to report to Congress, such as were by the tribunal deemed well-founded, just and equitable, and that ought to have been confirmed by the general intendency, had no change of government taken place; and such as ought not to have been confirmed: On these reports coming before Congress, it acted directly by statute, on such titles as were by the legislature considered well-founded and just claims. In all such instances it acted as the successor of the general intendency, and had the same discretion to confirm; and the sovereign power to perfect the incipient right, or to reject it, that the intendent-general had. Each exercising sovereign power, in regard to the claim, with full authority to award, or to refuse, a perfect title.

As the board of commissioners had no power to grant, but only to ascertain facts, and report their opinions; and their powers to examine, not extending to every description of

claim, Congress acted in some instances independent of any recommendation; necessarily in cases where the board has no right to interfere.

Chouteau's claim had been presented to the board early in 1809: In July, 1810, the board declared the opinion that this claim ought not to be confirmed; and no action was had on it by Congress on the return of the report of 1810.

In 1812, Congress confirmed the village claim as follows:

"That the rights, titles, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage de Sioux, St. Charles, St. Louis, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are *hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

*375]

A new board was organized according to an act of 1832, with powers to re-examine the claims (with others) deemed unworthy of confirmation by the former board. The new board was of a different opinion from the former in regard to Chouteau's claim, and in November, 1833, recommended it for confirmation, according to his concession: and it was confirmed by the act of the 4th of July, 1836; corresponding to a recent survey, made in conformity to the concession. The whole of the claim is included in the village common of St. Charles, as it existed on the 20th day of December, 1803; and under which the defendant protected his possession, as an outstanding title. The state circuit court in Missouri held the village right the better, and so charged the jury; which opinion was sustained in the supreme court of that state, on their former decisions: especially in the cases of *Byrd* v. *Montgomery*, 6 Mo., 514, and *Mackay* v. *Dillon*, 7 Mo., 10. The last involved a contest in which title was claimed by one party under the St. Louis common.

These cases maintain in substance, that such inchoate claims (as that of Chouteau was in 1812, when the community of St. Charles took its title, previously also inchoate) were not changed in their character, by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them: that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals: and that the legislation of Congress from 1804, to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes adopted to investigate the claims through boards of

commissioners, and then acting on them by legislation This court held likewise, in the *United States* v. *Wiggins*, 14 Pet., 350.

We think this reasoning correct, and necessarily following the nature of the claim as above set forth: it not having been perfected by the general intendency before the change of governments.

2. That court in substance also held, in the cases cited, that the federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles. Each claimant depends upon the justice or comity of the present government; and when the government exercises *its powers [*376
and confirms the land to one, it must necessarily be considered in a court of law the paramount and better title.

We think this position also sound, and that it is conclusive against the validity of the plaintiff's title; and therefore order the judgment of the supreme court of Missouri to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the supreme court of the state of Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said supreme court of the state of Missouri, in this cause be, and the same is hereby affirmed with costs.

JOHN CATTS, PLAINTIFF IN ERROR *v.* JAMES PHALEN, AND FRANCIS MORRIS, DEFENDANTS IN ERROR.

A person who receives the prize money, in a lottery, for a ticket which he had caused to be fraudulently drawn as a prize, is liable to the lottery contractors in an action for money had and received for their use. So far as he is concerned, the law annuls the pretended drawing of the prize; and he is in the same situation as if he had received the money of the contractors by means of any other false pretence.[1]

The fact that the lottery was illegal, is no defence; the defendant will not be permitted to take advantage of his own fraud.

Nor is infancy a defence in such a case.[2]

THIS case was brought up by writ of error, from the Circuit

[1] FOLLOWED. *Northwestern Ins. Co.* v. *Elliott*, 7 Sawy., 22. S. P. *Glenn* v. *Shannon*, 12 So. Car., 570; *Higgins* v. *Mendenhall*, 51 Iowa, 135; *Gist* v *Smith*, 78 Ky., 367.

[2] See *Nolan* v. *Jones*, 53 Iowa, 387.

Court of the United States, for the District of Columbia and county of Alexandria.

The facts were these:

The state of Virginia, in and prior to the year 1834, passed several acts authorizing a lottery to be drawn for the improvement of the Fauquier and Alexandria turnpike road.

In 1839, certain persons, acting as commissioners, made a contract with James Phalen and Francis Morris, of the city of New York, by which Phalen and Morris were authorized, upon the terms therein mentioned, to draw these lotteries. They proceeded to do so, and employed Catts to draw the tickets from the wheel. The following extract from the bill of exceptions sets forth the other facts in the case.

*377] *"That the plaintiffs (Phalen and Morris) before the drawing of such lottery, employed the defendant (Catts) to perform the manual operation of drawing with his own hand, out of the lottery wheel prepared for the purpose, the tickets of numbers therein deposited by them, in order to be drawn thereout by the defendant, without selection and by chance, as each ticket of numbers successively and by chance presented itself to his hand when inserted in the wheel, and which tickets of numbers, when so drawn out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands, according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively.

"That the defendant, before the drawing of the said lottery, and after he was employed to draw out the tickets of numbers as aforesaid, fraudulently procured and employed one William Hill to purchase of the plaintiff, at their office in Washington, with money given by defendant to said Hill for the purpose, a certain ticket in the said lottery for him, the defendant, but apparently as for the said Hill himself.

"That the said Hill did accordingly purchase such ticket of the plaintiffs at their said office, apparently as for himself, and really for defendant, and with money furnished to said Hill by defendant as aforesaid, and delivered such ticket to defendant before the drawing of said lottery.

"That defendant, being in possession of such ticket so purchased for him as aforesaid, did, on the said December, 1840, at the county aforesaid, undertake and proceed, in pretended pursuance and execution of his said employment in behalf of the plaintiffs, to draw out of the said lottery wheel, with his own hand, the said tickets of numbers, whilst at the same time he had fraudulently concealed in the cuff of his

coat certain false and fictitious tickets of numbers fraudulently prepared by him, which exactly corresponded in numbers with the numbers on the face of the ticket so held by him as aforesaid, and fraudulently prepared in the similitude of the genuine tickets of numbers which had been deposited in the said lottery wheel for the purpose of being drawn out by defendant, without selection and by chance as aforesaid.

"That defendant, when, under pretence of drawing out such genuine tickets of numbers, he inserted his hand into said lottery wheel, fraudulently and secretly contrived, without drawing out any *of the genuine tickets of numbers deposited in said wheel, to slip between his finger and thumb [*378 the said false and fictitious tickets of numbers before concealed in his cuff as aforesaid, and produced and exhibited the same to the agent of the plaintiffs, and other persons then and there present and superintending the drawing of said lottery, as and for genuine tickets of numbers properly drawn from the said wheel; by reason of which fraudulent contrivance, the number of the lottery ticket so purchased for defendant, and in his possession as aforesaid, was registered in the proper books kept for that purpose by the plaintiffs, as the ticket entitled to a prize of $15,000, so as to enable the holder of such ticket to demand and receive of the plaintiffs the amount of such prize, with a deduction of fifteen per cent.

"That the defendant afterwards, in the month of February, 1841, again fraudulently procured and employed the said Hill, in consideration of some certain reward to be allowed him out of the proceeds of such pretended prize, to present the said lottery ticket as a ticket held by himself to the plaintiffs, at their office in New York, and there demand and receive of them as for himself, but for defendant's use and benefit, payment of the said pretended prize, and for that purpose the defendant delivered the said lottery ticket to said Hill, who did accordingly present the same to plaintiffs at their said office, and then and there received of them, as for himself, and really and secretly for the defendant, the amount of such prize, with such deduction of fifteen per cent. as aforesaid."

Phalen and Morris brought an action in the Circuit Court against Catts to recover back the amount which was thus paid, viz.: $12,500. The declaration contained three counts, two of which were abandoned at the trial; the one retained being for money had and received by the defendant below (Catts) to the use of the plaintiffs.

The facts above set forth were not controverted, but the defendant relied upon a law of Virginia, (to take effect from the 1st of January, 1837,) passed for the suppression of lotter-

ies; and also upon his being an infant, under the age of twenty-one years, when the lottery in question was drawn.

Whereupon the defendant prayed the court to instruct the jury as follows, to wit.:

"If the jury shall believe, from the said evidence, that the said lottery was drawn under the said act of the commonwealth *379] of Virginia, and the said contract so given in evidence as aforesaid, that then the *said lottery was illegal; and if the plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover. And if the jury shall further believe, from the said evidence, that in December, 1840, when the said lottery was drawn, said defendant was an infant under the age of twenty-one years, that then the plaintiffs are not entitled to recover in this action.

Which instruction the court refused—to which refusal of the court the defendant excepts, and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 9th day of June, 1842.

The jury returned a verdict in favor of the plaintiffs for $12,500, to bear interest from 15th March, 1841.

Upon this exception, the case came up to this court.

Coxe and *Semmes*, for the plaintiff in error.
Jones and *Brent*, for the defendants in error.

The counsel for the plaintiff in error made the following points:

1. That the plaintiffs below made out no case establishing their right to recover—in other words, that they did not show any interest or property to be in them in the prize drawn on the said day of December, 1840, which is in substance one of the prayers refused by the court, viz.: "if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover."

2. That the court erred in refusing to instruct the jury that, under the act of Virginia referred to, said lottery was illegal. Plaintiff in error will contend that the lottery was illegal, and if so, that the plaintiffs below were not entitled to a verdict.

3. That the court erred in refusing to instruct the jury that the infancy of the defendant (the same being in evidence) was a bar to the plaintiff's right to recover.

Coxe, for the plaintiff in error, said,

That if the lottery was prohibited by law, no contract under it could be sanctioned by law. The question whether the

prohibitory act of Virginia was constitutional, was decided in the highest court of that state, and brought up to this court, where it is now pending. The court of Virginia decided that it did not impair the obligation of contracts. 1 Rob. (Va.), 713, *Phalen* v. *Commonwealth.*

*In support of the general position above taken, he cited, 11 Wheat., 258, 265, 268; 10 Bing., 107; 5 T. R., 242; 2 H. B., 379; Carth., 252; 1 Mau. & Sel., 596. [*380

Brent, for the defendants in error.

As to the plea of infancy, although the action is *assumpsit*, yet the record shows fraud. 1 Esp., 172, 173; 2 Kent Com., 240.

Infancy was shown at the time of drawing, but not when the money was received.

As to the illegality of the lottery:

This ticket was in fact never drawn, and therefore illegality cannot be affirmed.

This ticket was sold out of Virginia.

A contract is not void on account of the imposition of a penalty. 8 Wheat., 353; 1 Bayl. (S. C.), 315; 2 Hawes, 526.

[The counsel then examined the question of the illegality of the lottery, and the constitutionality of the prohibitory act, and cited, 12 Wheat., 70; Angell and Ames, 89; 4 Gill & J. (Md.), 198, 144, 152; 9 Id., 405; 3 Wash. C. C., 319; 6 Cranch, 87, *Fletcher & Peck.*]

Jones was proceeding to argue on the same side, but the court expressed a desire to waive further argument, for the present, upon that side.

Coxe, in reply and conclusion, relied upon the illegality of the lottery, and the right of the legislature of Virginia to revoke its grant before any interests had become vested under it. The circumstance that the ticket was sold in Washington, made no difference, because lotteries were prohibited there also; and he cited 4 Wash. C. C., 129.

Mr. Justice BALDWIN delivered the opinion of the court.

Phalen & Morris brought an action in the court below, to recover from Catts the sum of $12,500, which they alleged he had received for their use, and being so indebted, promised and assumed to pay, to which the plaintiff plead the general issue.

It appeared in evidence on the trial, that the legislature of Virginia had authorized lotteries, to raise money for improving

a turnpike road in that state, which were placed under the superintendence of commissioners appointed under those laws, *381] who, by articles of agreement contracted with the plaintiffs to manage and conduct the drawing *of the lotteries authorized by the laws, on certain terms therein stipulated, one of which took place in Virginia, under the circumstances set forth in the statement of the case by the reporter.

In the argument for the plaintiff in error here, it has been contended that this lottery was illegal by the suppressing act of 1834, which precluded a recovery of the money he received; but as, in our opinion, this cause can be decided without an examination of that question, we shall proceed to the other points of the case, assuming for present purposes the illegality of the lottery.

Taking, as we must, the evidence adduced by the plaintiffs below, to be in all respects true after verdict, the facts of the case present a scene of a deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove or mitigate at the trial, the consequence of which is, that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact; and he had claimed and received the money of the plaintiffs, by means of any other false pretence, and he is estopped from avowing that the lottery was in fact drawn.

Such being the legal position of Catts, the case before us is simply this: Phalan & Morris had in their possession $12,500, either in their own right, or as trustees for others interested in the lottery, no matter which, the legal right to this sum was in them, the defendant claimed and received it by false and fraudulent pretences, as morally criminal as by larceny, forgery, or perjury; and the only question before us is, whether he can retain it by any principle or rule of law.

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact; the contract which the law raises between them, is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case, even if the instructions prayed by the

defendant had been broader than they were. The instructions prayed were, 1. That if the jury believed from the evidence, that the lottery was drawn under the law of Virginia, and the contract referred to, then *the lottery [*382 was illegal; and if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover. 2. That if the jury shall believe from the evidence, that in December, 1840, when the lottery was drawn, the defendant was an infant, the plaintiffs are not entitled to recover in this action.

A party cannot assign for error, the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed: here they were asked to instruct the jury, that the belief of the plaintiff that the ticket had been fairly drawn, and the consequent payment, prevented a recovery, without referring to the fact in evidence, that that belief was caused by the false and fraudulent assertions of the defendant.

The second instruction asked was, that the plaintiffs could not recover, if the defendant was a minor in December, 1840, which the court properly refused, because they were not asked to decide on the effect of his minority when the money was received in February, 1841; and because, if he had then been a minor, it would have been no defence to an action founded on his fraud and falsehood.

The first instruction, if granted, would have excluded from the consideration of the jury, all reference to the fraud which produced such belief in the plaintiff, and they must have given it the same effect, whether it was founded in fact, or caused by the false asseveration of the fact by the defendant, knowing it was a falsehood, and thus depriving the jury of the right to decide on the whole evidence.

The second instruction asked would, if granted, have also taken from the jury the right of finding for the plaintiff, if the defendant had been of full age when the fraud was successfully consummated by the receipt of the money, which was the only fact on which the law could raise a promise to repay, for certainly none could be raised at any previous time; so that had these instructions been given, the verdict must have been rendered for the defendant without taking into view the only evidence on which the plaintiff relied, whether it was available in law or not.[1]

[1] APPLIED. *Haffin* v. *Mason*, 15 *Wall.*, 674.

For these reasons, the judgment of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the
*383] District of Columbia, holden in and for the county of Alexandria, and was argued * by counsel. On consideration whereof, it is now here 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 cent. per annum.

JANE DADE, COMPLAINANT, *v.* THOMAS IRWIN, JUN., EXECUTOR OF THOMAS IRWIN, DECEASED, AND WILLIAM L. HODGSON, DEFENDANTS.

A court of equity will not interfere, where the complainant has a proper remedy at law, or where the complainant claims a set-off of a debt arising under a distinct transaction, unless there is some peculiar equity calling for relief.[1]
Nor will it interfere where the set-off claimed is old and stale, with regard to which the complainant has observed a long silence, and where the correctness of the set-off is a matter of grave doubt.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, in and for the county of Alexandria, sitting as a court of equity.

The case was this:

In the years 1824 and 1828 Jane Dade executed two deeds of trust to one William Herbert, for the purpose of securing a debt which she owed to Thomas Irwin, the deceased.

In 1830, Thomas Irwin, junior, the executor of Thomas Irwin, (who had died in the mean time,) filed a bill against Jane Dade for the sale of the property. Herbert, the trustee, was alleged to be a lunatic, and the bill therefore prayed that a commissioner might be appointed to make the sale.

Jane Dade in her answer admitted the justice of the claim

[1] DISTINGUISHED. *Morgan* v. *Beloit*, 7 Wall., 618; *Oelrichs* v. *Spain*, 15 Id., 228. CITED. *Hipp* v. *Babin*, 19 How., 278; *Parker* v. *Winnipiseogee, &c. Co.*, 2 Black, 551. S. P., *Hendrickson* v. *Hinckley*, 17 How., 443; *Shapley* v. *Rangely*, 1 Woodb. & M., 213; *Pierpont* v. *Fowle*, 2 Id., 23; *Foster* v. *Swasey*, Id., 217.

Whether there be such a remedy at law, must be ascertained from the character of the case, as disclosed in the proceedings. *Watson* v. *Sutherland*, 5 Wall., 74.

as stated in the bill. A decree was entered in conformity with the bill, and William L. Hodgson appointed commissioner to carry the same into effect.

On the 21st of November, 1834, Jane Dade filed another bill on the equity side of the court, stating that the sale was to take place in a few days, and praying that it might be suspended. She alleged that she was entitled to a credit under the following circumstances: that in 1817 she had loaned to one James Irwin $680; that in 1821, *he executed his promissory note to her for $826.63, which was the amount of the above sum with interest; that to secure the payment of the note, he assigned a debt due to him from Henderson and Company, which debt was guarantied by Thomas Irwin, who had become liable for the same; and that the amount of this debt, with interest, should be deducted from the sum for which Thomas Irwin's executor was about to sell her property. The bill further alleged that Thomas Irwin, the deceased, had become personally liable from having sold some cordage to Henderson and Company, contrary to his instructions. The assignment of the debt from James Irwin to Jane Dade, (through her agent, John Adam,) and the admission of a personal liability by Thomas Irwin, were alleged to be in the following terms:— [*384

I do hereby assign to John Adam, the debt due me by Alexander Henderson for cordage sold him by Thomas Irwin, as my agent, for which debt said Irwin is himself liable, having received said Henderson's note without my consent. This assignment is made to secure to Jane Dade the payment of six hundred and eighty dollars, with interest thereon from the 16th of October, one thousand eight hundred and seventeen, money borrowed from her by said Adam for my use, for which I have given him my note, payable in eighteen months, with interest.

Given under my hand and seal, this 20th day of May, one thousand eight hundred and twenty-one.

JAMES IRWIN. [Seal.]

(Endorsed) JOHN ADAM.

Test: LEWIS COLE.

Endorsed. If the within debt cannot be recovered from Alexander Henderson, I am liable for the same: provided full time be allowed for the prosecution of the suit.

THOMAS IRWIN.

The bill further alleged that full time had been allowed for

the prosecution of the suit against Henderson, and that there was no prospect of any thing being recovered.

Upon filing this bill, an injunction was granted to stay the sale.

In February, 1835, Thomas Irwin, Jun., the executor, filed his answer, denying all knowledge of the note said to have been given by James Irwin, and denying the assignment above recited. The answer admitted that Thomas Irwin had sold some cordage to Henderson and Company, for which he had taken their note; that the *note had been put in suit, judgment rendered upon it, and execution issued; that Henderson was discharged under the insolvent act; that the recovery of the money due on the said note being considered as desperate, his testator had charged the amount to his principals, James Irwin and Company. The answer denied altogether the signature of Thomas Irwin, guarantying the debt; and alleged sundry other matters to show the absence of equity in the claim of the complainant.

*385]

In November, 1835, the court refused to dissolve the injunction, and suggested that an issue should be made up, to be tried at the bar of the court sitting as a court of law, to try the question of the genuineness of the signature of Thomas Irwin.

This was done, but the jury were not able to agree, and were discharged.

Numerous depositions were then taken and filed, and the case came on to be heard, when the court decreed that the injunction should be dissolved and the bill dismissed with costs.

The complainant, Jane Dade, prayed an appeal to this court.

Neale (in a printed argument) and *Brent*, for the appellant.
Jones, for the defendant in error.

Neale, for the appellant.

This cause which comes up by appeal from the Circuit Court of Alexandria county, was upon the final hearing in the court aforesaid, dismissed by a majority of the court, for the following reasons:

1. Because, in the opinion of a majority of the court, the court had not jurisdiction of the case sitting as a Court of Chancery.

2. Because, there was no consideration from which the defendant's testator could be made liable, either on account of the assumpsit in writing endorsed on exhibit B, or for blending his principal's goods with his own—taking a note therefor,

and sueing and obtaining a judgment thereon in his own name for the two amounts so blended, as the record proves.

3. Because, the complainant [now appellant] forbore to press this claim sooner, by way of set-off to the claim of the defendant's testator. For these reasons a majority of the court dismissed the bill at the complainant's cost. Dissentient —his honor the chief judge.

These objections, coming as they do from the very fountain of justice, are justly entitled to high respect and grave consideration. But however high and pure the source from whence they proceed, still it is an open question whether or not they are sustained by the *facts of the case—the principles of equity jurisdiction, and the legal liabilities of an agent to his principal. According to the regular order of pleading, the first inquiry to be instituted is as to the jurisdiction of the court, and upon that point we cite and rely upon the following authorities and accompanying remarks, to wit: [*386

Johns. Digest, 102; 1 Wash., 145; Barb. & H. Dig., 2, 4, 6, 11, 13, 15, 31, 46; 5 T. R., 603; 4 Bing., 459; 1 P. Wms., 325, 326; 2 Id., 128; 4 Id., 611; 5 Pet., 278; 2 Rob.'s Pr., 1, 4; Tuck. Comm., b. 3, p. 404; 1 Story's Equity, 82, and 442–446, sects. 462, 463, 464. In the case of *Grandin & Leroy*, 2 Paige (N. Y.), 509, it is said, "that after a defendant has answered a bill in chancery, and submitted himself to the jurisdiction of the court without objection, it is too late to insist that complainant has a perfect remedy at law; unless the court is wholly incompetent, [as a Court of Chancery,] to grant the relief sought by the bill."

Again it is said, "that whenever the remedy at law is doubtful or difficult, a Court of Chancery has jurisdiction." *American Insurance Company* v. *Fisk*, 1 Paige (N. Y.), 90; *Teague* and *Russell*, 2 Stew. (Ala.), 420.

In the case of *Ward* v. *Arredando*, Hopk. (N. Y.), 203, the court say, "the principle is that the jurisdiction may be upheld whenever the parties, or the subject, or such portion of the subject as is within the jurisdiction, are such that an effectual decree can be made and enforced so as to do justice."

[Mr. *Neale* then entered at great length upon the consideration of the other two points. His argument is omitted, because the decision of the court was placed upon other grounds.]

Jones, for the defendant in error:

This case might appear, at the first blush, somewhat extraordinary, as being a bill of injunction and an original bill to stay the regular execution of a decree in equity, and to obtain

relief against it four years after it had been obtained by the now defendant, Irwin, against the complainant, Jane Dade, with her full and unqualified consent for the sale of real property to pay a debt which she had collaterally secured by a conveyance of the same property in trust, for the specific purpose of being sold to raise the money for the payment of such debt, if not paid in a given time. It may not, perhaps, seem less extraordinary that, as an original bill it seeks not to set
*387] aside the decree for fraud, and that it is not, in any sense or shape, or in any *aspect whatever, a bill of review; that no error either of law or fact on the face of the decree, or in any part of the procedure, nor any new matter discovered since the decree, is at all within the scope or object of the bill: but on the contrary, it is admitted that the debt remains precisely as when the decree was obtained, except a small payment since on account of the interest, and about which there is not, nor ever was, the slightest dispute or difference between the parties; and that the decree stands wholly unexceptionable in itself, and in every part of the procedure, precedent and subsequent. The whole scope and object of the bill is to get the benefit of a pretended set-off, not discovered since the decree, but just as well known to the complainant before the decree, and in fact for many years before the commencement of the suit in which the decree was rendered, as at the present time. The pretended set-off consisted of a stale demand of more than thirty years standing, wholly unconnected with any transaction involved in that suit. The complainant had no original interest or concern in it. The only interest claimed by her in it was from a pretended assignment of it by a third person made seventeen years after the demand had accrued, more than nine years before the decree, and more than thirteen years before it was for the very first time brought out and asserted in this bill of injunction. The demand itself consisted in a liability pretended to have been incurred so long ago as 1804, by the now defendant's testator, Thomas Irwin, for misconduct as agent of one James Irwin, (from whom complainant derives her claim as assignee of the cause of action,) in having unduly indulged a debtor to whom he sold goods intrusted with him by James Irwin to sell on commission; and for which misconduct, if satisfactorily made out, James Irwin might have recovered damages in a special action on the case: a cause of action, therefore, purely and strictly legal in its nature. The only misconduct imputed to the agent is that of having taken a negotiable note, at 60 days, of the mercantile firm to whom he had sold the goods. Complainant pretends that seventeen years after this transaction,

when the assignment was made, Thomas Irwin endorsed on the assignment a conditional acknowledgment of his liability, if the debt cannot be recovered of the principal debtor, provided a reasonable time be allowed for the prosecution of the suit.

Now, supposing the complete establishment of this set-off in every point of law and fact; setting aside all consideration of the extraordinary length of time it had been kept back in silence and inaction; *and waiving all objection to [*388 equity jurisdiction of a demand so exclusively legal; and in fact *strictissimi juris*, in its nature; the appellee might be content to rely solely upon the well-known principles and rules of equity law and practice, which establish—first, that a final decree enrolled (or what, with us, is equivalent to enrolment in England, after the term at which the decree was rendered has passed over,) it cannot be set aside, nor can any relief whatever be obtained against it, by any sort of original bill, unless fraud in the decree be distinctly and circumstantially charged. Secondly, that even in the case of a bill of review, either demonstrative error in matter of law must be shown on the face of the decree, or the fresh discovery of new matter since the decree; the materiality of which, and the positive inability of the complainant to have come at a previous knowledge of it by using reasonable and active diligence, must all be clearly shown by affidavit. Thirdly, that after a case for a bill of review has been thus made out, it cannot be filed without the special leave of the court; one of the ordinary and standing conditions of which leave is, that the decree shall first be performed. So utterly foreign to all received notions of equity law or practice is a bill of injunction to stay the execution of a decree, and so utterly inadmissible is any sort of relief by means of one decree in equity against another decree in equity, but for one or other of the special causes, and in one or other of the special modes of procedure aforesaid.

Where there is newly discovered evidence it must be shown to be material and relevant, and to have been out of the power of the party to have produced before. Mitford on Pleading, 4 ed., pp. 84, 85; 16 Ves., 354; 2 Ball & B., 462; Amb., 295; 5 Russ., 195, where the cases are all examined.

No bill of review can be filed until the decree is performed.

In this case the ground of the bill is deserted. The court had no right to go back to an original claim in equity; and the claim is too stale and doubtful in its nature to be admitted. 1 How., 108.

[Mr. *Jones* was proceeding in his argument, when the court expressed a desire to hear the counsel on the other side.]

Brent, in reply and conclusion.

This is not merely a bill for an injunction, but also for a discovery as to the time of the origin of the set-off. The suit against Henderson was prosecuted until 1835, and the complainant did not think she had a right to file an original bill until the suit was decided.

*389] Mr. Justice STORY delivered the opinion of the court.

This is an appeal from the Circuit Court of the District of Columbia, sitting in Alexandria.

In the year 1824, the appellant, Jane Dade, became indebted to Thomas Irwin, the testator, and executed two deeds of trust for the security of the debt. At the November term of the Circuit Court of Alexandria county, 1830, Irwin, the executor, filed his bill to obtain a decree of the sale of the estate so conveyed in trust; and a decree was made without objection for the sale, the appellant admitting the justice of the claim; and the original trustee having become insane, William L. Hodgson was appointed trustee to make the sale. After sundry delays, the trustee advertised the estate for sale on the 28th of November, 1834; and on the day preceding the intended sale the present bill was filed by the appellant for an injunction against the sale. The bill made no objection to the original debt or decree, but simply set up a claim, by way of set-off or discount, of a totally distinct nature, and unconnected with the original debt, as due by the testator to her, and for which she alleged in her bill that she ought to receive a credit, to which in equity and strict justice she was entitled. The claim thus set up had its origin in this manner. In May, 1821, James Irwin gave his note for $826.63 to John Adam or order, for Mrs. Dade, for money borrowed of her, which note was endorsed by Adam, and on the same day James Irwin, as collateral security therefor, assigned to Adam a debt due to him by Alexander Henderson for cordage sold him by Thomas Irwin (the testator) as his agent, and for which the assignment alleged Thomas Irwin was liable, having received Henderson's note without the consent of James Irwin. Upon the back of this assignment there now purports to be the following endorsement, "If the within debt cannot be recovered from Alexander Henderson, I am liable for the same, provided full time be allowed for the prosecution of the suit." The supposed note referred to in the assignment was dated in Jan-

uary, 1804, and was for the payment of $901.83 to the order of Thomas Irwin, and was signed by Alexander Henderson & Co. This note the bill alleged to include the debt due to James Irwin. Judgment was obtained upon this note in 1805. Afterwards Henderson, in 1806, became insolvent, and in 1816 a bill in equity was filed for the satisfaction of the judgment out of supposed effects in the hands of certain garnishees, which suit was not finally disposed of until October, 1835, and was then abated by Henderson's death.

*The answer to the present bill by Thomas Irwin, the executor, denied the whole equity thereof. It de- [*390
nied that James Irwin ever executed the supposed assignment. But he admitted the origin of the debt due by Henderson and Co., and that the note taken by the testator included it; but that Henderson having become insolvent he was not liable for that amount, and charged it in his accounts against James Irwin and Co. He also denied the supposed endorsement on the assignment to be genuine, but alleged the same to be a sheer fabrication.

The injunction prayed for by the bill was granted, and afterwards the court directed an issue to be tried by a jury to ascertain whether the testator's signature to the endorsement was genuine or not. That issue was tried by a jury, who were unable to agree upon a verdict. The order for an issue was then rescinded, and the cause came on for a final hearing in 1839, when the bill was dismissed with costs. There is a great deal of evidence on both sides as to the genuineness of the signature of the testator, and also as to the appearance of the ink of the endorsement being that of recent writing. It is also remarkable that in the long interval between the time when the deed of trust was given in 1824, and the time when the sale was advertised and the bill filed, no demand was ever suggested by or on behalf of Mrs. Dade for the present supposed debt due her as a set-off or otherwise. On the contrary, although repeated and earnest applications were made for delay of the sale, from the time of the decree in 1830 until the advertisement in 1834, and some correspondence took place on the subject, no allusion whatsoever was made to any such supposed claim or set-off; but an entire silence existed on the subject. It is also somewhat singular, that when the bill upon the trust deed was filed and the decree therein obtained, no suggestion was made by Mrs. Dade in answer thereto of this supposed claim, nor any postponement of the decree of sale asked upon this account.

Now, upon this posture of the case, several objections arise as to the maintenance of the suit. In the first place, the

present bill is of an entirely novel character. It is not a bill of review, or in the nature of a bill of review, founded upon any mistake of facts, or the discovery of any new evidence. It admits in the most unambiguous terms that the decree was right. Then, it sets up merely a cross-claim or set-off of a debt arising under wholly independent and unconnected transactions. Now it is clear that courts of equity do not *391] act upon the subject of set-off in respect to distinct and unconnected *debts, unless some other peculiar equity has intervened, calling for relief; as, for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other.(*a*) In the next place, the remedy for Mrs. Dade, if any such debt as she has alleged exists, is at law against the executor; and there is no suggestion that the estate of the testator is insolvent, and that his assets cannot be reached at law. So that the bill steers aside of the assertion of any equity upon the foundation of which it can rest for its support.

In the next place, the nature and character of the claim itself, now for the first time made, long after the decease of both the Irwins, and thirteen years at least after its supposed origin. To put the case in the least unfavorable light, it is a matter of grave doubt whether the endorsement of the testator's name on the assignment is genuine or not. That very doubt would be sufficient to justify this court in affirming the decree of the court below, and leaving Mrs. Dade to her remedy at law, if any she have. But connecting this with such a protracted silence for thirteen years, without presenting or making any application for the recognition or allowance of the claim to the testator or his executor, it is impossible not to feel that the merits of the claim at such a distance of time can scarcely be made out in favor of the appellant. It is stale, and clouded with presumptions unfavorable to its original foundation, or present validity. Besides, in cases of this sort, in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury; and we should not incline, as an appellate court, to review the decision to which the court below arrived, unless under circumstances of a peculiar and urgent nature.

The decree of the Circuit Court is, therefore, affirmed with costs.

(*a*) See 2 Story Eq. Jur., §§ 1435, 1436.

ORDER.

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 now here 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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*WILLIAM J. MINOR, AND CATHARINE HIS WIFE, PLAINTIFFS IN ERROR, *v.* SHUBAL TILLOTSON. [*392

The distinction between writs of error and appeals cannot be overthrown by an agreement of counsel in the court below, that all the evidence in the cause shall be introduced and considered as a statement of facts.[1]

THIS case was brought before the court at the last term, on a motion to dismiss, and is reported in 1 Howard, 287.

The position of the case is sufficiently set forth in that report. It now came up on a final hearing.

Walker, for the plaintiffs in error, examined the title of the plaintiffs as set forth in the papers in the cause, and contended for its superiority over that of the defendant.

Webster, for the defendant, referred to the decision in 1 Howard, and said that it was quite evident that there was no error of law apparent on the face of the record. There is no ruling of evidence, no demurrer, no bill of exceptions, no agreed state of facts, no special verdict. Nor is it like any of those cases in which the court has acted on undisputed evidence, in cases from Louisiana, as if such undisputed evidence were equivalent to an agreed state of facts.

The whole case, law and fact, was submitted to the judge, as a referee or arbitrator. The law was disputed, and the

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[1] FOLLOWED. *Suydam* v. *Williamson*, 20 How., 439; *Walker* v. *Dreville*, 12 Wall., 442; *Murdock* v. *City of Memphis*, 20 Wall., 622. CITED. *Phillips* v. *Preston*, 5 How., 290; *Prentice* v. *Zane*, 8 How., 486; *Pomeroy* v. *Bank of Indiana*, 1 Wall., 604.

Consent cannot confer jurisdiction upon an appellate court; the regulations prescribed by Congress must be followed. *Kelsey* v. *Forsyth*, 21 How., 85; *Sampson* v. *Welch*, 24 Id., 207; *Ex parte McCardle*, 7 Wall., 512; *Washington County* v. *Durant*, Id., 694; *The Lucy*, 8 Id., 307; *Merrell* v. *Petty*, 16 Id., 342. And see *Hudgins* v. *Kemp*, 18 How., 530; *New Orleans* v. *Gaines*, 22 Id., 141.

facts were disputed; and whether judgment was rendered on the facts or on the law does not appear. The judgment is general, for the defendant. It is plain that this court cannot revise this judgment, without examining all the evidence, plan, depositions, surveys, &c., just as they would be examined by a jury.

For any thing which the record discloses, every point of law may have been decided in the plaintiff's favor.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by a writ of error, to the Circuit Court for the eastern district of Louisiana.

The action was commenced in the Circuit Court, to recover possession of certain tracts of land specified in the petition, and for damages, &c.

The defendant set up a title to the premises and pleaded prescription, under the various laws of Louisiana.

*393] *This cause was before this court at January term, 1833, on a writ of error, and was reversed and sent down for further proceedings. In the court below, the death of the plaintiff was suggested, and a supplemental petition was filed, making his heirs and representatives parties to the suit. The pleadings were amended, and a jury being called and sworn, evidence was heard by them, and certain exceptions taken to its admissibility by the defendant. But afterwards, by consent of parties, the jury, before they rendered their verdict, were discharged. The cause was then submitted to the court, under an agreement between the counsel, that "the documents filed in the cause, the plans, and written depositions, contain all evidence and exhibits on which this cause was tried by the court; the whole was read, subject to all legal exceptions except as to the form of taking the verbal testimony; and all other objection to the testimony, accounts, and plans, are to be argued as though the bill of exceptions were drawn out in form, signed and filed. The agreement is made for a statement of the facts in the case."

A large mass of evidence was received from both parties, consisting of concessions and grants under the Spanish government, intermediate conveyances, documents showing proceedings in regard to the title under the laws of the United States, and parol testimony, involving a great variety of facts, on a consideration of all of which a judgment was rendered by the Circuit Court for the defendant.

From the record, it is impossible for this court to say on what grounds of law or fact the Circuit Court gave judgment. No point as to the admissibility or effect of the evidence was

raised on the record by the plaintiffs in error in the Circuit Court. It seems to have been supposed that the above agreement of the counsel, that the evidence in the cause should be considered as a statement of facts, subject to all legal objections, though no objections were stated, was sufficient ground for a writ of error on which a revision of the legal questions in the case might be made in this court.

In this view, the writ of error must be considered as bringing all the facts before this court, as they stood before the Circuit Court. And this court, exercising a revisory jurisdiction would be required to try the cause on its merits. This is never done on a writ of error, which issues according to the course of the common law. Under the Louisiana system a different practice may prevail. But, we had supposed, that since the decisions of the case of *Parsons* v. *Bedford et al.*, 3 Pet., 445, there could be no misapprehension in regard to the *proceedings of this court on a writ of error. In [*394 that case, the court say, "it was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court; and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review." And the court go on to consider the effect of the act of 1824, in regard to the Louisiana practice, and hold that that law does not change the exercise of the appellate power of this court.

The case referred to had been tried by a jury, but in regard to the revisory power of this court, on a writ of error, there is no material difference between that case and the one under consideration. In both cases the facts were upon the record, and this court were called upon to determine the questions of law arising upon the facts.

In the case of *Parsons* the court do say, "that if the evidence were before them it would not be competent for the court to reverse the judgment for any error in the verdict of the jury." And they say, the refusal of the court, to direct the evidence to be entered on the record, as required under the Louisiana practice, was not matter of error.

Whatever opinion, therefore, may have been entertained in regard to the effect of the act of 1824, on the practice of the Circuit Court of the United States, in Louisiana, before the above decision; after it, there would seem to be no ground for doubt. The practice of the Circuit Court in Louisiana, since the above case was decided, has conformed to the rule laid down

in that case. But in the present cause, there is no statement of agreed facts. If the case be revised on a writ of error, the evidence on both sides must be considered and weighed by the court, as a jury would consider and weigh it; and after adjusting the balance, the principles of law, not as they were presented to the Circuit Court, but as they may arise on the evidence, must be determined. This is not the province of a court of error, but of a court of chancery on an appeal from the decree of an inferior court. On such a review, not only the competency of the evidence must be decided, but also the credibility of the witnesses.

The case under consideration was a proceeding at law, and, as the legal points have not been raised by a bill of exceptions, in the Circuit Court, it is not a case for revision in this court.

*395] A judgment of *affirmance is, therefore, entered, at the costs of the plaintiff in error.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the eastern district of Louisiana, and was argued by counsel. On consideration whereof, it is now here 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.

WILLIAM TAYLOR AND OTHERS, APPELLANTS, *v.* GEORGE M. SAVAGE, EXECUTOR OF SAMUEL SAVAGE, DECEASED, DEFENDANT.

The case of *Taylor and others* v. *Savage*, 1 Howard 282, examined and confirmed.[1]

THIS case came before the court at the last term, and is reported in 1 How., 282.

It was brought up again on a motion to dismiss the appeal.

Morehead, who made the motion, referred to the decision at the last term, and said that notwithstanding that decision, the case was still here. He considered the opinion of the court as covering the whole ground.

[1] See further decision in this case, *Taylor* v. *Benham*, 5 How., 233.

Crittenden, contra.

Both parties appealed from the decision of the court below; but Savage did not perfect his appeal. There is a difficulty in making proper parties, if the case is sent back. The law of Alabama says that administration of the estate shall be attached to the office of sheriff, but his official term will soon expire, and we shall have to litigate with temporary administrators.

Berrien, on the same side, thought there was still a case before the court upon which it could act. It is true that the decree below was rendered on the same day that the administrator was removed; but notwithstanding this, it was well rendered. If a party dies, the court will direct a judgment to be entered as on the first day of the term. 2 Peters, 481.

*There is no difference between a party dying and one in a representative character being removed. This [*396 must have been the view of the court; the validity of the decree must have been recognized when they said that the voluntary appearance of Benham would cure all defects. The decree could not have been considered null. If the decree was well rendered, the appeal was well taken, because it was taken at the same term whilst the proceedings were within the power of the court. The appeal was prayed and allowed in open court. This court can now proceed either,

1. By Benham's voluntary appearance, or
2. By issuing process to bring him in.

1. This was decided at the last term.

2. Benham's will cannot give the court jurisdiction. The 28th rule provides for the death of a party and summoning another to take his place. The same power that adopted this rule can modify it and say that the successor to an executor can be summoned. The power to establish a general rule involves the power to make a special one to suit a particular case; general rules are made only to prevent specific orders.

Sergeant, in reply and conclusion, argued at some length that the decision at the last term covered the case as it now stood. The party on the other side must go into the court below and have the record put into a correct form.

Mr. Justice STORY delivered the opinion of the court.

The court have had this case under consideration, and are of opinion that it is completely governed by the decision made in the same case at the last term of this court, which is reported in 1 How., 282. An attempt has been made at the bar to dis-

tinguish the former decision from that now sought, by suggesting that the former proceeded mainly upon the ground that the appeal was irregularly made, and did not directly involve the question now argued. We think otherwise; and that the ground of that decision completely covers all that has been urged upon the present occasion; not as mere incidental suggestions, but as the very hinge on which the case turned. Notwithstanding the opinion of this court then expressed, that the case might be remanded to the District Court, for the purpose of making the proper parties, the appellants have
*397] neglected, during a whole year, to take a single step for the remanding of the *case, or instituting any proceedings in the court below; which laches certainly ought not to produce any result in their favor.

The appeal is, therefore, dismissed, and the cause is remanded to the District Court of the northern district of Alabama, with leave to the appellants to make the proper parties, and to the new administrator, Benham, to become a party to the suit; and that such other proceedings be had as to law and justice shall appertain.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the northern district of Alabama and was argued by counsel. On consideration whereof, it is ordered and decreed by this court, that this appeal be, and the same is hereby dismissed, and that this cause be, and the same is hereby remanded to the said District Court, with leave to the appellants to make the proper parties, and to the new administrator, Benham, to become a party to the suit; and that such other proceedings be had therein as to law and justice shall appertain.

JAMES RHODES, PLAINTIFF IN ERROR, *v.* MOSES BELL.

The District of Columbia being still governed by the laws of Virginia and Maryland, which were in force anterior to the cession, it is not lawful for an inhabitant of Washington county to purchase a slave in Alexandria county and bring him into Washington county for sale. If he does, the slave will become entitled to his freedom.[1]

THIS case was brought up by writ of error, from the Cir-

[1] RELIED ON *in dissenting opinion, Dred Scott* v. *Sandford*, 19 How., 562.

cuit Court of the United States for the District of Columbia, in and for the county of Washington.

It was a petition for freedom filed by Bell. The facts are set forth in the special verdict, which is as follows:

"We of the jury find that previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria county, in the District of Columbia; that in the year 1837 the said Hoff, then owning and possessing the petitioner as his slave, in the county of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then *being a resident of Washington county, in the district aforesaid, [*398 and that the delivery of the petitioner was made to the said Little in Alexandria county aforesaid, and the petitioner was immediately removed by said Little to Washington county aforesaid, to reside, and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit: about one year or a little more, sold the petitioner to one Keeting in Washington county, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the county of Washington aforesaid; that at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit: he was fifty-four or fifty-five years old, and is now fifty-nine or sixty years old. And if upon the facts aforesaid the law is for the petitioner, then we find for the petitioner on the issue joined; if upon the facts aforesaid the law is for the defendant, then we find for the defendant on the issue joined." Whereupon all and singular the premises being by the court here seen, heard, and fully understood, and mature deliberation being thereupon had, the court is of opinion, from the statement of facts aforesaid, that the law is for the petitioner.

The writ of error was sued out for the purpose of reviewing this opinion.

Brent and *Brent*, for the plaintiff in error.
Bradley and *Hoban*, for the defendant.

The counsel for the plaintiff in error made the following points:

1st. That the removal of said Moses Bell from the county of Alexandria to Washington county, both in the District of Columbia, and under the same jurisdiction, as stated in the "special verdict," did not entitle him to freedom under any law in force in said district.

2d. That the said removal was not an importation of said Moses Bell, according to the true intent and meaning of the laws in force in the county of Washington aforesaid.

3d. That such removal, even if it had been illegal previous to the year 1812, was legalized by act of Congress on the 24th of June, 1812; and,

4th. That said Moses Bell, being over forty-five years of age at the time of such removal, was incapable (by the laws in force in said county of Washington) of receiving his freedom by or through any act or acts of his master or owner.

*399] *Brent*, Sen., referred to the law of Maryland, 2 Maxcy's Laws, ch. 67, p. 361, which prohibited the importation of a slave into the state, but argued that it did not apply to this case, because Alexandria and Washington were only parts of the same sovereignty. He referred also to the act of Congress, of June, 1812, Davis's Laws, 265, which permits the people of the district to remove their slaves from one county to another; and to 8 Pet., 44, 46, 48, 49, 50, where the question came up incidentally.

In 14 Pet., 142, 145, the court decided that the counties of the district do not stand to each other in the attitude of separate states.

Hoban, for appellee.

In matters of a local character, unless imperative necessity require a contrary course, this court will always adopt and follow the decisions of the local tribunals. Since the act of 1812, in every instance in which the question involved in this case has arisen, the Circuit Court of the District of Columbia has invariably decided that, in order to import a slave from one county into the other in this district, the party importing must reside in the county, and there own the slave, from which the importation is made. See Maxcy's Cases, *Dunbar* v. *Bell*, October, 1821; *Foster* v. *Simmons*, Nepo Williams, November, 1835.

The case in 14 Pet. was upon the statute of limitations; it is now cited to reverse our opinions as to importation of slaves between the two counties. That case asserts no principle with which we are not familiar; it affirms the judgment of the Circuit Court. It merely asserts that as to the limitation of suits, Alexandria and Washington counties, as to each other, are not beyond seas. As to all local law, the counties have always been entirely distinct—the act of February 27, 1801, Davis, 123, declares that the laws of Maryland, as then existing, shall be the laws of that part of the district taken from

Maryland, and the laws of Virginia of that part taken from Virginia.

Even from Maryland to import into that part of the district formerly belonging to Maryland, an act of Congress was necessary; namely, of May, 1803. Davis, 135.

If it be true that by virtue of the unity of sovereignty, the right of free importation, from county to county, exists, then all the adjudication from the cession down is wrong, and the act of 1812 was unnecessary.

If the right of importation, as claimed on the other side, exists, it *operates a repeal of the settled policy of [*400 Virginia and Maryland, prohibiting the domestic slave-trade between them.

Maryland and Virginia both prohibit the introduction of slaves into their territory, except by persons coming to reside. The part of the district formerly belonging to Maryland is still considered as part of it, as to the introduction of slaves from that state, and the part of the district formerly belonging to Virginia is still considered as a part of that state as to the introduction of slaves from that state, by the act of May, 1803. If by the act of 1812, a person residing in either county may import slaves into the other, by the act of 1803 he may immediately remove them into the state adjoining, and thus all the policy and the letter of the laws of Virginia and Maryland prohibiting importation are immediately repealed.

Before the act of 1812, a resident of one county could only introduce a slave into the other, bringing the slave with him when he came to reside, and then could only sell him in three years. See the act of 1796 of Maryland, Maxcy's Laws, p. 361, c. 67.

By the act of 1812, a resident of either county can introduce his slave into the other without coming to reside: provided he reside in the county from which the importation is intended—and sell him when he pleases.

As to the prohibition of freedom on account of age, it applies only to cases of voluntary emancipation—where freedom is claimed under the act of the master—and not in a case of forfeiture. (like this,) where the claim is adverse to that of the master.

Bradley, on the same side, commented on the act of 1812, and said that the permission therein granted was only to remove a slave from one county to another, under certain restrictions; but it did not authorize fresh purchases to be made, and importations for the purpose of sale. He referred, also, to the difference which still existed between the two

counties with regard to the issue of a female slave, as showing that the old law still prevailed in each county.

Brent, in reply and conclusion, said that the construction of the law, as stated by Mr. *Hoban*, had not been acquiesced in by the bar or the people of the district. Many thought the decisions wrong in the cases referred to by him; and, at all events, the opinion of the court below was not the law here. *401] When a slave is brought from Alexandria to Washington, he is not removed from one sovereignty *to another; and so the court decided in the case of the *Bank of Potomac*.

Before the act of 1803, negroes could be carried from Alexandria to Washington for the purpose of being hired out. The act of Maryland of 1796 allowed it.

Mr. Justice McLEAN delivered the opinion of the court.

A writ of error brings this case before us from the Circuit Court of the District of Columbia.

Moses Bell, the defendant in error, filed a petition in the Circuit Court representing that he was held in slavery by one James Rhodes, of the said county, and prayed that his rights might be inquired into by the court. The defendant pleaded that the said Moses was not free, &c. The jury returned a special verdict, and found "that previous to the year 1837, the petitioner was the slave of a certain Lawrence Hoff, a resident of Alexandria county, in the District of Columbia; that in the year 1837, the said Hoff, then owning and possessing the petitioner as his slave, in the county of Alexandria aforesaid, whereof he continued to be a resident, did sell and deliver the petitioner to one Little, then being a resident of Washington county, in the district aforesaid, and that the delivery of the petitioner was made to the said Little in Alexandria county aforesaid, and the petitioner was immediately removed by said Little to Washington county aforesaid, to reside and also for sale, whereof said Little was resident; that the said Little shortly afterwards, to wit, about one year or a little more, sold the petitioner to one Keeting, in Washington county, who sold and delivered him to the defendant; that since said sale to said Little, the petitioner has always been kept and held in slavery in the county of Washington aforesaid; that at the time of the sale and delivery of the petitioner as aforesaid by Hoff to Little, the petitioner was more than forty-five years of age, to wit, fifty-four or five years."

Upon the above facts the Circuit Court held, that the peti

tioner was entitled to his liberty. To revise this judgment, the writ of error has been prosecuted.

In the second section of the act of the 19th of December, 1791, the state of Maryland declared, "that all that part of the territory called Columbia, which lies within the limits of this state, shall be, and the same is hereby acknowledged to be for ever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil *as of per- [*402 sons residing, or to reside thereon pursuant to the tenor and effect of the eighth section of the first article of the constitution of government of the United States—provided that the jurisdiction of the laws of this state, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article in the constitution before recited."

Previously to the above cession, in 1789, Virginia ceded to the United States, "ten miles square or any lesser quantity for the purposes aforesaid, as Congress might direct," with the reservation "that the jurisdiction of the laws of Virginia over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in manner provided by the article of the Constitution before recited." This cession was accepted.

By the first section of the act of the 17th of February, 1801, Congress provided, "that the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said state to the United States, and by them accepted," &c., "and that the laws of the state of Maryland as they now exist, shall be and continue in force in that part of the said district which was ceded by it, &c." The part of the district ceded by Virginia constitutes Alexandria county, and the part ceded by Maryland, constitutes Washington county.

As the laws of Maryland and Virginia have been adopted by the above act of Congress, within the counties respectively ceded, it will be necessary to refer to those laws, so far as they have a bearing in the present case.

By the Maryland statute of November, 1796, 2 Maxcy's Laws, 351, it is declared, "that it shall not be lawful from and after the passing of this act, to import or bring into this state,

by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this state and shall be free."

The exceptions to the above provisions are,

*403] 1. Any citizen of the United States who removes to Maryland * with a *bona fide* intention of becoming a citizen, may bring his slaves with him, or bring them within one year afterwards, provided such slaves have been in the United States three years preceding the time of their removal.

2. By the act of 1797, the above privilege is extended to the executors of such persons, dying within one year after removal, &c.

3. Any citizen of Maryland who being seised and possessed of an estate of inheritance in land in any one of the adjoining states, who employed slaves in the cultivation of said land, is at liberty to bring such slaves into the state for his own benefit, but not for sale, provided such slaves had been in one of the adjoining states before the 21st of April, 1783.

4. Slaves acquired by descent, by a citizen of Maryland, may be brought into the state to be employed by the owner, but not for sale.

5. Travellers or sojourners may bring their slaves into the state.

By a law of Virginia passed the 17th of December, 1792, it is declared, "that no person shall henceforth be slaves within this commonwealth, except such as were so on the 17th of October, 1785, and the descendants of the females of them." And the second section declares that all "slaves which shall be brought into this commonwealth and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free. The third section imposes a penalty on any person who shall import slaves into the commonwealth, and also upon any one who shall sell or purchase such slaves. Exception is made of a person who, with a *bona fide* intention of becoming a citizen of Virginia, removes into the state, and exceptions extend to some other specified cases.

By the seventh section of the act of Congress of the 3d of May, 1802, it is provided, "that no part of the laws of Virginia or Maryland, declared by an act of Congress, passed the 27th of February, 1801, concerning the District of Columbia, to be in force within said district, shall ever be construed so as to prohibit the owners of slaves to hire them within, or

remove them to the said district, in the same way as was practised prior to the passage of the above-recited act."

Again, by the ninth section of the act of the 24th of June, 1812, Congress provides, "that it shall be lawful for any inhabitants in either of the said counties (of the district) owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised *over [*404 him, her, or them, in the county from whence the removal was made, any thing in any legislative act in force at this time in either of the said counties to the contrary notwithstanding."

From the foregoing legislative action it will be seen, that the counties of Washington and Alexandria are governed by the laws of the states to which the territories composing them were respectively attached before the cession. This is especially true in regard to the importation and sale of slaves. Neither the act of Congress of 1801, adopting the laws of the respective states, nor the act of 1802 above cited, made any modification of the Virginia or Maryland law in regard to slaves. It was, undoubtedly, the policy of Congress, until the passage of the act of 1812, to preserve the same relation between the counties of the district, on this subject, that existed between the two states.

A slave imported from Virginia to Maryland, not within one of the exceptions named, was free by the Maryland law. And it is not pretended that Bell can be brought within any one of the exceptions. The jury found that Little purchased Bell in Alexandria county, and brought him into Washington to reside and for sale, the purchaser being a resident of Washington county. Now independently of the act of 1812, no one can doubt that this act of the purchaser entitled the petitioner to his freedom. Indeed, he is entitled to it, under the express provision of the Maryland law.

The act of 1812 was designed to enable the owner of slaves in either of the two counties, within the district, to hire or employ them in the other. And this is the full purport of its provision on this subject. It clearly does not authorize a citizen of Washington to go to the county of Alexandria, purchase a slave and bring him to Washington county for any purpose, much less for the purpose of sale, as found by the jury in this case. If this could be done, it would subvert the whole policy of the Maryland law, which was to prevent, except in specified cases, the importation of slaves into the state. And Congress, by adopting the Maryland law, sanctioned its policy.

It is true that the two counties of this district are under the same political organization, and, in a certain sense, constitute one sovereignty. But this can have no effect upon the question under consideration. It depends exclusively upon the laws referred to. No views of policy or of supposed convenience can enter into the decision.

*405] *The case of the *Bank of Alexandria* v. *Dyer*, 14 Pet., 141, has been relied on by the plaintiff in error, as showing that the counties of Washington and Alexandria, being united under the same government, cannot be considered as foreign to each other.

That was a case where the statute of limitation was pleaded to a suit in Washington county. The plaintiffs replied that they were citizens of Alexandria, &c., to which the defendant demurred. And on this state of the pleading the question was, whether the plaintiffs were beyond seas, within the meaning of the Maryland statute. The court held that they were not; "that the counties of Washington and Alexandria resemble different counties in the same state; and do not stand towards one another in the relations of distinct and separate governments."

The words "beyond seas," in the Maryland statute, were borrowed from the statute of James 1, ch. 21, and have generally been construed in this country not literally, but as meaning, "without the jurisdiction of the state." Now, in reference to this construction, the decision of the court was correct, but it can have no direct bearing upon the question under consideration. That the District of Columbia must be considered as exercising the same general jurisdiction in both counties, is undoubted; but the rights of its citizens are not governed by the same laws. The counties of Washington and Alexandria, excepting the modification made by the act of 1812, are as foreign to each other, as regards the importation of slaves, as are the states of Virginia and Maryland. Such we understand to be the settled doctrine of the Circuit Court of this district. And this is no unsatisfactory evidence of what the law is. An acquiescence of many years in a course of decision involving private rights, should not be changed except upon the clearest ground of error.

There is a provision in the Maryland law prohibiting the owner of a slave from manumitting him, if he be over forty-five years of age; and this is urged by counsel as a reason why the petitioner in this case should not receive his liberty. He is now near sixty years of age; but how his rights are to be affected by a law which restrains the master, is not perceived. He claims to be wrongfully held in servitude, and the

court think his claim is founded in law. Now, shall he be kept in servitude because his master, if he were disposed, could not manumit him? The law makes him free without the concurrence of his master. Slaves brought into the state of Maryland, in violation of the law, are declared to be free without reference to *their age. And the court [*406 cannot affix a condition to the right of freedom, which the law does not authorize. Upon the whole, we are unanimously of opinion, that the judgment of the Circuit Court should be affirmed with costs.

ORDER.

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 now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

JOHN RANDEL, JUN., APPELLANT, *v.* WILLIAM LINN BROWN.

WILLIAM LINN BROWN, APPELLANT, *v.* JOHN RANDEL, JUN.

John Randel, Jr., placed in the hands of Brown two certificates of stock, which Brown afterwards refused to restore. Randel filed a bill in chancery against Brown, alleging that the deposit had been made for a special purpose, which had failed. The answer denied this, and claimed a lien on the certificates, or that they were given as a payment. *Held*, from the bill, answer, and evidence, that they were not delivered to Brown, either as a payment of a debt to himself, or to secure him from responsibility to another. *Held* also, that Brown had no legal or equitable interest in them at the time of the rendition of the decree.

The rights of the parties as they stand when the decree is rendered, are to govern, and not as they stood at any preceding time.

The retention of property, after the extinguishment of a lien, becomes a fraudulent possession.

"A lien cannot arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract." [1]

THESE two cases were argued together, being cross appeals from the Circuit Court of the United States for the eastern district of Pennsylvania, sitting as a court of equity.

[1] CITED. *Bank of Washington* v. *Nock*, 9 Wall., 382. See *Kelly* v. *Phelan*, 5 Dill., 228.

The facts admitted or proved were few.

*407] Prior to, and during the year 1831, Randel was engaged in a remarkably *troublesome litigation with the Chesapeake and Delaware Canal Company. In that year Brown was a student of law in the office of John Sergeant, Esq., of Philadelphia, who was one of Randel's counsel. Through his visits to the office, Randel became acquainted with Brown, who was then twenty-five years of age.

In the latter part of 1831, Randel removed to the state of New York, and engaged the services of John M. Clayton, Esq., of Delaware, who became the principal counsel in the cause.

During the years 1832 and 1833, the suit was prosecuted in Delaware against the canal company, Brown absenting himself from the office of Mr. Sergeant, at first partially, and then almost wholly. The troublesome nature of the controversy may be inferred from the facts, that the counsel for the canal company filed sixty-two pleas, to each of which there was a replication or answer. The whole of these were afterwards withdrawn: the record broken up: new counts added to the declaration: twenty-nine new pleas and demurrers filed, to each of which there was a replication or a joinder in demurrer, as the case might require, all of which were drawn out at full length. In the preparation of these papers Brown rendered such aid as he was able to do. The demurrers were argued at May term and November term, 1833, and overruled. On the 9th of December, 1833, the cause came on to be tried, and on the 25th of January, 1834, the jury found a verdict in favor of Randel for $226,885.

On the 18th of September, 1834, the sum of $2,000, with the interest due, and to become due thereon, was entered upon the record, as being assigned for the use of Brown.

On the 22d of September, 1834, Brown caused attachments to be issued against the captains of vessels passing through the canal as garnishees of the tolls.

On the 26th of September, 1834, Brown accepted an order drawn by Randel in favor of William M. Camac for $2,000, payable out of the first moneys he might obtain from said company on said account, or from tolls attached. If more than one year should elapse before the whole of the $2,000 was obtained, then he was to pay to Camac an interest of 6 per cent. on whatever balance might remain unpaid after the expiration of one year.

During the years 1834, 1835, and 1836, the attachments became the subject of much litigation, but were ultimately confirmed.

In March, 1836, an arrangement was made between Randel

and the canal company, by which the latter issued certificates of stock, *the interest upon which and principal were to be paid in preference to all other debts, the tolls being pledged for that purpose. This arrangement, however, was not consummated until April, nor were the certificates issued until July. They were then issued in manuscript for $5,000 each. In October they were issued in a printed form.

On the 18th of April, 1836, Randel gave Brown his promissory note at ninety days for $300, which was not paid.

On the 22d of October, 1836, Randel gave Brown a power of attorney, authorizing him to sell, assign, and transfer unto himself or to any other person or persons, $10,000 of the funded debt of the Chesapeake and Delaware Canal Company, entitled to priority of payment and transferable according to certificates thereof, numbered 34 and 35, each for $5,000.

On the same day Brown re-assigned to Randel the $2,000 worth of the judgment which had been assigned to Brown on the 18th of September, 1834.

Under the power of attorney, Brown transferred $10,000 to himself, and took out new certificates in his own name.

On the 29th of October, 1836, Randel filed his bill in the Circuit Court for the eastern district of Pennsylvania, in which he alleged that he was desirous of negotiating a loan from one of the banks in the city of Philadelphia, and hoped to do so by depositing as collateral security such of the certificates of debt, issued by the canal company, as might be sufficient to protect the lender from loss, giving at the same time his promissory note in the customary form; that he stated this desire to Brown, who replied that he had transacted business with the Schuylkill Bank, of which his cousin, Frederick Brown, was a director, and that he would do what he could for him; that Brown soon afterwards informed him that he feared he could not succeed; that the complainant then informed Brown that he would give $500 for a loan for a twelvemonth; that the complainant and Brown agreed that, as a premium was offered, it would be better that the name of the complainant should not appear in the transaction; that Brown then said he would negotiate it in his own name upon the hypothecation of the certificates, to which the complainant agreed; that the complainant afterwards understood from Brown that he had drawn a note for $10,000, payable in twelve months, and placed at the foot of it a memorandum, showing that it was to be secured by certificates of the debt of the Chesapeake and Delaware Canal Company; *that [*409 the complainant then observed that it would be well to add that a power of attorney would be given to sell or transfer the

certificates which would enable the bank, at once, to draw the interest to meet the note.

The bill further stated that Brown came to the house of the complainant in Wilmington on the 22d of October, and stated that he had prepared a new note, according to the form above stated, which had been presented to the bank and thrown out; but that it would be presented again, and it would be proper for him to have the certificates and a power of attorney authorizing a transfer, in order to give it its best chance; that the complainant assented and gave Brown two certificates of the character above described, of $5,000 each, and the power of attorney; that the complainant handed to Brown a blank form of a power of attorney similar to the one which had been filled, requesting him to fill it up as a copy, and write upon it a receipt for the power and certificates, stating in such receipt an engagement to return the certificates on the punctual payment of the note and interest, and also an engagement to account to the complainant for the dividends which he might have received whilst the certificates were in his possession; that Brown promised to make out a fair copy of such receipt and give it to the complainant, which, however, he wholly omitted to do.

The bill further stated that at the next interview between them, Brown said that the bank would not lend the money, and upon the complainants requesting that the certificates might be restored to him, Brown refused, and said, "I mean to hold the certificates and power of attorney until you settle with me; I have now got you in my power;" that the complainant denied owing him any thing, but that he had always intended to make him, Brown, a handsome present.

The bill further stated that the complainant went immediately to the office of the canal company for the purpose of stopping the transfer, but found that Brown had effected it on Monday, the 24th of October, (the power having been given to him on Saturday, the 22d,) and had, on Tuesday morning, received fresh certificates in his own name.

The bill then charged that these proceedings of Brown were fraudulent proceedings, and a direct breach of trust; that the deposit of the certificates was made in the hands of Brown merely as a trustee, in the full trust and reliance that no use whatever would be made of it but for the purpose of procuring a loan from the Schuylkill Bank. *It then called upon Brown to answer whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid, and to answer the several charges in the bill, concluding with a

*410]

prayer that Brown might be ordered to restore the certificates, and in the mean time an injunction might issue.

In March, 1837, Brown filed his answer, in which he set forth that as early as the spring of 1831, at the instance and request of the complainant, he engaged in the service of the said complainant, and particularly in the suit with the canal company; that he had various duties to perform, and assisted in the preparation of papers of great extent and importance; that he attended diligently to these services; that his whole time from 1831 to 1836 was entirely at the command of the complainant; that soon after the engagement the complainant informed him that he would pay the respondent a reasonable compensation for time actually bestowed in his service in any event; that he would bear his travelling and other expenses; and that in the event of success he, the complainant, would pay to the respondent two and a half per cent. on the sum received in the said suit with the canal company.

The answer further set forth that the assignment of $2000 of the judgment was made to the respondent in payment, up to that period, of the time expended by the respondent in the service of the complainant.

The answer further set forth that the complainant desired him to accept an order in favor of Camac for $2000, promising to place funds in the hands of the respondent to pay and take up the said order, which order the respondent accepted.

The answer further stated that in April, 1836, the complainant gave to the respondent his promissory note for $300 as a payment for the time expended since the assignment of the judgment, which note was never paid by the complainant.

The answer further set forth that on the 20th of October, 1836, after a conversation between the parties respecting a settlement between themselves, the complainant took from his pocket two certificates of the funded debt, each for $5000, and handed them to the respondent, and upon the respondent asking what they were for, the complainant replied "they are to pay you and Mr. Camac," adding that he wished the respondent to go to New Castle and reassign the judgment for $2000. In consequence of this, the respondent did go to New Castle and reassign the judgment, on which same day the *complainant executed to the respondent the power of [*411
attorney spoken of in the bill.

The answer then averred, that the transfer of stock had been made by the respondent to himself, and that the certificates had been given to him, not in trust, but absolutely as a payment to himself for a debt due and ascertained from the said complainant, and to place him in funds for the payment

of the order in favor of Camac. An account was also alleged against the complainant, the particulars of which were stated.

The answer admitted that the respondent had applied to his cousin, Frederick Brown, to procure a loan of money for the complainant, amounting to $10,000; that he drew his note for that sum, stating at the foot of it that the same amount of the funded debt of the canal company would be offered as collateral security, but denied that Frederick Brown was to receive $500, or that the note was offered at the Schuylkill Bank, or any other bank. It denied also that the matter of the loan had any connection with the two certificates handed to the respondent by the complainant. On the contrary, it averred that the loan was to be secured by other certificates.

The answer further averred, that no allusion was made directly or indirectly, by the complainant, to the certificates or power of attorney, until a conversation in which the respondent declined to act as agent for the complainant in the purchase of a piece of ground, unless the complainant would pay all his debts; and that the complainant then, for the first time, with great asperity, asked why the respondent had not given him a receipt for the certificates. The conversation proceeded with much warmth, and terminated with a demand from the complainant for a restoration of the certificates and a refusal to surrender them on the part of the respondent. The answer then replied particularly to the interrogatories of the complainant, and concluded by saying that the certificates were surrendered to the court upon the presentation of the complainant's bill.

Under commissions to take testimony, a vast mass of evidence was collected, consisting chiefly of the declarations of the parties respectively as to the compensation which Brown was to receive for his services, and the value of those services.

In May, 1839, the case was referred to John M. Scott, Thomas I. Wharton, and Peter McCall, Esquires, who were authorized to act as masters therein, with power to take depositions, &c., and directed to report the evidence to the court, together with a statement by the *said masters, or a majority of them, of such facts as in their opinion were established by the evidence, together with their opinion touching any matters on questions which they may deem material for consideration; and especially, first, to report the terms, consideration, and conditions of the transfer of the two certificates of debt referred to in the bill and answer, in the consideration of which, the answer of the defendant, so far as it is responsive to the averments of the bill or interrogatories, or a denial of the former, is to be taken as evidence of

*412]

the cause, according to the rules of equity. Second, to report what sums of money have been paid by the plaintiff to defendant, for or on account of disbursements made by defendant—time, labor expended, services rendered, for or to the plaintiff, for his use or at his request; whether any sum is yet due to defendant therefor, and to what amount.

Two of the masters united in a report; the third filed a separate one.

The two masters, in their report, recapitulated the principal part of the evidence which led them to their conclusion, and found—

1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust.

2. That the trust was to raise money.

3. That of the money so to be raised, part was to be paid to Mr. Camac; and that, as to this part, the respondent had a direct interest in the execution of the trust, in consequence of his acceptance of the draft in favor of Mr. Camac, referred to in the answer, and of his re-transfer of the interest in the judgment upon which the draft was drawn.

4. That another portion of the money so to be raised, was to be paid to Mr. C. Ingersoll.

5. That no express appropriation of the balance, or any part thereof, was made at the time by the complainant in favor of the respondent.

6. But that an intention had been declared previously, by the complainant, to pay or present to the respondent, through the medium of such certificates, a sum of money, the amount of which was not stated or specified, as a compensation or remuneration for his services during the pendency of the suit with the Chesapeake and Delaware Canal Company; but we do not find that any express reference to such declared intention was made at the time of the transaction.

7. That, in point of fact, no money was raised upon the certificates.

*8. That, on Monday, the twenty-fourth of October, 1836, the certificates were transferred by the respondent (under the power of attorney) to himself, and so remain; and [*413

9. That, since the filing of the bill in this case, the complainant has parted with all the remaining certificates of debt due to him by the said Chesapeake and Delaware Canal Company.

The two masters further reported, that the weight of testimony was against the allegation that the transfer of the $2000 was in payment for time expended.

They further reported that such a promise was made by the complainant, as the respondent has set forth; but that nothing was due to the respondent for his time expended.

They further reported that for labor and services rendered by the respondent to the complainant, for his use and at his request, there was due a sum equal to two and one-half per cent. on the amount of the judgment recovered against the canal company, viz., the sum of $5659.64. And that the debt due to Mr. Camac had been paid by Randel since the cause commenced.

On the subject of payments, the two masters reported that there was a balance of $10, which was to be applied to Mr. Randel's credit on the general account.

The third master concurred with the other two as to the contract for two and one-half per cent., and that the transfer of the certificates was in trust; but was of opinion that Brown's own claim was to be paid out of the proceeds, and that the $2000 contract was not disproved by evidence sufficiently strong to deprive the answer of the weight given to it by the rules of equity.

Numerous exceptions to this report were filed by both the complainant and respondent—on the part of the complainant it was objected, that the report was erroneous, because

1. The part of the answer which stated the contract for two and one-half per cent. was not responsive to the bill.

2. The respondent furnished no account of disbursements made or services rendered.

3. The payments alleged to have been made were not proved.

4. The sum of $80 was a payment and not a loan.

5. That nothing was due to the respondent from the complainant.

On the part of the respondent it was objected,

1. That the sums charged to the respondent in the account were not sustained by the evidence.

*414] *2. That the masters had not allowed the respondents sufficient credits.

In October, 1841, the cause came on to be heard upon bill, answer, replication, master's report, exhibits, depositions, and exceptions to report, and the court decreed that the exceptions to the master's report be disallowed; that there was due by the complainant to the respondent the sum of $5,649.64, with interest thereon from the fifth day of May, 1840, making together the sum of $6,136, which said sum should be paid and satisfied by and out of certain certificates of debt or the proceeds thereof, given to the complainant by the Chesapeake and Delaware Canal Company, and then under the control of

the court. And, it was further ordered that the costs of the suit, including the fees of the masters, be divided between, and equally paid by, the complainant and respondent.

From this decree, both parties appealed to this court.

J. R. Ingersoll and *C. Ingersoll*, jun., for Randel.
J. R. Tyson and *Cadwallader*, for Brown.

The argument consisted chiefly, upon both sides, in an examination and comparison of the evidence; and it is therefore thought advisable to omit it. Some legal positions were taken and authorities adduced to support them, which will be mentioned.

J. R. Ingersoll.

Where an answer is discredited in one particular, it is weakened in the remainder. 5 Mon. (Ky.), 23.

A claim existing will not justify the retention of trust-funds, 9 Wheat., *Palmer* v. *Gracie; Thompson* v. *Eyre*, Supreme Court of Pennsylvania, 3 Desaus. (S. C.), 268; 11 Wheat., 125.

The answer, setting up a contract, is not responsive to any part of the bill, and a defendant is only a witness as to what he is asked. 2 Stew. (Ala.), 302; 2 Johns. (N. Y.), Ch. 88, 90; 1 Bibb, (Ky.), 195; 8 Cow. (N. Y.), 387; 1 Wash. (Va.), 224; 1 Mumf. (Va.), 395.

J. R. Tyson.

The confessions of a party form the weakest of all evidence deemed admissible in law. *Bernard* v. *Flournoy*, 4 J. J. Marsh. (Ky.), 101; *Harding* v. *Brooks*, 5 Pick. (Mass.), 244; *Snelling* v. *Utterbach*, 1 Bibb, (Ky.), 609; *Linch* v. *Linch*, 10 Ves., 517, 518; *Thomas* v. *Thomas*, 2 J. J. Marsh. (Ky.), 65; *Morris* v. *Morris*, 2 Bibb, (Ky.), 311; *Logan* v. *McChord's heirs*, *2 A. K. Marsh. (Ky.), 225; 2 Johns. Ch. (N. Y.), 412; *Robertson* v. *Robertson*, 9 Watts, (Pa.), 43. [*415

A power of attorney, if coupled with an interest in the thing, is irrevocable. *Hunt* v. *Rosemaniere*, 8 Wheat., 175, also 1 Pet., 1.

The assignment of the judgment and the power of attorney here are under seal. Every deed imports consideration. Plowd., 308; Burr., 1637.

In a case of *fraud*, if parties be *in pari delicto*, a court of equity may interpose for a complainant upon terms, or, owing to his demerit, may abstain from the slightest interference. 1

Fonbl. Eq., b. 1, sect. 3, note (h), and cases cited; 2 Story's Eq., Juris, 6, 7, and cases cited.

Parties to a bill are held to as strict account in proof of the case stated as parties to an answer, for the court pronounces its decree *secundum allegata et probata*. *Boone* v. *Chiles*, 10 Pet., 209, also 4 Mod., 21, 29; 3 Wheat., 527; 6 Wheat., 468; 2 Wheat., 380; 2 Pet., 612; 11 Wheat., 103; 7 Pet., 274; 2 Ves., 243; 1 Marsh. (Ky.), 325; 3 Bibb, (Ky.), 530.

He who asks the aid of a court of equity must offer to do equity. *St. John* v. *Halford*, *Bart.*, 1 Ch. Cas., part 97; *Lord Dacres* v. *Crompe*, 2 Ch. Cas., part 87; *Stanley* v. *Gadsby*, 10 Pet., 521; *Brown* v. *Swann*, 10 Pet., 497; see 501.

Cadwallader cited the following authorities in addition to those cited by Mr. *Tyson*, respecting the declarations of parties. 7 Mod., 49; Foster, 243; Hard. (Ky.), 549; 4 Serg. & R. (Pa.), 331, 332; 14 Howell's State Trials, case of *Duke of Richmond*.

Because a man does what is wrong, a court should not take away what belongs to him and give it to another, to whom it does not belong.

A party may justify on a good ground, although there is also a bad ground in the case. 12 Mod., 387; Comyn, 78; Fitzherbert, Avowry, 232; 3 Coke, 26 a; 2 Leon., 196; 7 T. R., 654, 658; 4 Bing. N. Cas., 638; 2 Dowl. & Ry., 755, 756; 1 Eq. Cas. Abr., 354; 2 Ch. Cas., 23; 1 Vern., 49, 51; 2 Id., 159; 14 Journal House of Lords, 601, reversing case in 2 Vern.; 2 Ball & B., 271; 11 Wheat., 125, 126; 12 Pet., 297; 1 Ch. Cas., 97; 2 Ch. Cas., 87; 1 Pet., 382, 383.

*416] *C. Ingersoll*, jun., in addition to arguing upon the evidence, commented *upon many of the above authorities, to show that they were not applicable to the case.

Mr. Justice McKINLEY delivered the opinion of the court.

Randel filed his bill against Brown, on the chancery side of the Circuit Court of the United States for the eastern district of Pennsylvania. In which he states that, wishing to negotiate a loan of $10,000, to be secured on certificates of the funded debt of the Chesapeake and Delaware Canal Company, he applied to Brown to aid him in the negotiation, with one of the banks in Philadelphia. And that it was agreed between them, that Randel should deliver to Brown two certificates of the funded debt of the canal company, for $5,000 each, and execute to him a power of attorney, authorizing him to trans-

fer the certificates to himself, or to any other person; and that Brown should, upon his own note, and the pledge of the certificates, if practicable, obtain a loan, for Randel.

And in pursuance of this agreement, he executed the power and delivered it and the certificates to Brown. That instead of obtaining a loan of money, as he had promised, Brown transferred the certificates to himself, and delivered them up to the canal company, and obtained new ones in his own name. That when Randel applied to Brown to know whether he had obtained the loan of $10,000 for him, Brown replied, that he had bad news for him—"I have not succeeded at the bank;" that the bank had a disposition to lend, but had not the means. That Randel then requested him to return the certificates of debt, which Brown refused to do: saying he intended "to hold on to them" till Randel settled with him, or made him the present he had promised him.

Randel then put the following interrogatories to Brown: "Whether he did not receive the certificates and power of attorney in trust and confidence, in the manner and under the circumstances aforesaid; and whether he had any interest in the same, and was not, in holding the same, a mere trustee for the complainant, and did not refuse to deliver them to him; and whether he did not transfer said certificates to himself, on Monday, the 24th of October; and what circumstances occurred before the board of directors, or were communicated to him; and whether he did not inform the complainant, that he had not succeeded at the bank, and give the complainant to believe, that he had made application on that, or the preceding day; and whether the certificates were not transferred, by said Brown, to his own use, *and not for the use of the complainant; and what use or disposition, if any, [*417 he had made thereof, and to whom, and for what consideration."

The answer denies all the material allegations of the bill, except it admits the receipt of the power of attorney and the certificates of debt. Brown then sets up, in his answer, a claim for services rendered to Randel, from the early part of the year 1831, till the 24th day of October, 1836, of various kinds, but particularly, in attending to, and preparing for trial, a suit brought by Randel against the said canal company. And he alleges that Randel agreed to give him a reasonable compensation, for time to be expended in his service, in any event, and to pay his travelling and other expenses; and in the event of success in the suit, the additional compensation of two and a half per cent. on the amount that might be received thereon; and that Randel finally recovered judg-

ment, and received from the company, the sum of $230,000, in payment thereof.

But before the payment, and while it was uncertain whether anything would be realized from the judgment, Brown states that, from exposure in the service of Randal, he was taken sick, and it being uncertain whether he would recover or not, he applied to Randel for payment for the time then expended in his service, whereupon Randel caused to be transferred to the use of Brown $2,000, part of said judgment. And a short time thereafter, about the month of September, 1834, Randel requested him to accept an order, drawn on him by Randel, in favor of a certain William H. Camac, for $2,000, promising, at the same time, to place funds in his hands to meet its payment; which induced him to accept it. Brown refers to the order, in his answer, and which is as follows:

"Sir—Out of the sum of $2,000, with interest due, and to become due thereon, which was assigned, at my request, by Samuel H. Hodson, to you, being one-fifth part of the sum assigned by me to him, on trust, the 27th of January last, out of the judgment obtained by me against the Chesapeake and Delaware Canal Company, please to pay to William H. Camac or order the sum of $2,000, out of the first moneys you obtain from said company on said account, or on account of tolls attached. If more than one year elapse before you obtain the whole of said sum of $2,000, then pay to said Camac an interest of six per cent. on whatever balance may remain unpaid, after the expiration of said term of one year." Brown accepted this order on the 26th of September, 1834.

*418] *It is further charged in the answer, that on the 18th day of April, 1836, for time expended in his service, from the date of the assignment of the said sum of $2,000, down to that time, Randel gave to Brown a promissory note for $300, payable 90 days after date. He then charges, that the two certificates of debt were delivered to him by Randel, on the 20th of October, 1836, for the purpose of paying himself, and the debt of $2,000 to Camac. And at the same time, Randel requested him to go to New Castle and re-assign the part of said judgment which had been assigned to him as aforesaid; and that he, Randel, would then execute the power to Brown to enable him to transfer said two certificates of debt to himself. And accordingly, on the 22d of the same month, he at New Castle re-assigned to Randel said sum of $2,000, part of said judgment, and received from him the power of attorney authorizing him to transfer said two certificates of debt, numbered 34 and 35, to himself, or any other person.

And in answer to the interrogatories in the bill, Brown says,

"that he did not receive said certificates and power of attorney, in trust and confidence, in the manner and under the circumstances therein set forth, but absolutely, as an unqualified transfer, in payment of a debt due to him, by the complainant, and distinctly admitted by him, and to enable him, the respondent, to pay William H. Camac the amount of his, the respondent's, acceptance, as before stated; and that said respondent has an absolute and unqualified interest in the certificates, to the whole amount of their principal and interest, and that he does not hold them as trustee for the complainant, nor any other person, but in his own right, and for his own use.

"And that he did refuse to deliver said certificates to the complainant, and did actually transfer said certificates to himself, on Monday, the 24th day of October last; and that he did not place said certificates before the directors of the Schuylkill Bank, on Monday, the 24th, or Tuesday the 25th of October last. That touching the disposition your respondent has made of the said certificates, he says, that they still stand in the name of your respondent, and were surrendered to this honorable court, on the presentation of the complainant's bill of complaint." To the answer the complainant filed a general replication. And, after time had been allowed the parties to take depositions, the court referred the case to three masters, with special instructions.

The masters after a very thorough examination of the evidence in *the cause, reported against the claim of [*419 Brown for separate compensation for time; but allowed him the two and a half per cent. commissions, claimed in his answer, amounting to $5,659.64, as compensation for all services rendered. Both parties excepted to the report. Brown, to that part of it which disallowed his claim for separate compensation for time; and Randel excepted to that part which allowed to Brown two and a half per cent. on the amount of the judgment against the canal company.

The court overruled these and all other exceptions, confirmed the report of the masters, and rendered a decree in favor of Brown for the amount allowed by the masters, with interest from the fifth day of May, 1840, amounting together to the sum of $6,136, to be paid out of these two certificates. From this decree both parties have appealed to this court.

The right of Brown to compensation for time, and his right to commissions on the amount of the judgment, are both involved in his assertion of the more general right, to be compensated, for all his services, out of these certificates. The principal questions, therefore, which we deem it necessary to

examine are, 1st. Were the certificates delivered to Brown in payment of a debt to himself, and to pay the debt to Camac? And if they were not so delivered; then, 2d. Had Brown such a legal or equitable interest in the certificates as authorized the decree of the court below? A just solution of these questions depends upon a proper examination of the evidence applicable to them, and the particular circumstances under which the witnesses acquired a knowledge of the facts they have deposed to.

Shortly after the bill was filed, and before Brown had filed his answer, he went to Delaware to ascertain what evidence he could obtain from persons having a knowledge of the services he had rendered to Randel. And from the inquiries he made of several of the witnesses, and the disclosures made to them, of the nature of his controversy with Randel, it is reasonable to suppose, that he intended, at that time, to rest his defence upon the amount and value of his services only, and that he had not then thought of claiming the certificates, as having been delivered to him in payment of a debt due for those services. The depositions of four of those persons are found in the record; T. B. Roberts states, in his deposition, that Brown asked him what evidence he could give, as to the value of his services, while with Randel, stating, that the witness was aware of his having been for years doing business for him.

*420] *The witness then says, that Brown stated to him, "that the certificates had been put into his hands by Mr. Randel; to raise money upon them, to pay certain debts of Randel's in Philadelphia; one of which he mentioned was to Mr. Camac; I think, he stated himself, under some obligation to have paid by Mr. Randel; and another debt to Mr. Charles Ingersoll; he did not state that the balance was for himself. He said he had exerted himself to negotiate the certificates to several persons, but had not succeeded;" "that Mr. Randel wished him to return the certificates to him, but he had refused to do so, until Mr. Randel settled certain debts he owed."

A. C. Gray, to whom Brown applied, for the purpose of getting his services as commissioner to take depositions for him, in this suit, says, Brown stated, "that he had received a transfer of $10,000 from Randel of the canal's debt, for the purpose of raising money; with which Mr. Randel wished to pay his debts; he stated also, that Mr. Randel owed him money for services, which he had rendered him, during the long litiga tion which had taken place between Randel and the canal company. In consequence of these things, he had determined

to hold on to these certificates, as the only means to enforce the settlement of his claims."

Thomas Janvier, another of these witnesses, states, that when Brown applied to him to ascertain what testimony he could give in this case, Brown stated that Randel had promised to pay him two and a half per cent. on the judgment against the canal company. The witness replied, that his testimony might operate against him, as the only claim he had ever heard him assert, was, that he intended to make Randel pay him $2,000 for his services. Janvier then says, "that in the course of the conversation he gave me a history of the transaction, upon which this suit is founded; and told me that Randel had given him these certificates, which are now in controversy, for the purpose of negotiating a loan, to pay certain debts he had contracted—debts due to Mr. Camac, Mr. Charles Ingersoll, and himself; so far I recollect positively. I am certain, from the information of Mr. Brown, that the certificates were given for the purpose of negotiating a loan, to enable Randel to pay certain creditors. I am certain he named Mr. Camac, Mr. C. Ingersoll, and himself as creditors."

Cornelius D. Blaney, the fourth witness, says, he does not recollect that Brown stated how the certificates came into his hands; in other respects his testimony is, substantially, the same as that of the other *three witnesses; and it [*421 appears, that he was present at the conversation between Brown and the witness, Roberts.

After collating this evidence with clearness and ability, the masters proceed to say, "It is remarkable, that to none of these persons did the respondent state the fact, that he had transferred these certificates into his own name; it is remarkable also, that if, at that time, he did entertain the same clear and positive conceptions of his rights, which is set forth in the answer, he did not simply and plainly state that right, and say, "they (the certificates) were given in payment, or part payment of my own claim, and of my liability to Mr. Camac." We cannot close our minds to the force of the testimony of these four persons. It has been ably urged, that evidence gathered from the declarations of a party is unsafe, peculiarly liable to the effects of misapprehension, of inattention, of defect of recollection—that a word omitted, or displaced, may change the whole character of the declaration. We have felt the force of the argument, but it does not prevail against the influence of the concurring testimony of four intelligent and respectable men, giving a very uniform account of the respondent's representation of his own case; and, in relation to the question of trust, giving such a narration as to lead to one and

the same result. We have observed too, that it is the same species of evidence, upon which the respondent asserts his alleged contract with the complainant, which contract he states in his answer, in the words or declarations of the complainant, alleged to have been uttered to himself, at a time much less recent than his own declarations to the witnesses."

"The testimony of these witnesses then, establishes, in our opinion, and accordingly we find, and so report,

"1. That the delivery of the certificates by the complainant to the respondent was not absolute, but upon a trust.

"2. That the trust was to raise money.

"3. That of the money so to be raised, part was to be paid to Mr. Camac; and that as to this part, the respondent had a direct interest in the execution of the trust, in consequence of his acceptance of the draft drawn in favor of Mr. Camac, referred to in the answer, and of his re-transfer of the interest in the judgment upon which the draft was drawn.

"4. That another portion of the money so to be raised was to be paid to Mr. C. Ingersoll.

*422] "5. That no express appropriation of the balance, or any part *thereof, was made at the time by the complainant in favor of the respondent."

We concur entirely with the masters in their reasoning, and in the conclusions they have arrived at, upon this testimony, except as to the supposed interest of Brown in the execution of the trust, mentioned in the third specification. Upon that we shall have occasion to comment, in another part of this opinion. This evidence sustains the allegations of the bill, fully, and contradicts the answer, as to the objects and purposes for which the two certificates were delivered by Randel to Brown. There is, therefore, no further pretence to say, that Brown received the certificates in payment of a debt to himself, and for the purpose of paying the debt to Camac. And this evidence establishes another material fact in this case; and that is, that Brown had no interest or property in the certificates before they were delivered to him by Randel; and whether he acquired any in them afterwards, leads us to the consideration of the second question. Had Brown such an equitable interest in the certificates as authorized the decree of the court below?

In the third specification before referred to, the masters reported that Brown had a direct interest in the certificates, on account of his acceptance of Randel's order in favor of Camac, and his having relinquished to Randel his interest in the judgment. It is difficult to ascertain upon what ground it was assumed, at the date of the report, that Brown had

an interest in these certificates. The order was drawn upon a special and contingent fund, which might never be received; and until received, Brown was not liable to pay. There is no proof in the cause that can be relied upon, to show on what consideration the re-assignment was made; unless the statements in Brown's answer are to be received as evidence. When the answers of the defendant are directly responsive to the allegations of the bill, they amount to positive proof. But in this case there is no allegation in the bill, in relation to this assignment or re-assignment. Brown, in giving a history of the transactions between him and Randel, sets up in his answer this sum of $2000, as having been assigned to him in part payment of his services; and in another part of his answer, he states, that upon receiving the certificates and power of attorney, at the request of Randel, he re-assigned his interest in the judgment to him.

This being clearly matter in avoidance, it is entitled to no more consideration, as evidence, than are the allegations of the bill. There *is no evidence, therefore, that [*423 the re-assignment was made in consideration of the delivery of the certificates by Randel to Brown. But there is strong presumptive evidence, that it was made in consideration of the payment of the order to Camac by Randel, or of his promise to Brown, that he would pay it; for it appears by the report of the masters, that it was admitted by the parties, and the counsel on both sides, that the amount of the order had been paid by Randel to Camac after the commencement of this suit.

But if Brown had even acquired a valid lien on the certificates, on account of the acceptance of the order, and the re-assignment of his interest in the judgment, the payment of the order by Randel, pending the suit, extinguished the lien, and no decree ought, on account of this supposed lien, to have been rendered in favor of Brown; for it is the rights of the parties, at the time the decree is rendered, that ought to govern the court in rendering the decree. In either aspect of the case, however, Brown's right to these certificates is reduced to naked possession; and, since his refusal to restore them to Randel, his possession has been fraudulent.

It has been contended, by Brown's counsel, that, as the masters have reported that a large amount was due from Randel to Brown, and that Randel had parted with all the rest of his certificates of funded debt; that, therefore, Brown had a right to payment out of the certificates in controversy in this case. In support of this proposition, they relied on the case of *Handy and Harding*, 11 Wheat., 103.

The bill, in that case, stated that Wheaton, under whom the

complainants claimed, as heirs-at-law, about the year 1802, began to exhibit symptoms indicating loss of intellect, and soon became incompetent to the management of his estate. Under these circumstances, it was agreed among his children, that Handy, who had married his daughter, should endeavor to take his estate out of his hands, and preserve it for the benefit of his heirs-at-law. That it was agreed, that Wheaton should be prevailed on to convey the real property to Handy, for a nominal consideration, who should forthwith execute an instrument of writing declaring that he took and held the same in trust. 1st. To provide a decent support for the grantor, during his life; and after a full remuneration for his expenses and trouble, in that respect, to hold the residue of the estate for the benefit of the heirs-at-law. Handy procured the conveyance from Wheaton, and entered upon and possessed the property till his death, but refused to execute the declaration of trust.

*424] *The bill then prayed for an account; and that a decree might be rendered, exonerating the estate from the deed to Handy, after satisfying his just claims, &c.

The answer denied that Wheaton was incapable of conveying, when the deed was made. It denied also that the defendant purchased as a trustee; and averred, that he was a purchaser for a full and valuable consideration.

The Circuit Court decreed that the deed should be set aside; and that an account should be taken of the receipts and disbursements of Handy, and that he should be credited for all advances made, and charges incurred for the maintenance of Wheaton during his life, and for repairs and improvements made on the estate. This part of the decree was affirmed by the Supreme Court. Handy's possession of the estate was consistent with the intention of the parties; the advances made and charges incurred, for the maintenance of Wheaton, were according to their agreement; and the repairs and improvements made, preserved the estate, and enhanced its value. Thus far Handy executed the trust fairly, and thereby acquired a lien on the funds in his hands, arising from the rents and profits; nor were these acts tainted by his subsequent fraud, in refusing to execute other parts of the trust; and besides the complainants in their prayer for relief authorized the court to allow Handy his just claims against the estate. This case does not, therefore, give any support to the proposition assumed by the counsel of Brown.

There is no parallel between these cases, as a brief comparison will show. Brown's possession of the certificates, after

refusing to restore them to Randel, was not only fraudulent, but wholly inconsistent with the contract with Randel; and in violation of the trust upon which he received them. And Randel, so far from authorizing the court to allow Brown's claim out of the certificates, stated positively in his bill, that he owed him nothing. The proof shows conclusively, that Brown had neither property nor interest in the certificates, before they were delivered to him by Randel. Unless he can show, therefore, that he has a lien on them, he can neither hold them as security for the payment of the claims set up in his answer, nor is he entitled to payment out of them, at law or in equity. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien, founded upon his own illegal or fraudulent act, or breach of duty; nor can a lien arise, where, from the nature of the contract between the parties, it *would be inconsistent with the express [*425 terms, or the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as to hold them or the proceeds for the owner, or a third person. Story on Agency, 73, 74, 75; *Lamprier* v. *Pasley*, 2 T. R., 485; *Cranston* v. *The Philadelphia Insurance Company*, 5 Binn. (Pa.), 538; *Turno* v. *Bethune*, 2 Desaus. (S. C.), 285; *Jarvis* v. *Rogers*, 15 Mass., 389, 395; *Weymouth* v. *Bowyer*, 1 Ves., 416; *Taylor* v. *Robinson*, 8 Taunt., 648; *Gray* v. *Wilson*, 9 Watts (Pa.), 512; *Madden* v. *Kempster*, 1 Campb., 12; *Crockford* v. *Winter*, 2 Campb., 124.

In the case of *Madden* v. *Kempster*, Lord Ellenborough said, "The defendant being under an acceptance for Captain Hart, whose agent he had been, might have retained a sum of money to answer that acceptance. But the plaintiff is entitled to recover this sum of money, the defendant having obtained it by misrepresentation. He mentioned nothing of the acceptance, he obtained it as a balance when no balance was due to him. He cannot, therefore, set up the lien to which he might otherwise have been entitled." Lord Ellenborough held the same doctrine in the case of *Crockford* v. *Winter;* and the same doctrine was held in *Taylor* v. *Robinson*, 8 Taunt.

In this case of *Madden* v. *Kempster*, it is admitted that Kempster would have had a good lien on the £60 if he had obtained the money honestly, and in the course of business. But having obtained it by misrepresentation he was not permitted to set up the lien, to which he might otherwise have been entitled. How then, can Brown set up a lien on these certificates, holding possession of them as he does, by just as

gross a fraud? There is no aspect in which the question can be placed, consistently with the evidence and the authorities above cited, that will justify the decree in his favor. To permit this decree to stand would be to sanctify fraud, and to allow Brown, by taking advantage of his own wrong, to obtain compensation for his services in a court of chancery, upon a case purely cognisable in a court of law; the decree of the Circuit Court is, therefore, reversed, and the cause is remanded to the Circuit Court with directions to enter a decree for the plaintiff, conformably to this opinion, and that the defendant pay costs in both courts.

ORDER.

Randel *v.* Brown.

*426] This cause came on to be heard on the transcript of the *record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to enter a decree for the complainant conformably to the opinion of this court, and that the defendant pay the costs in both courts.

ORDER.

Brown *v.* Randel.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this appeal be, and the same is hereby dismissed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court with directions to that court to proceed therein conformably to the opinion of this court in this case on the appeal of the complainant.

SUSAN LAWRENCE, PLAINTIFF IN ERROR, *v.* ROBERT MCCALMONT, HUGH MCCALMONT, AND WILLIAM JOHNSON NEWELL, DEFENDANTS.

The following guarantee, viz.: "In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of $1

paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request, together with your charges; and I guaranty you from all payments and damages by reason of their default. You are to consider this as a standing and continuing guarantee, without the necessity of your apprizing me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards, between the firms as changed, until notified by me to the contrary."—*Held*, a continuing guarantee, and to include not only transactions under a letter of credit existing at the date of the guarantee, but also transactions which arose under a second letter granted at the expiration of the first; although the second credit contained a proviso "that the bills be drawn by, or in favor *of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months." [1] [*427

The principles laid down in the case of *Bell* v. *Bruen*, 1 How., 169, 186, which should govern the construction of commercial guarantees, reviewed and confirmed.[2]

A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, and this is equally true as to contracts of guarantee as to others.[3]

The consideration in this case was not past.

The question, whether or not the guarantor had sufficient notice of the failure of the principals to pay the debt was a question of fact for the jury.[4]

Where notes are deposited for collection by way of collateral security for an existing debt, the case does not fall within the strict rules of commercial law, applicable to negotiable paper. It falls under the general law of agency, and the agents are only bound to use due diligence to collect the debts.[5]

THIS case was brought up by writ of error, from the Circuit Court of the United States for the southern district of New York.

The facts were these:

Robert McCalmont and the other defendant in error, were co-partners in trade, in London, trading under the name of McCalmont, Brothers and Company.

In the year 1838, J. and A. Lawrence were merchants who resided in Brooklyn, near New York, in the same house with their mother, Susan Lawrence the plaintiff in error. Their

[1] CITED. *Brooks* v. *Baker*, 9 Daly, (N. Y.), 400; *Evansville Nat. Bank* v. *Kaufmann*, 24 Hun, (N. Y.), 615.

[2] See *Wills* v. *Ross*, 77 Ind., 12.

[3] FOLLOWED. *Davis* v. *Wells*, 14 Otto. 167; *Bolling* v. *Munchus*, 65 Ala., 561, 563. See *Toppan* v. *Cleveland, &c. R. R. Co.*, 1 Flipp., 74; *Woodruff* v. *McDonald*, 33 Ark., 97; *Taylor* v. *Wightman*, 51 Iowa, 411.

[4] CITED. *Louisville M'fg Co.* v. *Welch*, 10 How., 474. Compare *Watson* v. *Tarpley*, 18 How., 517; *Knickerbocker Ice Co.* v. *Gould*, 80 Ill., 388. Where the facts are not disputed, the question as to what constitutes due diligence in giving notice of non-payment to an endorser, is one of law for the court. *Rhett* v. *Poe*, *post* *457; *Harris* v. *Robinson*, 4 How., 336; *Orr* v. *Lacy*, 4 McLean, 243; *Diercks* v. *Roberts*, 13 So. Car., 338.

[5] CITED. *Dinsmore* v. *Philadelphia &c. R. R. Co.*, 11 Phil. (Pa.), 483, 485; *Whitin* v. *Paul*, 13 R. I., 42. See *Gallagher* v. *Roberts*, 2 Wash. C. C., 191; *Allen* v. *King*, 4 McLean, 128; *Westphal* v. *Ludlow*, 2 McCrary, 505; *Whitten* v. *Wright*, 34 Mich., 92; *Hazard* v. *Wells*, 2 Abb. (N.Y.), N. C., 444; *Wells* v. *Wells*, 53 Vt., 1; *Marschuetz* v. *Wright*, 50 Wis., 175.

counting house was in the city. McCalmont, Brothers and Co. had agents, J. Gihon and Co., also residing in New York.

On the 21st of November, 1838, J. and A. Lawrence obtained from the agents at New York the following letter:

New York, 21*st Nov.* 1838.

Messrs. McCalmont Brothers and Co., London:

Gent.:—We have granted to Messrs. J. and A. Lawrence of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents.

The above credit if granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be handed to us for transmission to you. You *428] are to charge one per cent. commission *on the amount accepted, and to keep the account at five per cent. interest per annum. We are, gents., your ob. st., JOHN GIHON and Co.

In the course of the trial, William Davidson being under examination, the plaintiff's counsel asked the witness whether the letter of credit, of 21st November, 1838, was delivered on an agreement for the guarantee. To this evidence the defendant's counsel objected, as irrelevant and inadmissible. The judge decided that it was admissible for the purpose of showing the nature and character of the plaintiff's claim on J. and A. Lawrence, but not to vary the construction of the guarantee, and admitted the evidence; to which the defendant's counsel excepted.

The witness then testified that the said letter of 21st November, 1838, was delivered on Mr. Lawrence's proposal of his mother's security for the credit, which will be presently mentioned.

On the 22d of November, 1838, this letter was transmitted to England with the following endorsement:

New York, *Nov.* 22, 1838.

Messrs. McCalmont, Bros. and Co.

Gent.:—You will please accept our, Mr. A. T. Lawrence's, dfts. for amount of within credit, in such amounts, and at such times, as he may draw. Your ob. st.,

J. and A. LAWRENCE.

On the 10th of December, 1838, Mr. A. T. Lawrence, being then in England, received the above letter, and forwarded it to London, accompanied by the following letter from himself:

Nottingham, Dec'r, 10th, 1838.

Messrs. McCalmont, Bros. and Co., London:

Gent.:—I now hand you enclosed, Messrs. J. Gihon and Co.'s letter of credit on you in favor of my house, J. and A. Lawrence, endorsed over to me for £10,000 sterling, and will you please write me, giving authority to draw for the amount? I observe that one of the conditions of the credit is, that goods to the amount of the same shall be shipped through your agents. Will you please inform me the names of the houses in Liverpool and London, through whom you would wish the shipments made? Please address me at this place. Respectfully, your obt. servt., A. T. LAWRENCE.

On the 11th of December, 1838, McCalmont, Brothers and Co., acknowledged the receipt of the above letter as follows:

**London*, 11*th Dec.* 1838. [*429

A. T. Lawrence, Esq., Nottingham:

Sir:—We have to acknowledge receipt of yours of yesterday's date, covering the letter of credit in your house's favor, opened by our mutual friends, Messrs. John Gihon and Co., say to the extent of ten thousand pounds sterling, to be availed of by drafts on us at four months against actual shipments of goods for their account, and going to their address; said goods, if shipped from Liverpool, to be forwarded through our agent there, Nathan Cains, Esq., India Buildings, or from hence through us, or such shipping agent as you may appoint; but in that case, a copy of the bill of lading to be lodged with us prior to presentation of your drafts, and such drafts to appear within thirty days from date of shipment. This credit to be availed of within six months from the 21st ulto., and your house undertaking to comply with the other stipulations stated in it by Messrs. J. Gihon and Co., viz.: that they engage to cover our acceptances before maturity, by direct remittances from United States by approved bills of sixty days, the seconds to be forwarded to us through our agents, Messrs. John Gihon and Co., your house to pay us one per cent. commission on the amount of our acceptances and disbursements; the account to be kept at five per cent. interest per annum, which credit we hereby confirm to you, trusting that in open-

ing an account with your respectable firm it will lead to a mutually agreeable and profitable correspondence.

We remain, sir, your most obedt. servt.,

McCalmont, Bros. and Co.

It is to be understood that the above credit is the only one you have in Europe. McC., Bros. and Co.

On the 17th of December, 1838, Susan Lawrence, the plaintiff in error, wrote the following letter:

Messrs. McCalmont, Brothers and Co., London:

Gent.:—In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request: together with your charges, and I guaranty you from all payments and damages by reason of their default.

*430] *You are to consider this a standing and continuing guarantee without the necessity of your apprizing me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary. Yours, respectfully,

Susan Lawrence.

Under these documents, advances were made and settled; and for the transactions within the six months, from November 21, 1838, nothing was claimed.

At the expiration of the six months the credit was renewed by the following letter:

New York, *June* 12*th*, 1839.

Messrs. McCalmont, Brothers and Co., London:

Gent.:—With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. and A. Lawrence for £10,000, to be drawn within six months from that date, and which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same stipulations, with this proviso, that the bills be drawn by, or in favor of parties permanently resident in

Europe; and if made from the continent, they be made at the customary date, say three months.

We remain, &c.,

JOHN GIHON and Co.

In the course of the trial, William Davidson, again called by the plaintiff's counsel, was asked, whether at the time of the renewal of the credit in June, 1839, a conversation took place with Mr. Lawrence respecting the application of the guarantee to it; to which the defendant's counsel objected; but the judge admitted the same, to show the nature and character of the plaintiff's claim on J. and A. Lawrence, but not to affect the construction of the guarantee; to which the defendant's counsel excepted. The witness then testified that Mr. Lawrence, on that occasion, called on him, and asked if it was agreeable for witness' firm to continue the credit for £10,000. Witness replied, that he had no objection to continue it on the same terms as before; stating that it was to be on his mother's guarantee attached to the previous credit; he answered that he did not expect it on any other terms, or without the guarantee. Witness was in a hurry, and said that he should refer to it, to find out whether the guarantee was for a particular credit, or was a continuing guarantee. *Witness afterwards referred to the letter of guarantee, [*431 and subsequently drew up the letter continuing the credit, and delivered it to Mr. J. D. Lawrence, and exhibited to him his mother's letter; he read it.

The plaintiffs' counsel then offered to prove, that both the house of J. Gihon and Co., and J. and A. Lawrence acted upon the guarantee as a continuing guarantee. To this, the defendant's counsel objected; but the judge admitted the evidence, for the purpose of showing that both acted upon it as a continuing guarantee, but not to vary the construction of the guarantee itself; to which the defendant's counsel excepted. The witness then testified, that Mr. Lawrence and he both agreed that it was a continuing guarantee, and as such no new letter was needed.

Witness testified that their house received sundry bills, receivable, understood and represented to be business paper, not at maturity when received, to be collected and realized, as far as they could do it, and the proceeds to be remitted to the plaintiffs for the credit. It was a distinct understanding between witness' firm and J. and A. Lawrence, that they received this paper subject to its encashment, on being paid at maturity. Witness has had a statement made of the proceeds of the paper thus deposited. Witness' firm had realized

from it, and remitted £1,309 16*s.* 6*d.* The amount due on the plaintiffs' said account with J. and A. Lawrence, crediting those remittances, and charging interest to the third day of May, instant, is £9,712 11*s.* 4*d.*—amounting in dollars, at $4.85 to the pound sterling, to $47,105.95.

On the 28th June, 1839, this letter was received by Mr. A. T. Lawrence, being still in England, and forwarded with the following letter from himself:

Nottingham, June 28, 1839.

Messrs. McCalmont, Bros. and Co.:

Dear Sirs:—By the steamer "Great Western," I have received a letter of credit for £10,000, granted to our house by your friends Messrs. J. Gihon and Co., on your house, which I now hand you enclosed. £5,000 of the same I wish you to hold subject to the drafts of Messrs. Jones, Gibson and Ord, of Manchester, drawn at such times and for such amounts as they may deem proper. The balance you will hold subject to my draft, or the drafts of such parties as I may advise at the time of their drawing.

I am, gent., your ob't serv't,

A. T. LAWRENCE.

*432] It is understood, of course, in case of your confirming the above *named credit, that the remittances to meet the drafts drawn against it shall be in such bills as are approved of by your friends in New York.

On the 5th of July, 1839, the receipt of the above was acknowledged by the following letter addressed to the house in New York:

London, 5th July, 1839.

Messrs. J. and A. Lawrence, New York:

Gent.:—Your favors of 6th and 24th May, were duly received with their enclosed remittances, which you will find at your credit in the annexed statement of your account current to 30th ulto.

This account we hope you will find correct, and the bills about coming due will, we doubt not, have your usual attention.

The further credit for £10,000 on your account opened by Messrs. J. Gihon and Co., we have confirmed to your Mr. A. Lawrence, on the understanding that it is to be met by remittances from New York, satisfactory to J. Gihon & Co.

We are, gent. your most ob't serv't,

McCALMONT, BROS. & Co.

Upon this credit, J. and A. Lawrence drew several drafts in the months of July and August, 1839.

On the 31st of October, 1839, J. and A. Lawrence addressed the following letter to the London bankers:

New York, 31*st Oct.*, 1839.

Messrs. McCalmont, Bros. and Co., London:

Gent.:—We were in hopes that we should have been enabled, ere this, to have made you a remittance to meet your acceptances for our account, due 13th and 19th Nov., but such is the state of our money market, that it is almost impossible to get money at any rate. The best of our commercial paper is offered freely at three and four per cent. per month discount; and owing to the deranged state of our internal exchanges, it is impossible to collect amounts due us in other cities, except at a ruinous rate. Exchange on Philadelphia, only 96 miles from this, is 15 per cent. discount to-day. Under all these circumstances, we have to beg a little indulgence on your part. We shall remit you the moment it is in our power. We have offered your friends, Messrs. John Gihon & Co., to place our business paper in their hands in settlement, but they have declined at present. Browns and other bankers are settling in this way. We are, gent'm, resp'y, &c.,

J. and A. LAWRENCE.

*On the 24th of January, 1840, McCalmont, Brothers and Co. transmitted their account current to the Messrs. Lawrence, the receipt of which was acknowledged in the following letter: [*433

New York, *May* 30, 1840.

Messrs. McCalmont, Bros. and Co., London:

Gent.:—Your favor of 24th January came duly to hand, enclosing your account current with us to 31st December last, showing balance due you on that day of £10,349 8*s.* 5*d.*—say ten thousand three hundred and forty-nine pounds eight shillings five pence, which we find correct. On 18th March last, we made a payment on your account to Messrs. J. Gihon and Co., of $11,822.26—say eleven thousand eight hundred and twenty-two $\frac{26}{100}$ dollars, for which we have their acknowledgment as your agents.

Respectfully, your ob't serv't,

J. and A. LAWRENCE.

On the 29th of May, 1840, John Gihon and Co. addressed the following letter to Susan Lawrence:

New York, May 29th, 1840.

Mrs. Susan Lawrence:

Madam:—We enclose on behalf of Messrs. McCalmont, Bros. and Co., a copy of the account of Messrs. J. and A. Lawrence with them, showing a balance due of £10,349 8*s*. 5*d*. —say ten thousand three hundred and forty-nine pounds eight shillings and five pence sterling, on first January last, with interest. These gentlemen not having fulfilled their engagements to reimburse this account, we claim payment of you under your guarantee to Messrs. McCalmont, Bros. and Company. Respectfully, yours,

J. Gihon and Co.,
Agents of McCalmont, Bros. and Co., of London.

In July, 1840, an action of trespass on the case was brought in the Circuit Court by McCalmont, Brothers and Co., against Susan Lawrence upon the guarantee; who pleaded the general issue.

Evidence was given by the plaintiff, upon the trial, to sustain the above facts. The defendant offered evidence that sundry notes were deposited in the hands of John Gihon and Co., by J. and A. Lawrence for collection, and that due notice of their not being paid was not given to them and to Susan Lawrence.

The counsel for the defendant then asked the court to charge the jury upon the points of law arising in the case, as follows, viz.:

1st. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.

*434] *2d. That defendant's guarantee of 17th December, 1838, is confined to the said credit, both as to time and amount.

3d. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit, are not covered by the guarantee of the defendant aforesaid.

4th. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendants' said guarantee.

5th. That the nominal consideration of one dollar, and the past consideration stated in defendant's said guarantee, are not, nor is either of them, sufficient to sustain the said guarantee.

6th. That the evidence that the said J. and A. Lawrence agreed to give a guarantee at the time said credit of 21st November, 1838, was given, is not sufficient in law to render

valid the consideration expressed in defendant's said guarantee or to sustain the said guarantee.

7th. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. and A. Lawrence to remit to cover the plaintiffs' acceptance was reasonable, is a question of law, and no notice, sufficient in law, was given of such failure to the defendant.

8th. If the sufficiency of such notice be a question exclusively of fact, a reasonable and sufficient notice was not given to her of such failure of J. and A. Lawrence to remit as aforesaid.

9th. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. and A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury, that the plaintiffs were not precluded from recovering under the guarantee in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration.

That the said guarantee of the 17th December, 1838, was not limited to the credit of November 21, 1838, but was a standing and continuing guarantee, and did apply to, and was sufficient to embrace, transactions arising after the said credit of November, 1838, was expired.

That the new credit of June 12, 1839, and the advances and *transactions under it, were not in law [*435 without the scope of the guarantee of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guarantee.

That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider, whether under all the circumstances in evidence, the defendant had not had such notice.

That as to the notes turned over by the principal debtors to J. Gihon and Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. and A. Lawrence would not entitle the defendant to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury: unto which charge, and to the refusal of the judge to charge other-

wise, and as requested by defendant as aforesaid, the defendants counsel then and there excepted.

The jury found a verdict for the plaintiff for $47,105.97.

The cause was argued by Mr. *Wood*, for the plaintiff in error, (Susan Lawrence,) and was to have been argued by Mr. *Lord* and Mr. *Sergeant*, for the defendants in error; but after Mr. *Lord* had finished his argument, the court declined hearing further counsel on that side. Mr. *Wood* replied; and his two arguments are consolidated.

Wood made the following points:

1. Supposing the defendants' guarantee might extend to a new continuing credit, it did not cover the credit of June 12, 1839, there being a variance from the first, in requiring a permanent resident in Europe, to draw or endorse the bills to be accepted, and in requiring the bills, if drawn from the continent, to be drawn at three months.

2. These variances might have impaired the means of J. and A. Lawrence to meet their payments, and thus increased the risk of the defendant.

3. But whether the variances were detrimental or not, they so changed the terms of the credit as to put it without the scope of the guarantee, and to warrant the defendant in saying, "*non hac in fœdera veni*," and the charge was in this particular erroneous.

*436] 4. The credit, or letter of credit of the 21st November, 1838, is *the exclusive subject-matter of the guarantee of the defendant below, declared upon, and said guarantee does not extend to any future or other credit. Because,

1st. It recites such credit as the subject-matter to be covered by it.

2d. It guaranties the fulfilment by J. and A. Lawrence of their agreements made and to be made for reimbursing the payments assumed by the plaintiffs below, under that and no other credit.

3d. Said credit being a continuing credit for six months, and extending to renewals within that period, the guarantee is satisfied, as a standing and continuing one, by confining it to that credit alone.

4th. The provisions in the guarantee that it is to stand and continue without notice of engagements and advances, and notwithstanding a change of partners in the plaintiff's firm, was designed, not to extend the guarantee beyond the first

credit, but to modify it as a continuing guarantee, by dispensing with some of the qualities of such a guarantee.

5th. This satisfies the language of the guarantee without extending by a forced construction the credit beyond the original six months.

6th. The judge erred, therefore, in inferring and charging that said guarantee was not confined to the first credit, because is was a standing and continuing guarantee.

5. There is no valid consideration to support this guarantee. Because,

1st. By the law of New York the consideration must be substantial, and be set forth in the written instrument of guarantee.

2d. Of the considerations expressed in this instrument, one is nominal and the other past, and without any previous request on the part of the defendant, either proved or set forth in the instrument.

3d. If the evidence to show the consideration nominal was not conclusive, it should have been left to the jury to pass upon.

6. There was a total failure to prove a reasonable notice by the plaintiffs to the defendant of the failure of J. and A. Lawrence to remit, and the justice erred in leaving it to the jury to infer such notice. Because,

1st. The reasonableness of the notice when the facts are ascertained, is a question of law, and the court should have charged the jury that the notice shown was, in point of law, unreasonable.

2d. Supposing it a question of fact, the verdict was, in this particular, without evidence to support it.

7. The justice erred in charging the jury that J. and A. Lawrence *were not entitled to notice of the dishonor [*437 of the notes, lodged with the plaintiffs or their agents, and by them received for collection.

8. The judgment being erroneous in the above and other particulars ought to be reversed.

Wood then stated that the first and main ground relied upon for reversing the judgment below, was the variance between the first and second credit, which took the second out of the scope of the guarantee. This ground assumes that the first credit is confined to one transaction of £10,000, and covers assumptions only to that amount.

This guarantee consists of two parts. The first part is clearly confined to the first credit, and does not authorize any change in the mode of credit. It recites that credit, and guar-

anties the reimbursement of the plaintiffs below under such credit, meaning that credit.

The second part of the guarantee provides that it shall be standing and continuing. This of course, upon the above assumption, extends it to future and other credits. But the general rule is, that where a party guaranties a dealing and then provides for the guarantee to continue, it extends to other dealings only of the same kind and character. Any variance is fatal. *Russel* v. *Perkins*, 1 Mason, 368; *Ludlow* v. *Simond*, 2 Cai. (N. Y.) Cas., 1; *Walsh* v. *Baillie*, 10 Johns. (N. Y.), 189; 1 Bos. & P., 34; *Hunt* v. *Smith*, 17 Wend. (N. Y.), 179.

The following cases are more particularly in point, as they show a variance in paper and credit. *Dobbins* v. *Bradley*, 17 Wend. (N. Y.), 422; *Edmonston* v. *Drake*, 5 Pet., 637, 639; *Hoff* v. *Hadley*, 5 Bing., 54; *Campbell* v. *French*, 6 T. R., 200; *Barstow* v. *Bennet*, 3 Campb., 221.

These cases fully show that the variance, even when supposed to be beneficial, takes the case out of the guarantee.

The requirement in the second credit of a permament drawer or endorser in Europe was material. It subjected J. and A. Lawrence to the necessity of giving a premium or reciprocating the favor. If the person of whom they bought should draw or endorse, he must guaranty to the bank out of which the money should be raised the solvency of the plaintiffs below.

The extension of the credit on bills from the continent to four months instead of three, to which they were restricted in the second credit, straitened their operations. It is no answer, to say that no such paper was made under the second credit. It was a part of that *contract of credit and varied from the first, and, as such, it took the case out of the guarantee. This very variance may have caused J. and A. Lawrence to withdraw their operations from the continent and confined them to England, and this may have caused their failure.

*438]

But it is maintained that the peculiar language of this guarantee takes it out of this general rule and sanctions the variance.

In the first part of the guarantee, she stipulates that J. and A. Lawrence shall fulfil the agreements they have made and shall make, &c. This is relied upon as sanctioning the variance. Assuming that this authorizes not only future but different agreements, it is manifest it can have no such result. The agreements there spoken of, are not the assumptions of the plaintiffs below which are guarantied, but the arrange-

ments of J. and A. Lawrence for reimbursing the plaintiffs. And this shows the whole fallacy of the argument. The credit of 21st November has two important objects. 1st. The acceptances, assumptions, and advances on the part of the plaintiffs. 2d. The arrangements on the part of J. and A. Lawrence for reimbursing them on account of such advances. The above clause in the guarantee refers to the latter and not the former. Of course it does not authorize a change in the former.

In the next place, much reliance is placed on the qualifying language in the second part of the guarantee. Here it dispenses with a notice to her from the plaintiffs below of their engagements and advances to J. and A. Lawrence. Hence it is inferred that there may be not only new but different engagements and advances by these plaintiffs from those embraced in the first credit. But this conclusion is entirely too broad. The whole object of the provision is not to vary the kind of engagements and advances, but to dispense with notice. It has been a moot point whether there ought to be notice to the guarantor of new transactions, though now settled otherwise in this court. The character of the engagements and advances is not affected at all by this qualifying clause, but is left subjected to the general rule applicable to a guarantee continuing.

Lastly, the clause authorizing a change in the firms is relied upon. It is difficult to conceive how this provision for a change in the firms can authorize a change in the guarantee in other particulars. The guarantee is to continue and apply to transactions between the firms as changed. The words "to continue and apply" would seem to convey the idea that the guarantee is to continue the "same," except *so far [*439 as modified by applying it to the firms as changed. A vague and loose construction of a guarantee under the pretence of liberalizing it, can only serve to involve the whole subject in uncertainty. A change in a firm, where the business and good-will continues, leaves it substantially the same firm. The rule that a continuing guarantee does not extend where there is a change in the firm, shows the strength of the principle, which can be impaired only with the prospect of increasing litigation.

General words in an instrument, even where they purport to confer a power, are confined to the particular subject. *Hogg* v. *Smith*, 1 Taunt., 347; 8 Wend. (N. Y.), 494; 6 East, 507.

The second ground relied on for reversal is, that the guarantee extended only to the credit of the 21st of November, 1838.

This depends upon the previous question, whether that credit was continuing, or was confined to one transaction of £10,000. The following cases are relied upon to show that it was a continuing credit for the period of six months, and if so, the language of the guarantee is fully satisfied by confining it to that one credit. There was ample time to have repeated the transactions under that credit so as to cover a second sum of £10,000. *Mason* v. *Pritchard*, 12 East, 227; *Merle* v. *Wells*, 2 Campb., 413; *Douglass* v. *Reynolds*, 7 Pet., 113.

In the third place, it was contended that the consideration was insufficient to support the guarantee. It was admitted that the court would not make new bargains for the parties, however unequal the contracts may be. But the rule requiring a consideration to support a parol contract means a substantial and not a nominal consideration. Two shillings and six-pence may be a consideration, provided it was really intended as such; but if designed to be merely nominal, it would not suffice. One dollar, according to a well-known usage, is generally inserted for a nominal consideration, it being customary to insert it in cases where a nominal consideration will suffice, and therefore a party is not estopped from showing it was nominal. There was evidence in the case to satisfy the jury that the consideration was nominal, and it ought to have been left to the jury to pass upon. The credit recited in the guarantee as a consideration was clearly meant to be the credit of the 21st of November, which was a fixed credit for a definite period already established by contract, and no other credit existed between the parties. It was therefore a past consideration, and not sufficient to support the guarantee. Chitty's Contracts, p. 12.

*440] *The plaintiffs below failed to give to the defendants a reasonable notice of the failure of J. and A. Lawrence to remit, which failure occurred in October, 1839; notice was given on the 29th of May following—she living within a few minutes' walk of their agents, through whom the whole arrangements of the plaintiffs were effected.

The reasonableness of the time when the facts are ascertained, as in this case, is a question of law. There was nothing to be left to the jury. The facts were clear, and the notice given was manifestly unreasonable. The notes lodged with the plaintiff by J. and A. Lawrence as collateral security, when protested, should have been subjected to the like notice. The "strict" notice required to affect an endorser was not necessary; but a reasonable notice ought to have been given. *Philip* v. *Astling*, 2 Taunt, 212.

There was nothing in the relationship between the defendant

below and J. and A. Lawrence that should dispense with the ordinary requirements of the law in regard to guarantees. On the contrary, that relationship subjected her the more fully to that species of influence which is brought to bear upon those who ordinarily go surety for friends.

This court has heretofore been deeply impressed with this consideration. 5 Pet., 637; 9 Wheat., 680.

In 7 Cranch, 90, the court, with Chief Justice Marshall as their organ, say: "It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases."

Lord then addressed the court in an argument, of which the following is a brief.

The Lawrences were purchasers in English market (not on continent) and wanted credit there to pay. Their mother guarantied; guarantee in 1838; postage; preferences; credit it induced; intended to induce; terms very broad and liberal. Principle of construction; original liability, as inducing party to enter into the transaction.

Law. Decisions of this court complete.

Construction. *Bell* v. *Bruen*, 1 How., 186; *Mauran* v. *Bullus*, 16 Pet., 528; *Douglass* v. *Reynolds*, 12 Id., 499; 7 Id., 122; *Mayer* v. *Isaac*, 6 Mees. & W., 612; as to construction, to be according to fair, full import of terms, without forcing a construction.

Notice, not requisite; successive advances under a general engagement. 12 Pet., 504.

Explanatory circumstances may be shown. 1 How., 186; **Lee* v. *Dick*, 10 Pet., 493; *Brooks* v. *Haigh*, 10 Ad. & E., 309, (37 E. C. L. R.) [*441

Consideration. 10 Ad. & E., 309; 2 C. & H. Ph. Ev., 216; 5 Bing. N. C., 577, *Dutchman* v. *Troth*.

Notice of default. 12 Pet.

Construction of papers. Guarantee.

"Having a credit with your house." Words capable of embracing past, present, and future.

"And in further consideration of $1;" receipt acknowledged; refers to legality, and to make effectual.

"I engage they shall fulfil the engagements." Plural words, referring to engagements of J. and A. Lawrence.

"They have made and shall make with you." "Have," refers to past; "shall," to future.

"For meeting and reimbursing the payments." Guarantee for payments.

"Which you may assume." "May," both past and future assumptions—not "shall," future, but "may," indefinite.

"Under such credit." Credit with your house; whatever credit will embrace "such" refers to.

"At their request." That refers both to past and future; least decisive circumstance.

"You are to consider this a standing and continuing guarantee." Evidently decisive of its character; vitally decisive.

"Without necessity of your apprizing me, from time to time, of your engagements and advances for their house." Not a limitation; for notice of successive advances under the same credit not necessary; an amplification or confirmation, for context is of amplitude, and notice of renewals might be needful.

"From time to time," could not refer to drafts under the one credit, all of which were to be used in a period of six months.

"Of your engagements;" plaintiffs'; only one engagement under the letter of 21st of November, viz.: to honor bills to be drawn, but the word is plural.

"Advances." By letter 21st November, no advance was to be, but acceptances covered.

"And in case of a change of partners." "And" connects with "without."

"Standing guarantee," with two explanations, waiving notice, and with permanency of corporation.

*442] *"Change of partners in your firm or theirs;" not shown change of firm contemplated in either; such double change not to happen within the short six months; evidently contemplated renewal; the guarantee is to apply to "transactions afterwards;" clearly, future contemplation; not only change of firms, but transactions afterwards.

"Until notified by me to the contrary." Not only ordinary continuance until notice, but such continuance notwithstanding change of firm.

If no previous letter of credit, undoubtedly this guarantee would have covered more than one credit.

Is there anything to limit? Said letter of November limits. Not a question of possible construction of that letter, but probable. If she never saw the letter or knew of it, then construction of guarantee as if no letter. If she saw the letter or knew it,—

"A credit of £10,000—to be availed in six months—in such drafts, &c.—against actual shipments;" a credit for goods to be purchased; not repeated purchases in six months of £10,000; the amount a strong circumstance to qualify.

"In such drafts," &c., imports amount of all drafts to £10,000—this is the natural and fair import.

"In six months." Drafts at four months; takes one month to buy and ship—in practice, took the whole six months; on notice of shipment, see account, time to sell to procure bills to cover. Not a natural construction to have this credit a continuing credit. Suppose this letter of 21st November lodged with a Nottingham house.

Not a continuing credit; no contemplation of continuous dealing expressed on this letter. *Melville* v. *Hayden*, 3 Barn. & Ald., 593; *Rogers* v. *Warner*, 8 Johns. (N. Y.), 119; *Whitney* v. *Givot*, 24 Wend. (N. Y.), 84. The action of the parties under it; the Lawrences did not attempt to eke it out by drawing anew, although they showed that they wanted a new credit.

If not a continuing credit, then clearly guarantee cannot be a standing and continuing guarantee unless it contemplates new letters of credit.

If asked, Why letter to six months if guarantee continuing? Answer, It might well become inconvenient for McCalmont, Bros. & Co., to renew so large engagements at such a period.

If letter of 21st of November is a continuing credit for six months, still the guarantee contemplates no such termination.

1. No limitation of time in guarantee. If intended, it would have been expressed—so much expressed, this would also have been expressed.

*2. Notice of engagements and advances waived—only one engagement of McCalmont—no advances here contemplated; the acceptances were to be covered. "At their request," contemplates a future request not in this letter of 21st November. [*443

3. "Engagements they have made and shall make"—cannot be satisfied if confined to the previous letter, for one engagement already made—no plural, no future.

4. "Payments you may assume," contemplates rather future than present—a word indefinite, to embrace both.

5. "From time to time," cannot reasonably be cut down to six months; or rather to the short time for the new drawing of bills, *i. e.* sixty days after the first drafts were drawn and covered.

6. "Change of partners"—this obviously contemplated a continuance beyond one set of drafts.

On the whole, a fair reading of the paper called for a continuance and renewal of the credit.

If "continuing and standing guarantee" no objection, that credit not renewed until after first one terminated.

The reference to the guarantee did not imply a doubt of its meaning, but the contrary—it only implied carefulness as to its terms.

II. No want of consideration. On face of paper, clear consideration of value. Opening the paper, is there want of consideration. Can they open the paper for this purpose at law; it is valid on its face. It is like a sealed bond, as to validity on its face. They may open the paper as a receipt to recover the consideration if not paid, but that supposes stipulation valid on our part so as to give them title to the consideration. Suppose consideration, instead of $1 to be $500, would nonpayment vitiate the guarantee? *Dutchman* v. *Troth*, 5 Bing. (N. C.), 577; 2 Ph. Ev. (C. & H.), 216, note 194. Like bargain and sale of lands; why not identical? The consideration there and here only to give form of law to intent of parties. But the letter of 20th November, delivered on the promise of this guarantee, was consideration. Adoption of previous promise. *Andrews* v. *Poutrac*, 24 Wend. (N. Y.), 288.

Again, Suppose paper opened: defendant must show actual want of consideration, so as not to intend to bind. Real consideration; the promise by her sons, on which defendants acted, she informed and confirmed it. Again, if she had refused, defendants' agents could have countermanded and have protested against part of the drafts. Having a credit would have ceased.

*444] *3. Guarantee supposed continuing, or no need of this question. If continuing, having a credit renewed was full consideration.

III. No variance in new credit. The guarantee, in terms of amplest kind; allowed of any future agreements with J. &. A. Lawrence as to reimbursements, either for shorter or longer credit of reimbursement; either for reimbursement by cash or bills; for smaller amounts, for narrower terms.

Again, the subject guaranteed was the engagement of McCalmont & Co., and their payments. Now if credit were broader or not, but bills were drawn exactly within the first credit, those engagements guaranteed.

But, the letter 21st November contemplated no drawing from the continent. Not presumed to draw except at customary rate, that three months, (letter Jan. 12,) but bills under old credit four months; showing no bills for continent. New credit allowed bills for continent and so broader: but guarantee not broader; only ask to cover bills within old

terms. If we had given two new letters, one for continent, one for England, no ground to contend latter not covered; the guarantee is not that we shall give the wider credit, but that the Lawrences shall pay the bills within the contemplation of the parties.

No additional security called for. Again, the stipulation as to parties permanently residing, &c. This declaratory only; just as the bills under the credit of November 21; it was optional with us, and not insisted on; it was evidently to guard against an abuse of the credit in this country; it was merely expressing the previous understanding of the parties as it had been acted on. It did not and could not prejudice the Lawrences or defendants; they were to draw, to pay for goods to be bought in England; the new letter fully allows this.

IV. Notice of default. J. D. Lawrence in court, son of defendant, living with her, united interests to large amount. If any damage actually, they knew, we did not. If examined, I have shown ability to provide. Notice, first merely to give surety notice before suit; subsequently applied for purpose of giving him opportunity to get indemnity. Look to substance, not like notice on a draft. The court told jury object of this notice; left them to say if notice was there. Actual notice of demand was proved; knowledge in season for indemnity was clearly submitted to jury and found by them.

V. Want of protest. The notes turned over, were turned over not as negotiated but deposited; like notes in a bank for collection. *Not a conditional payment. No [*445 liability sought against J. & A. Lawrence as endorsers. We hold subject to encashment, to be collected and realized as far as they could do it, and the proceeds to be remitted to plaintiffs for the credit. Distinct understanding that they received this paper subject to its encashment, on being paid at maturity. Here merely a question of *onus;* were plaintiffs under the technical obligation to notify J. & A. Lawrence, who had already failed? Evidently a mere deposit for collection, not a negotiation in way of business.

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the Circuit Court for the southern district of New York.

On the 21st of November, 1838, J. & A. Lawrence obtained from the agents (Messrs. Gihon & Co.) at New York, of McCalmont, Brothers & Co., of London, the following letter of credit:

New York, 21*st Nov.*, 1838.

Messrs. McCalmont, Brothers & Co., London:

Gents:—We have granted to Messrs. J. & A. Lawrence of this city, a credit with you of £10,000, say ten thousand pounds sterling, to be availed of within six months from this time, in such drafts as they may direct, at four months' date, against actual shipments of goods for their account, and coming to their address; said goods to be forwarded through you or your agents.

The above credit is granted under their engagement to cover your acceptances before maturity, by direct remittances from this country of approved sixty day bills—seconds of exchange to be handed to us for transmission to you. You are to charge one per cent. commission on the amount accepted, and to keep the account at five per cent. interest per annum. We are, gents, your ob. st.,

JOHN GIHON & Co.

The letter of credit was delivered on Mr. Lawrence's proposal of his mother's (the plaintiff in error's) security for the credit. On the 17th of December, 1838, Mrs. Lawrence gave the following guarantee:

Messrs. McCalmont, Brothers & Co., London:

Gents:—In consideration of Messrs. J. & A. Lawrence having a credit with your house, and in further consideration of one dollar *paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request; together with your charges, and I guaranty you from all payments and damages by reason of their default.

*446]

You are to consider this a standing and continuing guarantee without the necessity of your apprizing me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards between the firms as changed, until notified by me to the contrary. Yours, respectfully,

SUSAN LAWRENCE.

Under these documents, McCalmont, Brothers & Co. made the stipulated advances, which were repaid; and on the transactions included within the six months from 21st of November, 1838, nothing has been claimed by the London house

About the expiration of the six months, Mr. Lawrence, (one of the firm of J. & A. Lawrence) at New York, called on the agents of McCalmont, Brothers & Co., and asked if it was agreeable for the agents to continue the credit for £10,000. The reply of one of the agents was, that there was no objection to continue it on the same terms as before, stating that it was to be on the mother's guarantee attached to the previous credit. Mr. Lawrence then answered, that he did not expect it on any other terms, or without the guarantee. The agent then wished time to examine whether the guarantee was for a particular credit, or was a continuing guarantee; and having referred to the letter of guarantee, they drew up and delivered to Mr. Lawrence a second letter of credit, (Mr. Lawrence and the agents both agreeing that it was a continuing guarantee, and as such no new letter was needed from the mother.) The second letter of credit, dated on 12th of June, 1839, was as follows:

New York, *June* 12*th*, 1839.

Messrs. McCalmont, Brothers & Co., London:

Gent.:—With reference to our letter of 21st November last, opening a credit on your good selves, favor Messrs. J. & A. Lawrence for £10,000, to be drawn within six months from that date, and which expired by limitation last month. We hereby renew the same for a like period from the date hereof, and under the same stipulations *with this proviso, that the bills be drawn by, or in favor of parties permanently resident in Europe; and if made from the continent, they be made at the customary date, say three months. [*447

We remain, &c., JOHN GIHON & CO.

Under this second letter of credit bills were drawn and paid by McCalmont, Brothers & Co., to an amount exceeding in the whole the £10,000 stipulated for. The bills being all drawn at four months. The firm of J. & A. Lawrence not having made any remittances to pay the new advances, and firm having failed, the agents of the London house on the 29th day of May, 1840, addressed the following letter to Mrs. Susan Lawrence, giving her notice of the non-payment of the advances:

New York, *May* 29*th*, 1840.

Mrs. Susan Lawrence:

Madam:—We enclose on behalf of Messrs. McCalmont, Bros. & Co., a copy of the account of Messrs. J. & A. Lawrence with them, showing a balance due of £10,349 8*s.* 5*d.*—say ten thousand three hundred and forty-nine pounds eight shillings and five pence sterling, on first January last, with

interest. These gentlemen not having fulfilled their engagements to reimburse this account, we claim payment of you under your guarantee to Messrs. McCalmont, Bros. & Company. Respectfully, yours,

J. GIHON & CO.,

Agents of McCalmont, Bros. & Co., of London.

She declining to pay the deficit, the present action of assumpsit was brought against her to enforce the payment. At the trial upon the general issue, in addition to the facts already stated, it was in evidence that during the whole period of these transactions, Mrs. Lawrence resided at Brooklyn, (New York,) in the same house with her sons, J. and A. Lawrence. There was also evidence in the cause to show that McCalmont, Brothers & Co., had by their agents, certain notes belonging to the firm of J. & A. Lawrence, and endorsed by the firm for collection, and the proceeds when received were to be applied towards the liquidation of the debt due to the London house, subject to their encashment on being paid at maturity, under which the sum of £1,309, 16*s.* 6*d.* had been realized. The notes thus deposited for collection, which were dishonored at maturity, were protested accordingly, and the original plaintiffs offered the protests and notices to J. & A. Lawrence of the dishonor in evidence, but the evidence as to some of the
*448] notices was *not full. Much other evidence was given at the trial, which, however, it is not necessary to state.

The counsel for Mrs. Lawrence then asked the court to charge the jury as follows:

1st. That the said credit of 21st November, 1838, is a standing and continuing credit during the six months.

2d. That defendant's guarantee of 17th December, 1838, is confined to the said credit, both as to time and amount.

3d. That the acceptances and claims of the plaintiffs demanded in their declaration in this suit, are not covered by the guarantee of the defendant aforesaid.

4th. That the new credit aforesaid of the 12th of June, 1839, is not a continuance or repetition of the first credit, but a departure from it, and is not covered by or embraced in the defendant's said guarantee.

5th. That the nominal consideration of one dollar, and the past consideration stated in defendant's said guarantee, are not, nor is either of them, sufficient to sustain the said guarantee.

6th. That the evidence that the said J. & A. Lawrence agreed to give a guarantee at the time said credit of 21st November, 1838, was given, is not sufficient in law to render

valid the consideration expressed in defendant's said guarantee, or to sustain the said guarantee.

7th. The facts being ascertained, the question whether the notice given to the defendant by the plaintiffs of the failure of the said J. & A. Lawrence to remit to cover the plaintiffs' acceptances was reasonable, is a question of law, and no notice, sufficient in law, was given of such failure to the defendant.

8th. If the sufficiency of such notice be a question exclusively of fact, a reasonable and sufficient notice was not given to her of such failure of J. & A. Lawrence to remit as aforesaid.

9th. The notes received by the plaintiffs, through their agents to collect, ought, when there was a failure of payment, to have been regularly protested, and due notice thereof served on the defendant and J. & A. Lawrence; and, on failure thereof, a credit should be allowed for the same.

The judge thereupon charged the jury, that the plaintiffs were not precluded from recovering under the guarantee in evidence by reason of any supposed want of consideration therefor; and the same was not without sufficient consideration.

*That the said guarantee of the 17th December, 1838, was not limited to the credit of November 21, 1838, but was a standing and continuing guarantee, and did apply to, and was sufficient to embrace, transactions arising after the said credit of November, 1838, was expired. [*449

That the new credit of June 12, 1839, and the advances and transactions under it, were not in law without the scope of the guarantee of December 17, 1838, and that the plaintiffs were, under the evidence, entitled to recover for the same under the said guarantee.

That the defendant was entitled to a reasonable notice of the default of the principal debtors, to enable her to take measures for her indemnity; that it was for the jury to consider, whether under all the circumstances in evidence, the defendant had not had such notice.

That as to the notes turned over by the principal debtors to J. Gihon & Co., as the same were merely lodged with the latter, on their engagement that the proceeds of them, when received, were to be passed to their credit, the want of protest of any such notes as were dishonored, or of notice thereof to the said J. & A. Lawrence would not entitle the defendants to charge the plaintiffs with the amount of such notes, or to claim a deduction for that amount.

And with that charge left the said cause to the jury: unto

which charge, and to the refusal of the judge to charge otherwise, and as requested by defendant as aforesaid, the defendant's counsel then and there excepted.

The jury found a verdict for the plaintiffs for $47,105.97; upon which judgment was rendered for the plaintiffs; and upon that judgment and the exceptions taken at the trial the present writ of error has been brought.

Some remarks have been made on the argument here upon the point in what manner letters of guarantee are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying, that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean, that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guarantee are commercial instruments—generally drawn up by merchants in brief language—sometimes inartificial, and often loose in their struc-
*450] ture and form; and to construe the words *of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world.[1] The remarks made by this court in the case of *Bell* v. *Bruen*, 1 How., 169, 186, meet our entire approbation. The same doctrine was asserted in *Mason* v. *Pritchard*, 12 East, 227, where a guarantee was given for any goods he hath or may supply W. P. with, to the amount of £100; and it was held by the court to be a continuing guarantee for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for; and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh* v. *Brooks*, 10 Ad. & E., 309, and in *Mayer* v. *Isaac*, 6 Mees. & W., 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee* v. *Dick*, 10 Pet., 482, and in *Mauran* v. *Bullus*, 16 Pet., 528. Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the

[1] Quoted. *Pratt* v. *Matthews*, 24 Hun, (N. Y.), 388.

interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury.

Passing from these general considerations, let us now address ourselves to the points made at the argument. The first point is, that the second advance was made upon terms and under an agreement materially variant from that on which the guarantee was given, without any communication with the guarantor or her consent thereto. The variances insisted on are two; first, in requiring the bills to be drawn by or in favor of parties permanently resident in Europe; secondly, that if the bills were drawn from the continent of Europe, they should be made at the customary date, say three months. We think that there is no variance whatsoever, which is not fairly within the scope of the original guarantee, and was so contemplated by J. and A. Lawrence, as well as by the agents of the London house. This is explicitly proved by the evidence; for, upon the question arising both the Lawrences and the agents agreed that it was a continuing guarantee, and as such no new letter of guarantee was needed. It is *true [*451 that Mrs. Lawrence was no party to this interpretation of the instrument; but then it is strong evidence to establish that it was neither a forced nor unnatural interpretation of the words. And the agents of the London house agreed to make the second advance upon the faith of it.

Now, looking to the very words of the guarantee, we see that it contemplated—not a single advance and then it was to end—but a continuing guarantee, and the very words are found in it. It also contemplated not only agreements which had been already made between J. and A. Lawrence and the agents, but also future agreements. The guarantor says: "I engage that they shall fulfil the agreements they have made, and shall make with you for meeting and reimbursing the payments which you may assume." And again: "You are to consider this a standing and continuing guarantee without the necessity of apprizing me from time to time of your engagements and advances for the house." "So that new engagements and new advances were contemplated to be made to which the guarantee should attach without notice thereof." And this is not all—for the guarantee goes on to provide for its continuance in case of a change in the partners of either firm, (a change which would ordinarily be fatal to a guarantee;) and that the guarantee should apply to and continue upon transactions afterwards between the firms so changed,

until notified by her to the contrary. It seems plain from all this language, that a series of new transactions, new agreements, and new engagements were within the contemplation of the parties; not advances for six months alone, but advances from time to time, for an indefinite period, until notice to the contrary should be given by the guarantor. It is difficult to conceive of any language more definite and more full to express the real intention of the parties. The original advance was, indeed, agreed to be made in the manner stated in the first letter of credit; and if there be any variance between the terms of the first and the second letter of credit, that was left solely and exclusively for the immediate parties J. and A. Lawrence and the agents to adjust and consider. They might enter into any new engagements as to the mode of drawing the bill, and the time which they were to run at their pleasure, without breaking in upon the true intention of the guarantee. All the stipulations of the first letter of credit were retained in the second, and an additional provision made, that if bills were drawn from the continent of Europe they should be made at the customary date and by a permanent resident. But this *left J. and A. Lawrence at full liberty to draw direct on London at four months, if they chose; and in point of fact no bills were ever drawn by them except direct on London, and not from the continent. The additional liberty given, or condition imposed, was not availed of; and, if it had been, it would not have in any manner exonerated the guarantor from her responsibility. Without, therefore, looking to the question whether these variances might or might not have been material, if new arrangements and engagements had not been within the scope of the guarantee, we are of opinion, that the objection is, in the present case, not maintainable.

*452]

This view of the matter disposes also of the second, third, and fourth points made at the argument.

The fifth point is, that there is no valid consideration to support the guarantee. This is pressed under two aspects; the first is, that the consideration was past and not present; for the letter of credit had been already delivered to J. and A. Lawrence by the agents of the London house. The second is, that the payment of the one dollar is merely nominal and not sufficient to sustain the guarantee, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or

stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Troth*, 5 Bing. N. C., 577, where the guarantor gave a guarantee for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guarantee good and the consideration sufficient. In *Brooks* v. *Haigh*, 10 Ad. & E., 309, 323, the court held that a surrender by the guarantee of a former guarantee, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of frauds and to sustain a promise made on the footing thereof. But, independently of all authority, we should arrive at the same conclusion. The receipt of the one dollar is acknowledged; no *fraud [*453 is pretended or shown; and the consideration, if standing alone in a *bona fide* transaction would sustain the present suit.

As to the other point, that the consideration was past, it admits of several answers, each of which is equally decisive. In the first place, although the Messrs. Lawrence had received the letter of credit before the guarantee was given, yet it was a part of the original agreement contemporaneous with the letter of credit, that it should be given; and if the guarantee had not been given, the whole advance might have been recalled as a fraud upon the London house. In the next place, it does not appear that all the bills for the £10,000, under the first letter of credit, were drawn before the guarantee was actually given; and if they were not, certainly it would attach upon the bills drawn under the first credit after it was actually given. The contract was then a continuing contract on both, and partially performed only by one. In the next place, the guarantee itself uses language susceptible of being treated as a present continuing consideration *in fieri*. It is "in consideration of Messrs. J. and A. Lawrence having a credit with your house;" now, the word "having" imports a present or future advance, just as much as a past. The word "having" is in the present tense; and if the parties then understood the letter of credit to be *in fieri*, and to be absolute only upon a condition subsequent, viz.: the giving of the guarantee, the word is the most appropriate which could be used. The case of *Haigh* v. *Brooks*, 10 Ad. & E., 309, approaches very near to the present. There the guarantee

was "in consideration of being in advance to L. &c., I guaranty, &c." The Court of King's Bench thought that the words "being in advance" did not necessarily import a past advance, but might be applied to a present or future advance.

But that which puts the whole matter in the clearest light and beyond the reach of legal controversy, is that the advances now sued for were all made after the second letter of credit was given; and if the guarantee applied (as we hold it did) to those subsequent advances under the new engagements, then the consideration was complete as upon a present and not as upon a past consideration. In every view, therefore, in which we can contemplate the objection it has no just foundation in law.

As to the sixth point on the question, whether due notice of the failure of Messrs. J. and A. Lawrence to repay the advances had been given; it was a mere question of fact for the consideration of the jury, as to whether the guarantor had reasonable notice or not. *They have found a verdict for the plaintiffs, and we are not at liberty to disturb it in a court of error.

*454]

As to the seventh point, the notes having been left for collection only with the agents of the London house, although endorsed by the Messrs. Lawrence, they do not fall within the strict rules of commercial law applicable to negotiable paper. Admitting for the sake of the argument, that notice was not punctiliously given by the agents, still it resolves itself into a mere question of due diligence on the part of the agents to collect the notes, and falls under the general law of agency. No evidence was shown at the trial to establish any loss or damage on the part of Mrs. Lawrence for want of due protest and notice, (if they were not made;) and in the absence of such proof we are not at liberty to presume that the agents did not do their duty.

The case of *Swift* v. *Tyson*, 16 Pet., 1, is entirely distinguishable from the present in its leading circumstances. There, the question was, not whether a person receiving a note as collateral security or for an antecedent debt was not bound to due diligence in its collection, otherwise he made it his own, which was not doubted; but, whether taking it as collateral security or in payment of an antecedent debt, he was not to be treated as a *bona fide* holder for a valuable consideration, unaffected by any unknown equities between the original parties. This court held that he was.

Upon the whole we are all of opinion that there was no error in the rulings of the court, and the judgment is, therefore, affirmed with costs.

ORDER.

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 now here 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 cent. per annum.

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*EX PARTE IN THE MATTER OF CHARLES F. SIBBALD. APPELLANT, *v.* THE UNITED STATES. [*455

Upon a petition so to alter a former mandate of this court, as to direct lands in Florida, which had not been offered for sale under the President's proclamation, to be included within a survey, as well as those lands which had been so offered.—*Held*, That this court has no power to grant the relief prayed.

THIS case was brought up by appeal from the Superior Court for the district of East Florida. It was a petition, the nature of which can be best explained by referring to the petition itself, which was as follows:

To the honorable, the Supreme Court of the United States, the petition of Charles F. Sibbald, respectfully represents,

That, at January term, 1836, of the Supreme Court of the United States, that the case of the United States, appellants, *v.* your petitioner, the subject-matter being on a grant of land derived from the Spanish government, and situated in Florida, its extent 16,000 acres, your honorable court confirmed the entire grant of your petitioner.

That the grant stipulated, and your honorable court decided the right, as exercised by your petitioner, of making surveys anywhere in Florida; at which decision three several surveys, as made, were accordingly confirmed to your petitioner. *Vide* 10 Pet., 321.

That it being ascertained that divers interfering surveys, under valid titles from the British and Spanish, as also some donations from the government of the United States, would deprive your petitioner of a large portion of the 16,000 acres as decided to belong to him, at the January term of your honorable court, of 1838, he found it necessary to apply to have the former mandate of the court so strengthened, or altered,

that the surveyor of the public lands in Florida, and the judge of the United States court there, would be directed to make surveys for such a quantity of land as that of which he was deprived by these conflicting claims within his former surveys.

That your honorable court (12 Pet., 488 to 496,) heard his petition, representing "that, by the opinion of this honorable court, he considered two points clearly settled, to wit: the first, that he was entitled to 16,000 acres, according to the original grant; secondly, that he had an inherent privilege to direct, or point out, where other locations should be made, in case the other surveys made for him were interfered with by older and good claims."

*456] *That your honorable court (12 Pet., 494) have directed the application of the Missouri law of 1824, which, you say, "will meet the prayer of your petition, which you feel bound to grant, for the reasons set forth;" and, in accordance with which, a supplemental petition was added by the counsel of your petitioner, at the suggestion of your honorable court, referring to the Missouri law.

That, upon receiving the mandate of the court, and examining this law, your petitioner ascertained, that while the decree of your honorable court, confirmed and decided his rights to select lands anywhere in Florida, he ascertained that this act only authorized the entry of such refuse lands as had been offered at public sale under the President's proclamation; and thus depriving him of the very spots he might wish to select.

That, also, while this act would limit and confine him to such lands as [are] surveyed, the fact exists, that only a small portion of the public land in East Florida have been surveyed.

That your petitioner, therefore, is obviously debarred in the exercise of his right to select the lands decreed to him; and prays your honorable court to order the mandate [to be] so amended as to meet his case.

Your petitioner respectfully refers to the case of *Smith* v. *United States*, 10 Pet., 334, where your honorable court says: "Should this grant be confirmed, it must follow its tenor and purport; the decree must affirm its validity, not merely to the quantity of land, but with the right of location, according to its express terms, which gives St. Vrain the unlimited choice of the most valuable portions of the public lands. It would be in direct violation of those rights, which constitute the great value of the claim (which were not of the quantity of land), to make a decree that they were secured to him by the law of nations, the treaty, and acts of Congress, as inviolable, and in the same decree to limit him in the selection of such

lands in Missouri as should have been offered at public sale, without a bid beyond the minimum price of the public lands. This would necessarily deprive him of the very spots to which he would be entitled under our decree, wherever he might choose to apportion them by a lawful survey."

Your petitioner further represents that, in *Arredondo* v. *The United States*, 6 Pet., 710, your honorable court said: "In conformity with the principles of justice, and rules of equity, the court is directed to decide all questions arising in the cause, and by a final decree to *settle and determine [*457 the validity of title according to the law of nations, the stipulations of any treaty, and the proceedings under the same, the several acts of Congress in relation thereto, and the law 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."

CHAS. F. SIBBALD.

Filed 5th March, 1842.

Mr. Justice STORY delivered the opinion of the Court.

On consideration of the petition filed in the above cause, it is the opinion of this court that it has no power to grant the relief prayed. Whereupon it is now here ordered and adjudged by this court, that this petition be and the same is hereby dismissed.

ROBERT BARNWELL RHETT, PLAINTIFF IN ERROR, *v.* ROBERT F. POE, CASHIER OF THE BANK OF AUGUSTA, DEFENDANT.(*a*)

Where the drawer of a bill has no right to expect the payment of it by the acceptor; where, for instance, the drawer has withdrawn, or intercepted, funds which were destined to meet the bill, or its payment was dependent upon conditions which he must have known he had not performed, such drawer cannot claim to be entitled to notice of the non-payment of the bill.[1]

(*a*) This case, although subsequent in this volume to that of *Lawrence* v. *McCalmont*, was in fact decided before it; having been argued at the preceding term and held under a *curia advisare vult;* and the manuscript opinion in the present case was sent for and referred to, during the progress of the argument in that of *Lawrence* v. *McCalmont*. The reason for stating this may be easily seen by referring to the report of that case.

[1] S. P. *Valk* v. *Simmons*, 4 Mason, 113; *Allen* v. *King*, 4 McLean, 128; *Kimball* v. *Bryan*, 56 Iowa, 632.

It becomes a question of law, whether due diligence has or has not been used, whenever the facts are ascertained; and therefore there is no error in the direction of a court to the jury that they should infer due diligence from certain facts, where those facts, if found by the jury, amounted in the opinion of the court to due diligence.[2]

If the drawer and acceptor are either general partners or special partners in the adventure of which the bill constitutes a part, notice of the dishonor of the bill need not be given to the drawer.[3]

*458] A court is not bound to grant an instruction prayed for, where it is merely a recital of general or abstract principles, and not accompanied by, or founded upon, a statement of the testimony.

The strictness of the rule requiring notice between parties to a bill, is much relaxed in cases of collateral security, or of guarantee in a separate contract; the omission of such strict notice does not imply injury as a matter of course. The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker and to give notice, and then he is discharged only to the extent of the damage sustained.[4]

THIS case came up by writ of error to the Circuit Court of the United States for the district of South Carolina.

The suit was brought in the court below, by Poe, the cashier of the bank, against Rhett as the endorser upon a note for $8,000 under the following circumstances:

Dixon Timberlake was a merchant who, it appeared from the evidence, had been for several years prior to 1837, in the habit of going from New York to the south, during the cotton buying season, and then returning to New York. In the winter of 1836-7, he was at Augusta, in Georgia, with large letters of credit from various houses in New York, and also one from Benjamin R. Smith, then a merchant in Charleston, South Carolina. By the aid of these letters he acquired a credit at the Bank of Augusta, and purchased considerable quantities of cotton and some bank and other stocks in the course of the season. Some of these purchases were upon the joint account of Smith and himself, but the evidence was contradictory as to the particular purchases thus made.

In February and March, 1837, Timberlake, being in Augusta, drew several bills upon Smith in Charleston, which all became due in May. The whole amount of the bills thus due in May, was $21,500. A separate bill for $14,000 is not included amongst these, because it was paid.

This sum of $21,500 was divided into two classes; one class consisting of $8,000 and the other of $13,500.

[2] CITED. *Watson* v. *Tarpley*, 18 How., 519. See *Lawrence* v. *McCalmont*, *ante* *427 and note.

[3] The rule applies where a bill is drawn by one firm on another, and accepted by the latter, both firms having a common partner. *New York &c. Co.*, v. *Selma Savings Bank*, 51 Ala., 305. Compare *McMean* v. *Little*, 59 Tenn., 330.

So also where a check is drawn by a firm on one of its members. *New York &c. Co.*, v. *Meyer*, 51 Ala., 325.

[4] CITED. *Westphal* v. *Ludlow*, 6 Fed. Rep. 350.

It appeared by the evidence, that Smith was to provide for the first class of $8,000, and Timberlake for the remaining $13,500.

In order to carry out the arrangement respecting the first class, a bill was discounted drawn by Timberlake upon Smith for $8,000, and the note which was the subject of the present suit offered and accepted as collateral security. The note was as follows:

*$8,000. *Charleston, May 9th*, 1837. [*459

Sixty days after date, I promise to pay to W. E. Haskell, or order, eight thousand dollars, for value received.

BENJAMIN R. SMITH.

Endorsed, W. E. HASKELL, per attorney B. R. SMITH.

R. BARNWELL SMITH, per attorney B. R. SMITH.

R. Barnwell Smith, whose name it was admitted was placed upon the note by proper authority, was the same person as R. Barnwell Rhett, his name having been changed after the time of the endorsement.

Timberlake having made no provisions for the other class of bills, amounting to $13,500, Smith was unable to take them up, and they were protested.

On the 2d of June, Smith made an assignment of his property for the benefit of his creditors, in a certain order which it is unnecessary to state; and it was further proved that at and before the maturity of the note on which the action was brought, Benjamin R. Smith was insolvent.

On the 11th of July, both the bill drawn by Timberlake upon Smith for $8,000, and the note in question for $8,000, became due; but neither being paid, the note was regularly protested and certain proceedings had upon the bill which constitute the defence in this case, where suit is brought upon the note.

It was given in evidence on the part of the plaintiff, in order to establish the regularity of the proceedings with regard to the bill, that the notary demanded payment at the store of Smith, the acceptor, and his clerk (Smith being absent) replied, "there were no funds for paying the same;" that the notary thereupon protested the bill for non-payment and enclosed the notice thereof for Timberlake, the drawer, in a letter sent by mail, addressed to Robert F. Poe, the cashier of the Bank of Augusta, as was the custom in similar cases; that the notary, at the time when he protested the draft, did not know where Timberlake was to be found; that he had heard that he had resided and done business at Augusta, but was told

that he had left that place. That he had made inquiries for Timberlake, and was then told that he had left Augusta, and it was not known where he had gone to. That the discount clerk of the Bank of Augusta had it in charge, as a part of his business, to make dilligent search for the parties upon whom notices were to be served; that such notices were served upon them, personally, by said clerk if they were in Augusta, *460] *and transmitted to them through the post-office if they were at a distance; that said clerk was in Augusta on the 11th of July, 1837, and believes the notice would have been served on Timberlake if he had been in Augusta; that said clerk has searched for the notice to Timberlake and cannot find it; that Timberlake lived in a boarding-house whilst in Augusta; that he was insolvent when said bill became due. It was further testified by the postmaster and his assistant, that two or more letters were received at the post-office for Timberlake during the summer after he had left Augusta, which were not advertised; that he leased a box at the post-office, for a time which did not expire until the 1st of October, 1837, into which his letters were placed; that such letters could not have been forwarded to the general post-office, because they were not advertised; that Timberlake left Augusta on the 30th June, 1837, in the public stage; and that he left no agent in Augusta.

On the other hand, it was given in evidence on the part of the defendant, upon the cross-examination of Timberlake himself in this case, that Timberlake left Augusta on the 30th June, having requested the postmaster to forward his letters after him, and that he received several letters, forwarded from Augusta, agreeably to his directions, but never received any letter or notice of the non-payment of the bill.

The defence rested chiefly on the ground, that proper diligence had not been used to give notice to the drawer of the dishonor of the bill, and that, consequently, the securities upon the note which was given collaterally, were exonerated from its payment.

In the trial of the cause in the court below, two separate sets of instructions were prayed for, on behalf of Rhett the defendant. The first set consisted of two prayers, which were refused by the court and were as follows:

1st. That by omission to inquire for the residence of Timberlake, or to send notice after him, the plaintiff has lost his right of action against him as drawer of the bill for $8,000.

2d. That if the jury find that the note was given as collateral security for the bill drawn by Timberlake, and that Tim-

berlake is discharged, then the plaintiff cannot recover against the defendant on the note sued upon.

The second set of instructions consisted of five prayers which the court were asked to grant, but the court refused to do so, with the exception of the fourth, and gave its own instructions to the jury. The prayers and instructions given are as follows:

*And the defendant, by his counsel, before the jury retired from the bar, further prayed the court to instruct the jury as follows: [*461

1st. The parties having shown, that Timberlake had drawn upon Smith four bills, amounting in all to $21,500, which Smith had accepted, and had, at the time of the acceptance of the said bills, $10,000 in hand, received of Timberlake, to meet those bills, the defendant prayed the court to instruct the jury, that if the evidence was believed, then Timberlake had funds in the hands of Smith, and was entitled to notice.

2d. The defendant having shown that Timberlake resided in New York, and came habitually, between the months of October and January, to Augusta, and resided in Augusta during the winter and spring, and that Timberlake left Augusta on the 30th June, 1837, and that the notice of non-payment of the draft was forwarded by the notary in Charleston, to the plaintiff, on the 11th July, 1837, and nothing was shown to prove that the plaintiff had made any inquiry after Timberlake, or endeavored to give him notice.

The defendant prayed the court to instruct the jury that the plaintiff had not used due diligence to give the drawer notice.

3d. And inasmuch as evidence had been given, that the bills drawn by Timberlake on Smith were drawn for purchases of cotton or stock, on the joint account of Smith and Timberlake, and Timberlake had diverted the property purchased on joint account to his own use, and was therefore bound to provide for the bills which fell due in May, to the amount of $13,500, and had not done so; the defendant prayed the court to instruct the jury, that the default of Timberlake to take up the bills for $13,500, did not excuse the want of notice to make him liable on the bill for $8,000.

4th. And the defendant prayed the court to instruct the jury, that if Timberlake had effects at any time between the drawing and the maturity of the said bill, in the hands of Smith, he was entitled to notice.

5th. The defendant prayed the court to instruct the jury, that the insolvency of the acceptor and drawer, before the maturity of the bill, did not excuse the holder from giving notice of non-payment to the drawer.

And the court instructed the jury as follows: On the first instruction asked, the court instructed the jury, that if they believe from the evidence, that Timberlake had in the hands
*462] of Smith, when Smith accepted the bill for $8,000, $10,000, that Timberlake was entitled *to notice of the dishonor of the bill from the holder. But if the jury also believed from the evidence, that the $10,000, in the hands of Smith, was a fund raised upon Smith's letter of credit to Timberlake, and was to be applied to the payment of purchases on joint account, and had been so applied, and that there was an arrangement afterwards between Timberlake and Smith in respect to all the bills drawn by Timberlake, amounting to $21,500; that Timberlake was to put Smith in funds to pay bills to the amount of $13,500, of the $21,500, which were to become due before the bill of $8,000 became due, and that on Timberlake doing so Smith was to pay the $8,000 bill; and that Timberlake did not put Smith in funds to pay the $13,500, and that the same were protested, of which Timberlake had notice; then, that Timberlake had no right to notice of the non-payment of the $8,000 bill from the holder.

On the second instruction asked, the court instructed the jury, that if they believe from the evidence, that Timberlake resided in New York, and was a sojourner in Augusta, from time to time, as stated in the instruction asked, that then, as drawer of the bill, he was entitled to notice of its dishonor; but if the jury believe from the evidence, though he may have resided in New York, that he had made Augusta his residence since the fall of 1834 or 1835, and that he had removed from Augusta, and out of the state of Georgia, after the bill for $8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill.

On the third instruction asked, the court instructed the jury, that if they believe from the evidence, that the bills drawn by Timberlake upon Smith, were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and that Timberlake had diverted the property purchased on joint account to his own use, and that after promising Smith, the acceptor, to take up the bills to the amount of $13,500, he had failed to do so, and had not supplied Smith with money to take up the bills for $13,500, after the same were dishonored, up to the time when the $8,000 draft became due, and that there was an arrangement between Timberlake and Smith, after the $8,000 bill was accepted, that Timberlake was to put Smith in funds to take up the drafts for $13,500, which had been dishonored, and did not do so, that Timber-

lake was not entitled to notice of the dishonor of the bill for $8,000.

To the fourth instruction asked, the court instructed the jury, if *they believe from the evidence, that Timberlake had effects in the hands of Smith at any time between the drawing of the bill, and the maturity of the said bill, that he was, as drawer, entitled to notice. [*463

To the fifth instruction asked, the court instructed the jury, that the insolvency of the drawer and the acceptor, before the maturity of the bill, did not excuse the holder of the bill from giving notice of non-payment to the drawer. But the court further instructed the jury, that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for a purchase on joint account, or a transaction in which they were partners, and that the property so purchased had been diverted by the drawer to his own use, and that the payment of all the bills had been the subject of private arrangement between the acceptor and the drawer, that then the holder was excused from giving notice of the non-payment of the bill for $8,000.

Whereupon, the said counsel, on behalf of the said defendant, before the jury retired from the bar, excepted to the aforesaid opinion and charge of the court, on the first, second, third, and fifth instructions moved for, and now excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this nineteenth day of April, in the year eighteen hundred and forty-one.

JAMES M. WAYNE, [L. S.]
R. B. GILCHRIST, [L. S.]

The jury found a verdict for the plaintiff for $8,000, with interest from the 11th July, 1837.

To review all these prayers and instructions, the writ of error was brought.

Coxe and *Legare*, (attorney-general,) for the plaintiff in error.

Wilde and *Hunt*, for the defendant.

Coxe, for the plaintiff in error, said two questions naturally arose in the case.

1. Is Timberlake discharged?
2. If he is, what is the effect upon Rhett?

Mr. *Coxe* reviewed the evidence in order to show that Timberlake had provided sufficiently for the draft of $8,000, as he thought; and that it was charged to Smith and not to Timber-

lake, in his account with the bank. He then argued that Rhett, being a collateral security, was entitled to all the rights of a party; that Timberlake's obligation to pay arose only in case the acceptor did not, and he, Timberlake, *was duly notified of such failure; that he was not notified for a year; that the bank never served the notice, which it was bound to do. Chitty on Bills, ed. of 1839, p. 465, ch. 10, sect. 1, where the cases are collected. (See note.) The holder must give notice to all parties. 3 Taunt., 130.

*464]

It is true that the cases recognise a distinction between an endorsement upon the bill itself and an engagement in a separate contract. But no case justifies the extent of the doctrine which must be contended for by the other side.

As to the second instruction, there was no evidence that Timberlake had made Augusta his residence; and even if there was, the notice should have been sent after him to New York. Another state is not a foreign country. He did not abscond; he went away in company with one of the officers of the bank, and was with another of them, at the Sulphur Springs. There is no evidence that it was a partnership debt. The books say, it is dangerous not to give notice. Our remedy must not be impaired; separate notices ought to be given to all the parties. Chit., 466. Our remedy against Timberlake has been impaired by the course pursued.

The first instruction of the court modified the prayer by adding, "if the fund was raised by Smith's letter of credit to Timberlake;" but, these funds do not appear to have been raised in this way. The evidence is to the contrary. It said also, that if Timberlake failed to take up his share, viz., $13,000, then Smith was exonerated from his agreement as made between them. But suppose this so, does this excuse the bank? A suit would have been necessary, which the bank had no right to anticipate. It is always inferred that a drawer has funds in the hands of a drawee and had a right to draw. 1 T. R., 416; 20 Johns. (N. Y.), 485, 486.

If there is a reasonable expectation that a bill will be paid, the drawer is entitled to notice. 2 Campb., 461; 12 East, 433, s. c.; Chit., 487.

The holder must use reasonable diligence to discover the residence of the endorser; but here there was no effort at all. They might have learned at the post-office where Timberlake's letters were sent to. 2 Pet., 96; Chit., 488. A.; 3 Greenleaf, 83; 8 Pick. (Mass.), 251.

Wilde, for defendant in error.

The plaintiff in error contends:

1. That due notice of the non-payment of the bill was not given to Timberlake, the drawer, and therefore Timberlake was discharged.

*2. That his undertaking being only collateral to that of Timberlake, the discharge of Timberlake releases him. [*465

And to this effect he prayed the first and third instructions.

To this it is replied on the part of the defendant in error:

1st. That there was actual notice to Timberlake or, due diligence to give such notice. [Mr. *Wilde* here entered into a critical review of the testimony, and inferred that,] there were before the jury sufficient facts to warrant them in finding actual notice. If the evidence falls short of establishing actual notice, still due diligence is abundantly proved. When the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. 1 Pet., 583; Chitty on Bills, ed. 1817, p. 226, where it is said, (quoting the words of Lord Ellenborough in *Walwyn* v. *St. Quentin*,) when the holder of a bill does not know where the endorser is to be found, it would be very hard if he lost his remedy for want of immediate notice.

English Cases.—12 East, 433; Cowp., 81; Wightwick, 76.

American Cases.—1 Johns. (N. Y.), 294; 3 Id., 376; 5 Binn. (Pa.), 541; 4 Serg. & R. (Pa.), 480. Other American cases collected in Bayley on Bills, 176, 183, notes; also, 5 Wend. (N. Y.), 587; 21 Id., 643; 24 Id., 230; 4 McCord (S. C.), 503; 3 Id., 394; 2 Wash. C. C., 191. The decision in the last case was sustained in 10 Pet., 572; 6 Wheat., 104; 8 Id., 326, 330; 9 Id., 598; 1 Pet., 582; 2 Id., 96.

[Mr. *Wilde* gave an abstract of each of these cases, and dwelt particularly upon the last, where the court say, "The holder of a bill or promissory note in order to entitle himself to call upon the drawer or endorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it should be absent from the state, and has left no known agent to receive it; if he absconds, or has no place of residence, which reasonable diligence, used by the holder, can enable him to discover, the law dispenses with the necessity of giving regular notice." He then examined the evidence to show how the case at bar was covered by the authority quoted, and that due diligence had been used.]

It is clearly shown moreover by the evidence, that when the bill fell due, both drawer and acceptor were insolvent.

Here then is the full justification of the second instruction

and so much of the fifth as differs from the instruction prayed.

But if the facts clearly proved do not constitute due dili-
*466] gence, we say:

*2. That Timberlake was not entitled to notice. In regard to this transaction, we insist, he is to be considered either as a partner drawing on a partner, or the drawer of a bill for his own accommodation; and in either branch of the alternative he is not entitled to notice.

1st. As a partner; notice to one partner is notice to all. Gow on Partnership, 214, 215; 1 Campb., 82, 404; 1 Mau. & Sel., 259; 20 Johns. (N. Y.), 176.

[Mr. *Wilde* here examined the evidence to show that this was a partnership transaction, or if not so, that it was for the accommodation of the drawer.] Where the drawer has no effects in the hands of the acceptor, he is not entitled to notice. 1 T. R., 405; Chitty on Bills, ed. 1834, p. 39; 4 Mau. & Sel., 226, 230, 231, 232; 3 Barn. & Ald., 619, 623; Chitty, 57; 3 Campb., 281; 4 Moo. & P., 463.

The case of the *Bank of Columbia* v. *French*, 4 Cranch, 141, does not impugn the authority of *Bickerdike* v. *Bollman*, 1 T. R., 405; but merely overrules the cases of *Walwyn* v. *St. Quentin*, and *de Berst* v. *Atkinson*, which are no longer law, even in England. See 15 East, 216; 3 Barn. & Ald., 619, 623. The case in 4 Cranch, 141, is commented on and sustained, as to the point, in 10 Pet., 578.

This branch of the argument may therefore be summed up as follows:

That Timberlake must be regarded either as a partner drawing on a partner, or as the drawer of a bill for his own accommodation. In the first instance, notice to Smith was notice to him; in the second, he was clearly not entitled to notice.

There is no error, therefore, in the first or third instruction.

3. In seeking to determine the extent of Rhett's responsibility, he may be considered either as if his name were on the bill as endorser, or as if he were a mere guarantor.

1st. As if his name were on the bill.

In order to perfect the claim of the holder of a bill against the endorsers, it is not necessary for the holder to give notice to the drawer. It is for the endorsers to give notice to the drawer, if they wish to preserve a remedy against him. Chitty on Bills, ed. 1834, pp. 68, 69; 1 Str, 441; Burr., 669; 2 Campb., 539.

Let it be remarked, that the note sued on was collateral security for Timberlake's bill; if the bill were paid, the note
*467] was paid. Now, the note being duly protested for non-payment, and notice *thereof sent on the same day to

Rhett and Haskell, Rhett and Haskell must have been thereby apprised that the bill was not paid, and it was for them, according to the authorities just quoted, to give notice to Timberlake if they desired to hold him responsible.

Let it be remarked further, that the very note given as collateral security and sued on in this case, is endorsed by procuration. Smith endorses both for Rhett and Haskell, under powers of attorney from both. Smith, therefore, the attorney in fact of Rhett, had express notice of the dishonor of the bill, for the collateral security of which the note sued on was taken.

Notice to him was notice to Rhett, and if Rhett (considering him in the light of an endorser) desired to hold Timberlake responsible, it was for him to give Timberlake notice. The plaintiff was not bound to do it.

This court, in delivering its opinion in *Williams* v. *Bank of the United States*, 2 Pet., 96, already cited, evidently had the limitation of the holder's obligations in view. They say, "it is incumbent on him to give notice to the party whom he means to charge. He is not obliged to notify any others; if they desire to have recourse over on other parties, it is for them to give such parties notice."

Considering the rights and liabilities of Rhett, therefore, as if his name were on the bill—the situation of the parties would be this:

Smith, acceptor, as partner, or for the accommodation of Timberlake.

Rhett, endorser, for the accommodation of Smith.

Now to whom had Rhett to look?

To Smith and Timberlake.

Both are liable:

Smith as acceptor.

Timberlake as the drawer of an accommodation bill, or as a partner.

All Smith's effects are assigned to Rhett; and, whatever is due from Timberlake to Smith, on their joint account, can be received by Rhett from Timberlake. Timberlake continues liable to Smith for whatever may be paid for him by Smith as acceptor for his accommodation; or, considering them as partners, for the balance of partnership accounts, and this balance, whatever it may be, is assigned by Smith's assignment for Rhett's benefit as a protected endorser.

Rhett, therefore, has sustained and can sustain no injury by the *want of notice to Timberlake. He has lost no security which he would have kept had such notice been given. [*468

Timberlake was not entitled to notice. He is not discharged of his obligations to Smith or Rhett by want of notice.

If notice had been given to Timberlake, Rhett would have gained no advantage, and by its omission he has sustained no injury.

Considering Rhett as a guarantor.

"Persons whose names are not upon the instrument, or who are not parties thereto, but have transferred the instrument by delivery, when payable to bearer, are not within the custom of merchants. Therefore, a party who, by an independent memorandum guaranties the payment of a bill, is not as a matter of absolute right entitled to notice. It is not in general essential to give him notice: but as a surety (upon general principles) he may be discharged if he can show that a particular loss or prejudice has accrued to him from the omission to give him notice; but even then the discharge will only be, it seems, to the extent of the detriment."

The cases cited are: *Warrington* v. *Furber*, 8 East, 242; *Swinyeard* v. *Bowes*, 5 Mau. & Sel., 62; *Holbron* v. *Wilkins*, 1 Barn. & C., 10; *Van Wort* v. *Woolley*, 3 Id., 439.

In the case of *Warrington* v. *Furber*, which was an action against the guarantor of a bill of exchange, on which no demand had been made against the acceptor, he having become bankrupt before the bill was due, it was held the guarantor was liable.

Lord Ellenborough, in delivering the opinion of the court, says: "The same strictness of proof is not necessary to charge the guarantors as would have been necessary to support an action on the bill itself, where by the law-merchant a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantors, who insure as it were the solvency of their principals; and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead, and it is nugatory to go through the ceremony of making a demand on them."

Gross, J., says: "The necessity of a demand, notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or endorser, is founded solely on the custom of merchants." 8 East, 246.

*469] "The rule in the case of a guarantor," says Chancellor Kent in *his Commentaries, vol. 3, pp. 123, 124, "is not so strict as in that of mere negotiable paper. The neglect to give notice must have produced some prejudice to the guarantor: and in the case of absolute guarantee of the payment

of a note, no demand or notice is requisite to fix the guarantor."

"And persons who are not parties to the instrument, but are responsible if it be not paid, as having guarantied the payment or delivered it without endorsement on account of a debt, are not, it seems by the custom of merchants, entitled to the strict observance of the rule as to presentment. As to such persons a formal presentment may be excused, by showing that the acceptor became insolvent before the bill fell due; that it would not have been paid if presented; that the defendants were aware of the fact, and that no injury resulted from the omission." Chitty on Bills, 48 a, ed. 1834. Refers to the cases already cited.

In the case of *Reynolds et al* v. *Douglass et al.*, 12 Pet., 503, this court say: "The rule is well settled that the guarantee of a promissory note, whose name does not appear on the note, is bound without notice where the maker of the note was insolvent at its maturity. That his liability continues unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note and non-payment."

In the present case the proof is full that both drawer and endorser were insolvent before the bill fell due; notice, therefore, would have been nugatory; and regarding Rhett as a guarantor, Poe was not bound to give him notice. Considering Rhett, therefore, either as if his name was on the bill, or as if he be a guarantor by a separate instrument, he is not released by the want of notice to Timberlake.

4. This brings me to consider our adversaries' view of their case. They insist that Timberlake is to be regarded as the drawer of a bill in the fair course of trade, having funds in Smith's hands at the time, and being entirely unconnected with him in any contract of partnership. I will not weary the court by going over the evidence, but I ask leave to remark, that this pretence is set up for the first time after the suit.

[Mr. *Wilde* here referred to particular parts of the evidence stated in the record.]

I desire the court to note in the next place that this attempt to give to this bill the color of one drawn in the usual course of trade, upon funds in Smith's hands, rests solely on the testimony of Timberlake *and Smith. Now, [*470 assuredly it is not my purpose to impugn the testimony of these gentlemen, who are entirely unknown to me; but I should be false to my trust if I did not remark that their view of this subject seems to have changed with their change of

position. The illusions of interest are at least as great as those of optics.

I ask the court to remark that Timberlake's effort to make out that this was a bill drawn upon funds in Smith's hands, is exceedingly lame. He says the bill was not drawn for my accommodation, it being for the purpose of renewing my two bills, &c.; as if being in renewal, it was necessarily not an accommodation.

[Mr. *Wilde* here again commented on the evidence.]

Let it be remarked, also, that Timberlake, in his evidence, does not allude to the agreement between himself and Smith, to which Smith testifies that if Timberlake paid the drafts for $13,500, he, Smith, was to pay the draft for $8,000. Remark, also, that Timberlake is never shown to have had any capital or funds.

With respect to Smith's evidence to make this business paper drawn on funds in his hands. It is in contradiction with his previous acts and declarations; with his letter to the bank; his declaration to Adger; with all the earlier proceedings, in which both parties regard and declare these bills accommodation paper; the only difference being that Smith says they were drawn for the accommodation of Timberlake, and Timberlake that they were drawn for the accommodation of Smith. Taking Smith's evidence with all these drawbacks, and what does it amount to? He states that these drafts were originally drawn on joint account for joint speculations in cotton and stocks; that it was subsequently agreed between them that he the witness would pay the draft for $8,000, and that Timberlake would pay the three drafts amounting to $13,500. That if Timberlake was now to pay the three drafts amounting to $13,500, he, the witness, would owe him the amount of the draft of $8,000. Thus we see the same paper assumes, according as the interest of the parties varies, the character of partnership paper, accommodation paper, or business paper drawn on actual funds.

But assuming for the sake of argument that Timberlake drew this bill, having funds in Smith's hands.

The court will remark, by the testimony of Smith, "that he did not assign any particular fund to meet the draft for $8,000. That the proceeds of the cotton sent to Bayard and Hunter
*471] were realized in June or July, after he had executed his deed of assignment, and that *he never applied those funds to the payment of Timberlake's drafts on him."

He further testifies, that the proceeds of the cotton sent to Bayard and Hunter in Savannah, were passed by him to the credit of R. B. Rhett, (the present defendant,) "and went to

pay a note with Mr. Rhett's endorsement discounted at the Bank of Charleston."

Now, if Smith had funds of Timberlake's in his hands, he has sustained no injury by want of notice to Timberlake. And if these very funds have been passed over to Rhett, he has clearly no right to be discharged from his liability as guarantor for Smith, on the ground that injury has been sustained by want of notice to Timberlake.

The ground assumed for insisting on notice to Timberlake, is, that he has funds in Smith's hands. If he had no funds he is bound without notice. If he had funds, then Smith the acceptor as the original debtor, was bound to pay the bill, and Rhett is bound to Poe as the guarantor of Smith.

The court will observe that as to the drafts for $13,500, drawn by Timberlake and discounted by the bank, Rhett became in no manner liable. He became guarantor to the bank for Smith, by a collateral security only to the limited amount of the draft for $8,000. Is it not to be taken then, that he gave this collateral security, relying on the cotton in the hands of Bayard and Hunter for his indemnity? And now, how does this matter stand upon the very footing claimed for it by the plaintiff in error? What is the justice, equity, and good conscience of the defence, according to our learned adversaries' own statement of it?

Smith obtains the proceeds of the cotton from Bayard and Hunter, and passes them over to Rhett by his general assignment. They go to pay a note of Smith's in bank, with Rhett's endorsement. Rhett having thus received the very fund upon which, as he alleges, the bill was drawn, insists on being released from his guarantee, because no notice was given to the drawer, Timberlake. But if Timberlake has funds in Smith's hands, the only ground for entitling him to notice, then Smith was the principal debtor, both in fact and form: and Rhett, having received the very fund, cannot evade his responsibility for Smith.

On the one hand, then, considering this as a bill drawn for Timberlake's accommodation. Could Timberlake recover against Smith on his acceptance? Evidently he could not. The case of *Sparrow et al.* v. *Chisman*, 4 Man. & Ry., 206, 207, is conclusive on that * point. If not, what [*472 injury has Timberlake sustained by want of notice? And if he has sustained no injury, he is not discharged. If he is not discharged, neither can Rhett be discharged, because the only claim of Rhett to be released is founded on the alleged release of Timberlake.

On the other hand, regarding this as a bill drawn by Tim-

berlake on funds in Smith's hands, accepted by Smith, and the payment of that acceptance guarantied by Rhett, can Rhett after receiving under Smith's assignment the funds on which the bill was drawn, object that the drawer is discharged by want of notice?

Whatever room for cavil or dispute there may be on the other points in this case, there are two, in my humble judgment, decisive.

First. The unquestioned facts show due diligence.

Next. These drafts were clearly on joint account; and in a partnership transaction notice to one partner is notice to the other.

Where then is the error in granting the instructions given, or in refusing those refused?

The fourth and fifth instructions the court gave as prayed. They are out of the question.

The second the court gave with the necessary and lawful limitation, that if the jury believed the facts there stated, there was due diligence.

The first, it was no error to refuse, for the court merely laid down the rule with its legal limitation.

Hunt, on the same side, for the defendants in error, said,

The acceptance and note bore date the same day, and became due the same day; and the whole case turns upon the steps taken to demand payment, and give notice of non-payment of this draft.

Mr. Rhett contends that the note on which he was endorser was only a collateral security; and if the holder, by any laches, has made the draft his own by discharging any of the parties, he is paid, and the collateral note is discharged; and he charges that D. Timberlake was discharged, as drawer of the bill, by neglect to give him notice of its non-payment. That, as sureties, the parties to the note are entitled to their remedy over against Timberlake, the drawer; and it was the duty of the holder to give him due notice, in order to fix his liability; and having neglected to do so, the note is not obligatory.

To this defence, the defendant in error answers:

*473] 1. That the note and draft were contemporaneous securities for *the payment of one sum of $8,000 on the 11th of July, and that the failure of the acceptor of the bill to pay it at maturity, instantly rendered all the parties to the note liable; and having received due notice of the non-payment of the draft, by being notified as endorsers of the note, they are bound as of 11th July, 1837; and if they desired to make use of the bill, they were bound to pursue

their remedy by paying the note and receiving the draft. No obligation attached to the holder to do more than demand payment, and on its refusal, to resort to his other security for the debt.

The note was not an ultimate security dependent upon exhausting the remedies upon the bill, but a concurrent one, and was perfected by the mere dishonor of the draft by the acceptor.

2. That as far as relates to the plaintiff in error, even if he had a right to require the holder to give notice to Timberlake, and had a right to the draft, he has sustained no damage, as the said Timberlake was wholly insolvent at the time it became due; and even as surety he can only claim to the extent of the loss proved.

3. That, in fact, the holder did use due diligence to fix the drawer, by using the ordinary means to give him notice.

That the drawer left the state where he transacted business and had his domicil when the draft was negotiated, and without giving any notice to the holder where notice would reach him; and so, being out of the realm, he was not entitled to notice.

4. That said Timberlake and Benjamim R. Smith were copartners in relation to the said draft, and were equally bound to have provided funds for its payment; and a notice and demand upon one copartner was a notice to both, and so said Timberlake is responsible, being a copartner, as acceptor of the bill as well as drawer.

5. That said Timberlake was not entitled to notice, and was liable on said draft without notice, because he had intercepted and used the copartnership funds, which ought to have been applied to the payment of that draft.

6. The defendant in error also contends, that Mr. Rhett cannot complain of any want of notice, inasmuch as he has received, as a preferred creditor of the acceptor, the identical copartnership funds which ought to have been applied to the payment of this draft. He got $8,000 in first class, and full indemnity in the next, and no account of the proceeds of the cotton.

7. That Timberlake knew that the acceptor had assigned all the funds of the copartnership prior to the maturity of the draft, and so *knew it could not be paid; and Mr. [*474
Rhett was the assignee, and has received the fund.

And so the defendants in error will contend, that R. Barnwell Rhett was bound, as endorser, to pay the said note of $8,000, and that the instructions by the court contain the true legal positions arising out of the cause; and they deny that the plaintiff in error was authorized to require the court to

state the law on any supposed case, or any imperfect statement of this case. It is enough if the court state the rules of law correctly, and leave the jury to apply them.

That if the court think that there was no other connection between the note sued upon and the draft of $8,000 than this; then the holder was to demand payment of the draft at maturity, and in default of payment, was authorized to resort to the note immediately—and did so—and gave due notice to the parties on the note—and was not bound to do more—then the instructions were all immaterial, and the necessity of any notice, and the fact of due diligence as to the bill, did not arise in the case.

1st Point. The note, even if collateral, was a security that the bill was good and would be paid at maturity, and the moment it was dishonored the note became absolute and the right of action accrued, and there is no dispute that the parties to the note were duly notified.

The holder of the bill was not obliged to notify the drawer; the notice to the endorser of the note was sufficient, and they were bound to look to the parties to the bill and fix them.

The note was a security that the bill would be paid at maturity. See *Trimble* v. *Thorne*, 16 Johns. (N. Y.), 152. The parties to the note were bound to pay it at maturity in the order of notice.

If so, then has Poe lost his claim; the neglect to notify is by way of discount. It is a demand independent of the note. Rhett was no party to the bill.

Suppose Rhett had paid the note, could he then recover against Poe for neglect? What sort of contract? Was he agent? The delivery of the note with no condition was absolute; the memorandum in pencil does not alter the contract.

The party who receives a guarantee is not bound to give notice; the guarantor must look out for his own safety. 2 H. Bl., 616.

The guarantor is bound without notice where the drawer is
*475] insolvent, unless he proves that some special damage accrued from the *failure to give notice. A distinction is recognized between parties to a bill and guarantors. 2 Pet., 497.

The same strictness of proof is not necessary to charge the guarantor as in an action on the bill itself. 8 East, 245.

In 6 Ves., 734, Lord Ellenborough says, there is no obligation of active diligence on the part of the creditor, as far as the surety is concerned. The law-merchant is confined to papers where all are parties to the bill. 2 Johns. Ch. Cas., 559, 560, 662.

2d Point. Rhett has sustained no damage, as Timberlake was insolvent.

[Mr. *Hunt* here referred to several parts of the evidence to show that he was insolvent.]

The guarantor is only entitled to complain of want of notice where he has sustained injury, and there only to the extent of the injury. He guarantees the solvency of the parties to the bill, and if they are insolvent, he is liable. 12 Pet., 503.

Insolvency is an excuse for no demand being made, where the claim is prosecuted against a guarantor not on the bill. 9 Serg & R. (Pa.), 202; 8 East, 242, confirmed by 2 Taunt., 212.

3d Point. The holder did use due diligence.

[Mr. *Hunt* here examined the evidence.]

A letter put into the post-office is sufficient. 6 Taunt., 305; 2 H. Bl., 509; 17 East, 385.

If a party has absconded, no notice is necessary, 4 Mass., 45—53.

It is not necessary to prove that a letter was actually mailed; only that it was put in the proper way of being so. 4 Campb., 194; 4 Bing., 715, (15 Eng. Com. L., 125;) 1 T. R., 167; 3 Ad. & E., 193, (30 Eng. Com. L., 69;) 1 T. R., 294; 5 Johns. (N. Y.), 375; 2 Esp., 516.

The law considers the place where the bill is drawn as the residence of the drawer. 2 Cai. (N. Y.), 127.

In the court below, the judge only decided what constitutes due diligence in law. The facts were left to the jury.

4th Point. That Timberlake and Smith were partners, &c.

[Mr. *Hunt* referred to the evidence to show that they were partners.]

To constitute a partnership, both names need not be used; it is enough if the money went to a joint account. 8 Barn. & C., 427, (15 Eng. Com. L., 257;) 3 Campb., 493; 2 Barn. & Ad., 23, (22 Eng. Com. L., 18, 19;) 2 Pet., 197; 20 Johns. (N. Y.), 126; 17 Ves., *412; 7 East, 210; 1 Campb., 82; 18 Eng. Com. L., 436; 4 Mau. & Sel., 226. *476]

The case in 2 Campb., 309, cited on the other side, only decides that the note of one partner could not be declared upon as a joint note; but here the drawer and acceptor were copartners, and it was one paper, by both partners, for a joint debt. See 3 Campb., 496.

5th Point. Timberlake was not entitled to notice, because he had intercepted the funds, &c. 1 Wash. C. C., 461; 4 Mason, 113; 2 Nott & M. (S. C.), 257, 437.

[The argument upon the remaining points was entirely a comment upon the evidence.]

Mr. *Legare*, (attorney-general,) for the plaintiff in error, and in conclusion.

The doctrine contended for upon the other side, puts all the cotton buyers out of the protection of the law-merchant, if Timberlake was not entitled to notice. The mistake of the other side is in supposing that Rhett considered himself entitled to notice. But he did not.

In 12 Pet., the court said that a guarantor was only entitled to a notice in a different manner from the acceptor. This is admitted. In 8 Pick. (Mass.), 426, Chief Justice Parker says, that the contract of guarantee is not clearly settled in the books.

The first and second instructions prayed for in the court below, by the counsel of Mr. Rhett, involve the following propositions:

1. That the note was collateral security.
2. That the parties to it were guarantors.
3. That as such, they would be entitled to the bill and all the rights of the bank.
4. Whatever extinguishes the right of the principal destroys the guarantee.
5. That by the omission to find Timberlake he was as much released as if he had a written receipt.
6. That therefore the guarantor, Rhett, was discharged.

1st and 2d points. It was marked on the note itself that it was collateral security for the bill, by the agent of the party himself. If the principal is more bound than the rest, then it is a case of guarantee.

The case in 14 Ves., 159, is a case of distinct collateral security and not co-suretiship. The situation of the parties in that case was very analogous to this, and yet they were not all held principals.

*477] *Notice must be given to the guarantor unless both parties are bankrupt. This was a guarantee of the bill and not that the acceptor only should pay it. 2 Taunt., 206. The case in 8 East, 245, is examined in the above.

3d and 4th Points. The guarantor has a right to be subrogated to the rights of the creditor; and if the principal is released through negligence, the guarantor is also. 1 Pothier on Obligations, 365; 1 Bell's Commentaries, 347, 377, 5th ed.

Bankruptcy in the books means something positive, and not loose talk of insolvency. 4 Johns. (N. Y.), Ch., 123, 140; 11 Ves., 22; 9 Wheat., 680.

5th Point. Was Timberlake discharged? This is the only difficult point in the case.

The burden of proof that due diligence was used, is on the

other side. Doug., 179; 7 East, 231; 3 Barn. & R., 619; Chitty on Bills, 511, 512.

The least doubt of notice is fatal to the claim. Chitty, as above.

[Mr. *Legare* here examined the evidence as to the degree of diligence that was used.]

But it is said that Timberlake was not entitled to notice because he had no funds in the hands of the drawee. The counsel on the other side attempted to prove that Rhett had got possession of this fund under the assignment, after proving that there was no fund there. But there was a fund. Smith drew for $5000 in February, 1837, and in April for $5000 more, making $10,000; it remained in his hands. If he dishonored the previous bills, his funds were not paid away. Lord Kenyon, in the case cited from Term Reports, allowed a plaintiff to show that there were no funds, and by this decision produced great difficulty. Half of Chitty's book is filled with cases resulting from this doctrine.

The drawer is entitled to notice, although the bill is for the acceptor. Chit., 481.

Where there is drawing and re-drawing, there must be notice. 2 Ves. & B., 240; Chit., 480, note—where the rule of Lord Kenyon is regretted.

It is said that Timberlake had absconded. But this court have said that absconding means quitting his house in a secret manner. The case quoted from 2 Peters decides this. But the northern merchants come to the south to buy cotton and go away when the season is over. These men cannot be outlawed. The evidence shows *that Timberlake [*478 resided in New York. [Mr. *Legare* referred to the evidence.] The case in 2 Pet., 96, only says that where parties live in the same town, notice must be left at the residence; but if he absconds, due diligence only need be used.

As to absconding, see 9 Wheat., 598; 3 Taunt., 130; Chitty on Bills, 401; 1 Ld. Raym., 743, a leading case, where a house was shut up, which is an act of bankruptcy in England. 9 Serg. & R. (Pa.), 201; Chit., 486. Chitty says (486) if there is no residence, due diligence must be used. Has it been used in this case?

[Mr. *Legare* remarked upon the evidence.]

It is said that there was a partnership.

If Timberlake and Smith were partners, all who draw and re-draw are so. They agreed to purchase stocks, but did not buy them; and took back the money. Afterwards Timberlake bought stocks on his own account, and permitted Smith to come in.

Mr. Justice DANIEL delivered the opinion of the court.

The instrument upon which this suit was instituted in the Circuit Court, was, as the foregoing statement evinces, in form simply a common promissory note, signed by Benjamin R. Smith, made payable to William E. Haskell, endorsed by Haskell to Robert Barnwell Smith *alias* Robert Barnwell Rhett, and by this last individual to Robert F. Poe, cashier of the Bank of Augusta, the plaintiff in the action. Such being the nature of the instrument, and it appearing that the formalities of demand at its maturity, and notice to the endorsers have been regularly fulfilled by the holder, a question as to the justice of a recovery by the latter could scarcely be suggested, if the rights and obligations of the several parties shall be viewed as dependent upon their relation to the note itself considered as a distinct and separate transaction. Such, however, is not precisely the attitude of the parties to this controversy. It is in proof that there was held by the plaintiff below, beside this note, a draft for $8,000 drawn by Timberlake on the 6th of May, 1837, at sixty days, in favor of the plaintiff, on Benjamin R. Smith, and accepted by Smith; and farther, that upon the note was written by the plaintiff's agent, a memorandum in the following words: "This note is collateral security for the payment of the annexed draft of D. Timberlake on B. R. Smith of $8,000." Upon the effect of both these instruments, as constituting parts of one transaction, the questions pro-
*479] pounded to the Circuit Court and brought hither for review have *arisen. The farther proofs contained in this record will be adverted to in the progress of this opinion, as notice of them shall become necessary to explain the instructions prayed for, and those given by the Circuit Court on the trial of this cause. The second series of instructions, embracing a more extended and varied survey of the evidence than is contained in that preceding it, will be first considered. It is to the first, second, third, and fifth instructions of this second series that exceptions are taken. To the first proposition affirmed by the court in this first instruction, it is difficult to imagine any just ground of objection on the part of the defendant below, as that proposition concedes almost in terms the prayer of that defendant. To the second branch of this instruction it is not perceived that any valid objection can be sustained; for, although it might have been true that at the date of acceptance of Timberlake's draft on Smith for $8,000, the latter had been in possession of $10,000 placed in his hands by Timberlake, it would not follow under the circumstances proved, or under those assumed in the instruction, that Timberlake as the drawer of that draft was entitled to notice.

If, as the instruction supposes, the acceptances for $21,500, which Smith had come under for Timberlake, were drawn for the accommodation of the latter, upon the faith of funds to be furnished by him for their payment; that the $10,000 had been furnished by Timberlake in part for that purpose, but had been withdrawn by him for his own uses prior to the maturity of the draft for $8,000—that he should have intercepted before the maturity of the draft all the funds against which he knew the acceptances of Smith were drawn, and that he the drawer, and Smith the acceptor, had, before such maturity, become notoriously insolvent, under such a predicament the law would not impose the requirement of notice to the drawer upon the holder. No useful or reasonable end could be answered by such a requisition. Where a drawer has no right to expect the payment of a bill by the acceptor, he has no claim to notice of non-payment. This is ruled in the following cases: *Sharp* v. *Baily*, 9 Barn. & C., 44; 4 Man. & Ry., 18; *Bickerdike* v. *Bollman*, 1 T. R., 405; *Brown* v. *Meffey*, 15 East, 221; *Goodall* v. *Dolly*, 1 T. R., 712; *Legge* v. *Thorpe*, 12 East, 171. If the $10,000 said to have been in the hands of Smith were by the agreement or understanding between Smith and Timberlake to be applied in payment of joint claims against them, and falling due before the draft for $8,000, and had been so applied, it had answered the sole object for which it had been raised, and could not in the *apprehension of these parties constitute a fund [*480 against which the draft of $8,000 subsequently to become due was drawn. Those $10,000 were gone, were appropriated by these parties themselves. Then if, after this appropriation, there was, as this instruction assumes, an arrangement between Timberlake and Smith in respect to the bills drawn by Timberlake to the amount of $21,500, that he was to put Smith in funds sufficient to pay $13,500 of the amount just mentioned, which were to become payable before the $8,000 draft, and that on Timberlake's supplying those funds Smith was to pay the $8,000 draft, and Timberlake failed to put Smith in funds to take up the $13,500, and that the drafts for the same were protested, of which Timberlake had notice, he, Timberlake, could have no claim to notice of non-payment of the draft for $8,000. There could be no reason for such a notice from the holder of the draft. Timberlake could have had no right to calculate on the payment of this draft; on the contrary, he was bound to infer its dishonor. He knew that payment of the draft for $8,000 was dependent upon a condition to be performed by himself, and he was obliged to know from the notice of the dishonor of all his bills, that he had not performed that

condition, and had thereby intercepted the very funds from which the acceptances by Smith were to be met. He therefore *quoad* this draft had never any funds in the hands of Smith, and consequently, never had any claim to notice of non-payment from the holder.

The case of *Claridge* v. *Dalton*, in 4 Mau. & Sel., is strongly illustrative of the principle here laid down. That was a case in which the drawer had supplied the drawee with goods which were still not paid for. To this extent, then, the former unquestionably had funds in the hands of the latter; but on the day of payment of the bill the credit upon which the goods were sold had not expired, and the court thereupon unanimously ruled that *quoad* the obligations of the parties arising upon these transactions, the drawer must be understood as having no effects in the hands of the drawee, and therefore, not entitled to notice. The second instruction affirms in the first place, what must be admitted by all, and what is not understood to be matter of contest here, viz.: that whenever a party to a bill or note is entitled to notice, such notice, if not given him in person, must be by a timely effort to convey it through the regular or usual and recognized channels of communication with the party or his agent, or with his known residence or place of business. It is to so much of this instruction as is applicable to what may amount to *a dispensation from the regular or ordinary modes of affecting parties with notice, that objection is made; to that portion in which the court charged the jury, that if they believed from the evidence that although Timberlake may have resided in New York, that he had since the autumn of 1834 or 1835 made Augusta his residence, and that he had removed from Augusta, and out of the state of Georgia after the bill for $8,000 was drawn and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill. It is not considered by this court that this charge in any correct acceptation of it trenches upon the legitimate province of the jury, or transcends the just limits of the authority of the court, or contravenes any established doctrine of the law. 'Tis a doctrine generally received, one which is recognised by this court in the case of the *Bank of Columbia* v. *Lawrence*, 1 Pet., 578, that whenever the facts upon which the question of due diligence arises are ascertained and undisputed, due diligence becomes a question of law; see also the *Bank of Utica* v. *Bender*, 21 Wend. (N. Y.), 643. In the case before us every fact and circumstance in the evidence which was to determine the residence of the drawer in Augusta, or his abandonment of that residence, or his removal from the state of

*481]

Georgia; the unsettled and vagrant character of his after-life, the fruitless inquiries by the notary to find out his residence, the notoriety of his having neither domicil nor place of business in Georgia, the effort to follow him with notice of dishonor of his draft, were all submitted to the jury to be weighed by them. The charge of the court should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed; with reference, also, to the reasonable conclusions which that testimony tended obviously to establish. Interpreted by this rule, it amounts to this, and this only, a declaration to the jury that if the evidence satisfied them of the residence of Timberlake in Augusta at the time of drawing the draft, of the certainty and notoriety of his having abandoned that residence and the entire state before its maturity, leaving behind him no knowledge of any place, either of his residence or for the transaction of his business, satisfied them also of the real but unavailing effort of the notary who protested the draft to discover his whereabout, they ought to infer that due diligence had been practiced by the holder of the draft. In the case of an endorser, with respect to whom greatest strictness is always exacted, it has been ruled that the holder of a bill is excused for not giving regular notice of dishonor [*482 *to the endorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the endorser may be found. Thus, Lord Ellenborough in *Bateman* v. *Joseph*, 2 Campb., 462, remarks, "When the holder of a bill of exchange does not know where the endorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive ignorance, but if he uses reasonable diligence to discover the residence of the endorser, I conceive that notice given as soon as this is discovered is due notice within the custom of merchants." See to the same effect 12 East, 433; *Baldwin* v. *Richardson et al.*, 1 Barn. & C., 245; *Beveridge* v. *Burgis*, 3 Campb., 262. It has been held in Massachusetts, that where the maker of a promissory note had absconded before the day of payment, presentment and demand could not be required of the holder in order to charge the endorser: opinion of Parsons, Chief Justice, in *Putnam* v. *Sullivan*, 4 Mass., 53. In *Duncan* v. *McCullough*, 4 Serg. and R. (Pa.), 480, it was ruled that if the maker of a promissory note is not to be found when the note becomes due, demand on him for payment is not necessary to charge the endorser, if due diligence is shown in en

deavoring to make a demand. *Hartford Bank* v. *Stedman*, 3 Conn., 487, where the holder of a bill who was ignorant of the endorser's residence, sent the notice to A. who was acquainted with it, requesting him to add to the direction the endorser's residence, it was held that reasonable diligence had been used. The measures adopted in this case by the holder of Timberlake's draft, when viewed in connection with the condition and conduct of the drawer himself, appear to come fully up to the requirement of the authorities above cited; and, therefore, in the judgment of this court, affect him with all the consequences of notice, supposing this now to be a substantial proceeding upon the draft itself.

Next and last in the order of exception, is the fifth instruction. The first position in this is given almost literally in the terms of the prayer. The court proceeds further to charge, that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and that the payment of the bills had been the subject of private arrangement between the acceptor and drawer, that then the holder was excused from giving notice of the *non-payment of the bill for $8,000. With respect to the exception taken to this instruction, all that seems requisite to dispose of it, is the remark, that if the drawer of the bill was in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer need not have been given. The knowledge of the one partner was the knowledge of the other, and notice to the one notice to the other. Authorities upon this point need not be accumulated; we cite upon it *Porthouse* v. *Parker*, 1 Campb., 82, where Lord Ellenborough remarks, speaking of the dishonor of the bill in that case, "as this must necessarily have been known to one of them, the knowledge of one was the knowledge of all;" also, *Bignold* v. *Waterhouse*, 1 Mau. & Sel., 259; *Whitney* v. *Sterling*, 14 Johns. (N. Y.), 215; *Gowan* v. *Jackson*, 20 Id., 176. Recurring now to the first series of instructions prayed for, we will consider how far the two propositions presented by them were warranted by the correct principles upon which the opinion of the courts may be invoked; and how far the court was justifiable in rejecting the propositions in question, upon the ground either of want of connection with any particular state or progress of the evidence—or of support and justification as derived from the entire testimony in the cause. It is a settled rule of judicial

*483]

procedure that the courts will never lay down as instructions to a jury, general or abstract positions, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts upon which the questions of law naturally and properly arise. It is equally certain that the courts will not, upon a view of the testimony which is partial or imperfect, give an instruction which the entire evidence in a cause when developed would forbid.[1] Tested by these rules, the two instructions prayed for in the first series are deemed to be improper, they are accompanied with no statement of the testimony as their proper and immediate foundation; they are bottomed exclusively upon assumption, and such assumption too as the testimony taken altogether is believed to contradict. The court, therefore, properly refused these instructions; for this refusal it was by no means necessary that the causes should be assigned, by the court, *in extenso*—these are to be seen in the character of the instructions themselves, and in the testimony upon the record. This court has thus considered and disposed of the several prayers for instruction in this cause, and of the rulings of the Circuit Court thereupon. *Whilst this procedure has [*484 been proper with the view of ascertaining how far the rights of the parties have been affected by the several questions presented and adjudged in the Circuit Court; it is our opinion that the true merits of this controversy are to be found within a much more limited and obvious range of inquiry than that which has been opened by these questions. The note on which the action below was instituted, was given as a guarantee for the solvency of the parties to the bill for $8,000, drawn in favor of the plaintiff, and for its punctual payment at maturity. Such being the character and purposes of the note, was it necessary, in order to authorize a recovery upon it, that every formality, all that strictness should have been observed in reference to the bill intended to be guarantied, which it is conceded are indispensable to maintain an action upon a mercantile paper against a party upon that paper? It is contended that a guarantee is an insurance of the punctual payment of the paper guarantied; is a condition and a material consideration on which this paper is received, and therefore that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here

[1] Approved. *City of Lynchburg* v. *Slaughter*, 75 Va., 67.

stated, the authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guarantied such bill or note by a separate contract. In the former instances notice in order to charge the drawer or endorser is with very few established exceptions uniformly required; in the latter the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course. In *Warrington* v. *Furbor*, 8 East, 242, where the guarantee was not by endorsement of the paper sued upon, and the action was upon the contract, Lord Ellenborough said, "that the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where by the law-merchant a demand and a refusal by the acceptor ought to be proved to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure as it were the solvency of the principal, and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him." Le Blanc, Justice, says, in the same case, "there is no need of the *485] same proof to charge a guarantee as there is a party whose name is on a bill of exchange; for *it is sufficient as against the former to show that the holder could not have obtained the money by making demand of it." The same doctrine may be found in *Philips* v. *Astling et al.*, 2 Taunt., 205. So too, Lord Eldon in the case of *Wright* v. *Simpson*, 6 Ves., 732, expresses himself in terms which show his clear understanding of the position of a collateral guarantee or surety, his language is "as to the case of principal and surety, in general cases, I never understood that as between the obligee and the surety there was an obligation to active diligence against the principal, but the surety is a guarantee, and it is his business to see whether the principal pays and not that of the creditor." The case of *Gibbs* v. *Cannon*, 9 Serg. & R. (Pa.), 198, was an action against a guarantor who was not a party on the note, upon his separate contract. The Supreme Court of Pennsylvania decided in this case, that provided the drawer and endorser of the note were solvent at the maturity of the note, notice of non-payment should be given to the guarantor, and that the latter under such circumstances may avail himself of the want of notice of non-payment, but it places the burden of proving solvency, and of injury flowing from want of notice upon the guarantor. The last case mentioned on this point, and one which seems to be con-

clusive upon it, is that of *Reynolds* v. *Douglass et al.*, 12 Pet., 497, in which the court establish these propositions.

1st. That the guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of non-payment.

2d. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this court, in 12 Pet., it would seem that this case should admit of neither doubt or hesitancy. The note on which the action was brought was given as a guarantee for the payment of the bill for $3,000, as is proved and indeed admitted on all hands. It is the distinct and substantive agreement by which the guarantee of the bill was undertaken. It is established by various and uncontradicted facts and circumstances in the cause, and finally by the solemn admissions of Timberlake the drawer and Smith the acceptor of the bill, both of whom have testified in the cause, that at the maturity of the *bill they were both utterly [*486 insolvent; that Timberlake was probably so before the commencement of these transactions, and that Smith before the maturity of the bill had made an assignment of every thing he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

Under such circumstances to have required notice of the dishonor of the bill would have been a vain and unreasonable act, such as the law cannot be presumed to exact of any person. Upon a review of the whole case, we think that the judgment of the Circuit Court should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of South Carolina, and was argued by counsel. On consideration whereof, it is now here 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.

Austin L. Adams and Ann C. Harding, Plaintiffs in error, *v.* Julia Roberts.

On the trial of a petition for freedom, a paper was produced, which was a copy of a deed of manumission, executed in December, 1801, by the owner of certain slaves in Virginia (and amongst them, the mother of the petitioner, to become free on the 1st of January, 1814,) to which paper the names of two persons were attached as witnesses. In January, 1802, the grantor went into court in Fairfax county, Virginia, and ordered it to be recorded; but it did not appear whether the two witnesses were then with him or not. The grantor resided in the District of Columbia.

Under these circumstances, and under the statute of Virginia, passed December 17, 1792, a prayer to the court to instruct the jury that the petitioner was not entitled to freedom was properly refused.

The mother of the petitioner becoming free on the 1st of January, 1814, the exact time of the birth of the petitioner, whether before or after that day, was a fact for the jury; and a prayer to the court which would have excluded the consideration of that fact was properly refused.

*487] *This case was brought up by writ of error, from the United States Circuit Court of the District of Columbia for the county of Alexandria.

Julia Roberts, a colored woman, sued in the Circuit Court for her freedom under the following circumstances.

Anterior to the cession to the United States of that portion of Virginia which is now comprehended within the District of Columbia, Simon Summers resided in it, and was the owner of a female slave named Sarah, who, it was admitted, was the mother of Julia, the petitioner in the court below.

On the 30th of December, 1801, Summers executed a deed of manumission of several negroes, and amongst them, Sarah, then about eighteen years old, to be free on the 1st day of January, 1814; and the deed further provided that the children of Sarah should be free at the age of twenty-five years.

Before the execution of this deed of manumission, Summers had been transferred, by virtue of the cession from Virginia, to the District of Columbia. The deed concludes as follows:

As witness my hand and seal, this 30th day of December, 1801. Simon Summers, [L. S.]

Test. Charles Little,
Harrison Cleaveland.

At a court held for Fairfax county, 18th day of January, 1802, Simon Summers acknowledged this deed of manumission, to the several negroes therein mentioned, to be his act and deed, which is ordered to be recorded.

Test. William Moss, *Clerk.*

A copy. Test. S. M. Ball.

This deed was acknowledged before, and recorded in, the court of Fairfax county, Virginia, in which county Summers had lived, prior to the cession to the United States. After the cession, he became thereby a resident of Alexandria county, in the District of Columbia, without changing his domicil.

The statute of Virginia in force in Alexandria county, is the 36th section of the act of the General Assembly of Virginia, passed the 17th December, 1792, entitled "an act to reduce into one the several acts concerning slaves, free negroes, and mulattoes." Sect. 36, will be found at p. 191 of Pleasant's edition of the laws of Virginia, published in 1803, and is in the following words:

"It shall be lawful for any person by his or her last will and testament, or by any other instrument in writing under his or her hand *and seal, attested and proved in the County or Corporation Court by two witnesses, or [*488 acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves, or any of them, who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act."

The original deed of manumission, after being recorded, was mislaid or lost, but a paper, admitted to be a true copy, was produced upon the trial. It was admitted that the petitioner, Julia, was the daughter of Sarah, and was, at the time the suit was brought, over twenty-five years of age.

The trial took place at May term, 1842. Much evidence was given which is embodied in the following bill of exceptions, and which is set forth at large, because the prayer in the second bill of exceptions refers to, and is based upon it.

1st Bill of Exceptions.

At the trial of this cause, the petitioner having given evidence tending to show that, previous to the year 1801, Sarah, the mother of the petitioner, was the property of Simon Summers, and remained in his possession until about the year 1799, when she was placed by said Summers in the possession of Wesley Adams, who about that time married the daughter of said Summers, and who lived then, and continued to live for many years thereafter, in Fairfax county, Virginia, then gave evidence that diligent search had been made among the records of Fairfax county, Virginia, for an original deed of manumission of said petitioner's mother by said Summers, but no such original deed could be found, and that the same is

lost; but that there was among said records the enrolment of a deed, whereof the annexed paper, marked A, is admitted to be a true copy, and of the certificates of acknowlegment and the recording of the same. And further offered evidence that said deed was personally acknowledged by the said Simon Summers, in the county court of the said county of Fairfax—the said slave Sarah being then there in the said county, and having always before resided in the said county. And the petitioner then read in evidence the said paper marked A, purporting to be the copy of a deed of manumission from said Summers, of the negro woman named Sarah, named therein; and then gave evidence tending to show that the petitioner *489] was the child of said *named Sarah, and is now about ·38 (28) years of age; and further gave evidence tending to show that the defendant Harding makes no claim to the petitioner in her own right, but solely by the direction of her co-defendant Adams, who is the son of the Wesley Adams above named, and his said wife the daughter of said Summers. And the petitioner further gave evidence tending to show that, about the year 1820, the said Wesley Adams brought Sarah, the petitioner's mother, to the public poor-house in Fairfax county, state of Virginia, and applied to the overseers of the poor for said county, for alimony for said Sarah as a free woman of color, and her two small children; and that a levy was made upon said county for their support, and they were supported until the year 1826, when a levy was made for the support of said Sarah and the three children which she then had with her, but among whom the petitioner was not included; and that said levy, when raised, was placed in the hands of said Wesley Adams for their support as aforesaid. And further gave evidence tending to show that Sarah passed as free for a number of years, and that Wesley Adams, about the year 1826, said that Sarah and her children were free, and that the said Adams wanted to sell the petitioner to a witness, to serve him until she should reach twenty-five years of age, when she was to go free; and that Simon Summers had given slaves to him in such a way as to be of no service to him, as they became free so soon as they became valuable. And the petitioner further gave evidence tending to prove, that at the division of the estate of Simon Summers, who died in 1836, the defendant Adams was present, and that in said division the said Sarah was brought into hotch-pot—that is, Wesley Adams was charged as distributee of Simon Summers's estate, with the value of the services of said Sarah, up to the year 1814, when she went free, and up to which time the said Summers had allowed her to serve Wesley Adams. And the plaintiff further

offered evidence to prove, that the said Simon Summers resided in the county of Fairfax before and until the 27th of February, 1801, when the county of Alexandria was erected, consisting of a part of the said county of Fairfax; and the then residence of the said Simon Summers fell within the said county of Alexandria, in the District of Columbia, without any change of his actual residence; that the slaves mentioned in the deed of emancipation had always resided in the said county of Fairfax up to the date of the said deed, and to the time of its acknowledgment as aforesaid.

The defendants then offered evidence tending to prove, that an *order was made by the overseers of the poor of the said county of Fairfax, in 1825, to demand of the said Wesley Adams the $20 advanced him for the support of Sarah's infant children. [*490

The defendants then gave evidence tending to show that said Sarah died some years ago, on the land of John Adams, and after remaining two days there, was buried at the expense of the defendant, Austin L. Adams.

The defendants then gave evidence tending to show that at the date of the paper, marked A, viz.: 30th December, 1801, the said Simon Summers was a resident of the county of Alexandria, District of Columbia, and did not reside in Fairfax county, Virginia. But the witnesses who proved the said residence of said Summers, proved, on cross-examination, that at said last-mentioned date, the said Sarah was in the possession of Wesley Adams, in Fairfax county, Virginia; and that at said date Simon Summers owned 200 acres of woodland in said Fairfax county, and was interested in another tract of land in said Fairfax county, on which there was a house, and which was cultivated land, but which was tenanted by one Furguson; and that said Simon Summers resided before 1800 in Fairfax county, in Virginia, and never removed from the place where he then resided; but that the place of his residence was included within the lines of the District of Columbia, and that he continued to reside in the same place until his death.

Whereupon the defendants, by their counsel, prayed the court to instruct the jury, that if they shall believe, from the above evidence, that the said Simon Summers did reside in the county of Alexandria, District of Columbia, at the time of the executing and acknowledging the deed aforesaid, and continued so to reside until his death, in 1836, then that the deed of emancipation so, as aforesaid, made, executed, acknowledged, and recorded in the County Court of Fairfax county, Virginia, does not entitle the petitioner to freedom under the statute of

Virginia, in such cases made and provided, entitled "An act reducing into one the several acts concerning slaves, free negroes, and mulattoes," passed the 17th December, 1792.

But the court refused to give the instruction as prayed, and to which refusal the defendants except, and pray that this their bill of exceptions may be signed, sealed, and enrolled, and which is accordingly done, this the 18th of May, 1842.

W. CRANCH, [L. S.]
JAMES S. MORSELL, [L. S.]

*491] *2d Bill of Exceptions.

Be it remembered, that on the trial of this cause, the petitioner and defendant having offered the evidence contained in the first bill of exceptions, and this being all the evidence adduced on the part of the petitioner and defendant aforesaid, the defendants, by their counsel, prayed the court to instruct the jury, that the testimony aforesaid, although believed by the jury, is not sufficient in law to maintain the issue joined; and therefore the law is for the defendants.

But the court refused to give the instruction so prayed, not being willing to certify that the evidence so stated as aforesaid is all the evidence adduced by the parties in the said cause, and because such an instruction would take the cause from the consideration of the jury, without giving the petitioner the benefit of the presumption which the jury might draw from the facts so given in evidence. To which refusal the defendants except, and this their bill of exceptions is signed, sealed, and ordered to be enrolled, this 18th of May, 1842.

W. CRANCH, [L. S.]
JAMES S. MORSELL, [L. S.]

Upon the refusal of the court below to grant the prayers contained in the first and second bills of exceptions, the case came up before this court.

Neale and *Bradley* for the plaintiffs in error.
Brent, sen., for the defendant.

Neale made the following points:

1. That the court erred in allowing the deed of manumission to be given in evidence on the part of the petitioner for the purpose of establishing her right to freedom; that said deed was, and is, wholly inoperative to establish or vest in the petitioner any such right.

2. That the court erred in allowing evidence to go to the jury tending to establish a reputation of freedom in Sarah, the

petitioner's mother, as competent evidence to establish the petitioner's right of freedom, the latter basing her right on the said deed of manumission.

3. That the court erred in refusing to give the instructions prayed for in the second bill of exceptions.

4. That the court erred in accompanying their refusal to grant the prayer, in the second bill, with a refusal to certify that the evidence contained in the first bill of exceptions was all the evidence adduced in the cause, without at the same time stating that there was other *evidence [*492 adduced and not inserted in the first bill, and also showing what that evidence was, and what it tended to prove.

5. That the court erred in the further reason they gave for refusing the prayer of second bill, viz.:—"because such an instruction would take the cause from the consideration of the jury, without giving the petitioner the benefit of the presumption which the jury might draw from the facts so given in evidence."

6. That the verdict of the jury is wholly irregular and void, in not responding to the issue submitted for them to try, and in not finding damages for the petitioner, even though they might have been nominal: And was such a verdict on the issue tried, that the court were not competent to award a judgment thereon "that the petitioner recover her freedom"—and that the court erred in entering such a judgment thereon.

He contended that the deed of manumission was not valid, because it was not acknowledged in the place where the grantor resided. His residence was in the District of Columbia, and the deed was acknowledged in Fairfax county, Virginia. The law of Virginia requires it to be acknowledged in the county where the grantor himself resides. Old Revised Code, act of 1792, p. 191, sec. 36; 2 Leigh, (Va.), 312.

A nuncupative will cannot emancipate. 1 Robinson's Practice, 428.

All negroes are presumed to be slaves. 1 Hen. &. M. (Va.), 141; Wheeler on Slavery, 31, 395.

Brent, for defendant in error, said:

The case in Henning and Mumford does not bear out the last position of the opposite counsel. He then argued the following points:

1. That there is no error in the judgment of the court below, as rendered: and if there be, it cannot be corrected or reversed here, in the form presented by the record.

2. That there is no error in the refusal of the court below to give the first instruction asked by the plaintiffs in error.

3. That the court below was right in refusing the second instruction.

4. That by the law of Virginia of 1782, in force in the county of Alexandria, in the District of Columbia, all negroes *493] are, *prima facie*, free unless they come within the exceptions of that law; and that *the *onus probandi*, as to the exceptions, rests upon those who claim them as slaves.

5. That the defendant here, if not entitled to her freedom under the law named in the last reason assigned, is entitled to it by birth, being the child of a free woman at her birth.

6. That the mother of the defendant in this court was a free woman, and passed as such, and was so recognized from the 1st of January, 1814, to her death in 1836—a period of twenty-two years; and in the absence of positive proof of emancipation, the law presumes a deed of emancipation to have been made, after so long a lapse of time.

7. That by the law of Virginia a deed of manumission may be made by an instrument of writing under seal, attested by two witnesses, and proved in any court, &c.; and that there is no time limited for its proof, and no form or manner pointed out in which it is to be proved; and that it may be done on the trial of the suit for freedom, or at any other time, or in any other form.

8. That a deed of manumission, acknowledged by a non-resident in the court of the county where the slave resides, is good and binding in law. And

9. That if the defendant, Julia Roberts, was entitled to her freedom in any way whatever, and the same appears by the evidence in the record, she is free, and the instruction asked for in the first bill of exceptions, if it had been given by the court could not benefit the plaintiffs in error, and its refusal is no ground for a reversal of the judgment.

In support of the 5th point, he said that Sarah, the mother of Julia, was free on the 1st day of January, 1814, and that Julia must have been born after that day; because she was twenty-eight years old when the trial took place, in May, 1842. Besides, the lapse of twenty years authorizes a presumption of a deed of manumission. 1 Hill (S. C.), 222; 2 Hill (S. C.), 593; 7 Leigh (Va.), 702.

There is no form prescribed for the instrument itself, the acknowledgment, or the proof. 2 Leigh (Va.), 311, 312, 318.

The original deed of manumission was not produced at the trial: but there was what was admitted to be a true copy. It was permitted to be read in evidence, and it is too late to object to it now. The bill of exceptions does not object to its admissibility as evidence.

The law of Virginia ought to be liberally construed. 6 Rand., *652, 657; 7 Leigh 701, 714; 4 Id., 260, 264; 2 Id., 320; 2 Call, 270; 1 Robinson's Practice, 431.

As to Summers's right to emancipate, see 8 Pet., 238; 6 Gill and J. (Md.), 143.

Bradley, for plaintiffs in error, in reply.

Virginia has taken away from non-residents the power of manumitting slaves within the state. There is no one to support them or provide for them.

If the deed was not acknowledged in the court of the county or corporation, it cannot be evidence. 2 Leigh, (Va.), 314; 6 Mumf., (Va.), 201; 7 Leigh, (Va.), 689.

Mr. Justice WAYNE delivered the opinion of the court.

We think the court below did not err in refusing to give the instructions asked for by the defendants in either the first or second bill of exceptions.

By the statute of Virginia two modes are pointed out in which manumission by deed can be accomplished.

1. The instrument in writing under the hand and seal of the party must be attested and proved in the County or Corporation Court by two witnesses; or

2. It must be acknowledged by the party in the court of the county where he or she resides.

Either of these modes is effectual. It is stated in the bill of exceptions, and is not contradicted, that the county of Alexandria was made on the 27th of February, 1801, being composed of what had been a part of the county of Fairfax, in Virginia, and that Summers owned 200 acres of woodland in Fairfax county, and was interested in another tract of land also in said county, upon which there was a house. But it does not appear how far within the line of the District the actual residence of Summers was thrown, whether the dividing line ran through his farm, separating the house from the great body of the land, or whether the land upon which his slaves resided was a separate estate, detached from his residence. But it sufficiently appears that up to February, 1801, Summers had been accustomed to resort to the court of Fairfax county, for the transaction of business of every description, and that the jurisdiction under which he lived then became changed, without its having been done by his removal from where he had lived before.

*The claimant in support of her freedom alleges, that [*495 Summers executed an instrument under his hand and seal on the 30th December, 1801, to which the names of Charles Lit-

tle and Harrison Cleaveland are attached as witnesses. Upon the 18th of January, 1802, by a copy admitted to be a copy of that instrument, and not objected to when offered as evidence, it appears that Summers went into court in Fairfax county and acknowledged it to be a deed of manumission. The court ordered it to be recorded, and it was done. There is nothing in the record to show whether or not the two witnesses were present with him in court when he made this acknowledgment. If they were, the case would clearly fall within the first mode pointed out by the statute, being an instrument in writing, under the hand and seal of the party, attested and proved in the County Court by two witnesses. It is not said in what court the attestation and proof must be made; in the case of a non-resident owning slaves resident in Virginia, but we presume that in such a case the attestation and proof ought to be made in the County Court where the slave resides.

It is not necessary however to decide that question in this case, because the proof to substantiate and give validity to the instrument does not exist, but we have recited the preceding facts, because they are evidence in the case, and are connected with the paper purporting to be a copy of a deed of manumission, which was introduced to sustain the claimant's demand for freedom. This then is the copy of an original paper not denied to be such by the plaintiffs in error, and the question occurring is, how ought it to have been considered in the court below as a part of the evidence in the cause, with reference to the instructions asked? In the first instruction, the court is asked to put the case, that the deed of emancipation so as aforesaid made, executed, and acknowledged and recorded, did not entitle the petitioner to freedom, under the statute in such cases made and provided by an act, entitled an act reducing into one the several acts concerning slaves, free negroes, and mulattoes, passed December, 17, 1792.

The paper in evidence was a copy of an original, the execution of which by the grantor was not denied. It was received as evidence upon proof of the loss of the original. It was forty years old. No proof of its execution was necessary; its antiquity proved it. But, it is said, the proof and attestation before the court in Virginia, to give it validity, was wanting, and that it appeared to be so upon the face of the paper given in evidence. That might, or might not be so. But it was a fact in controversy between the parties, as much so as *any other fact in the case, and the court could not be asked to instruct the jury upon their belief of another single fact, namely, the residence of Simon Summers in the county of Alexandria, that the party was not entitled to freedom

*496]

under the statute of Virginia. The instruction as asked excludes all the other evidence, and puts the legal issue proposed on it upon a single fact. It excludes also, all presumptions which the jury might make from the other evidence in connection with the antiquity of the paper which was before them. The court did not err in refusing to give the first instruction.

The second instruction asked for by the defendants in the court below was, that the testimony, although believed by the jury, was not sufficient in law to entitle the petitioner to her freedom.

If the jury believed all the evidence offered, the case would have stood thus: Susan the mother of Julia was to become free on the first of January, 1814. If they believed that fact, and also believed that Julia was born after that day, she was the child of a free woman and of course free herself. The trial took place at May term, 1842. Evidence was offered to show that Julia was then about twenty-eight years old. If she was twenty-eight years of age at any period between the first of January and May, 1842, of course she was born after her mother had become free. The instruction asked the court to deprive the jury of the power of saying, she was born in that interval. This was a fact especially proper for the consideration of the jury, and the court could not have given the instruction asked by the defendant; that the testimony was not sufficient in law to entitle the petitioner to her freedom, without assuming the fact, that Julia was not born in the interval already mentioned. We think the court did not err in refusing the instruction.

The judgment of the court below is affirmed.

ORDER.

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 now here 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.

*THE LOUISVILLE, CINCINNATI, AND CHARLESTON RAILROAD COMPANY, PLAINTIFFS IN ERROR, v. THOMAS W. LETSON, DEFENDANT.

A citizen of one state can sue a corporation which has been created by, and transacts its business in, another state, (the suit being brought in the latter state,) although some of the members of the corporation are not citizens of the state in which the suit is brought, and although the state itself may be a member of the corporation.[1]

The cases of *Curtiss* v. *Strawbridge*, 3 Cranch, 267; *Bank United States* v. *Deveaux and others*, 5 Cranch, 84; *Commercial and Railroad Bank of Vicksburg* v. *Slocomb and others*, 14 Pet., 60, reviewed and controlled.

The act of Congress, passed on the 28th of February, 1839, making it "lawful for a court to entertain jurisdiction and proceed to the trial and adjudication of a suit between parties who may be properly before it, although there may be other defendants, any one or more of whom are not inhabitants of, or found within, the district where the suit is brought, or do not voluntarily appear thereto," is an enlargement of jurisdiction as to the character of the parties. The clause, exempting absent defendants from the operation of the judgment or decree, is an exception to this enlargement of jurisdiction, and must be strictly applied.[2]

A corporation created by, and transacting business in a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business, is sufficient to give the Circuit Courts jurisdiction.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of South Carolina.

Letson, a citizen of New York, brought an action of covenant against the Louisville, Cincinnati, and Charleston Railroad Company, alleging that they had not fulfilled a contract with him relating to the construction of the road

The suit was brought in November, 1841.

In April, 1842, the defendants filed a plea to the jurisdiction, which was afterwards amended to read as follows:

[1] FOLLOWED. *Stafford* v. *American Mills Co.*, 13 R. I., 311.

[2] CITED. *Ober* v. *Gallagher*, 3 Otto, 205. See *McPike* v. *Wells*, 54 Miss., 136.

[3] APPLIED. *Germania Fire Ins. Co.*, v. *Francis*, 11 Wall., 216; *Culbertson* v. *Wabash Nav. Co.*, 4 McLean, 545. FOLLOWED. *Covington Drawbridge Co.*, v. *Shepherd*, 20 How., 232; *Ohio &c. R. R. Co.*, v. *Wheeler*, 1 Black, 296; *Cowles* v. *Mercer County*, 7 Wall., 121; *Steamship Co.* v. *Tugman*, 16 Otto, 120; *Blackburn* v. *Selma &c. R. R. Co.*, 2 Flipp., 531. RELIED ON. *Northern Ind. R. R. Co.* v. *Michigan Cent. R. R. Co.*, 15 How., 248. SUSTAINED. *Marshall* v. *Baltimore &c. R. R. Co.*, 16 How., 325; (see Id., 338, 340, 349). CITED. *Merchants' Ins. Co.*, v. *Ritchie*, 5 Wall., 542; *Paul* v. *Virginia*, 8 Wall., 178; *Baltimore &c. R. R. Co.* v. *Harris*, 12 Wall., 82; *McCabe* v. *Illinois Cent. R. Co.*, 13 Fed. Rep., 831. S. P. *Vallette* v. *Whitewater Valley Canal Co.*, 4 McLean, 192; *New York & Erie R. R. Co.* v. *Shepard*, 5 Id., 455; *Greeley* v. *Smith*, 3 Story, 76. See *Case of the Sewing Machine Cos.*, 18 Wall., 574.

If a corporation is incorporated in two states a citizen of either state may sue it in the other. *City of Wheeling* v. *Mayor &c. of Baltimore*, 1 Hughes, 90.

"And the said the Louisville, Cincinnati, and Charleston Railroad Company come and say, that this court ought not to have or take further cognisance of the action aforesaid, because they say that the said the Louisville, Cincinnati and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford, and Charles Baring, are, and were at the time of commencing the said *action, citizens of North Carolina; and the state [*498 of South Carolina is, and was at the time of commencing the said action, a member of the said corporation, and the Bank of Charleston, South Carolina, is also, and was at the time of commencing the said action, a member of the said corporation, which said the Bank of Charleston, South Carolina, is a corporation, some of whose members, namely, Thomas Parish and Edmund Lafau, are, and were at the time of commencing the said action, citizens of New York. And the Charleston Insurance and Trust Company is now, and was at the time of commencing the said action, a member of the said Louisville, Cincinnati and Charleston Railroad Company; which said Charleston Insurance and Trust Company, is a corporation, some of whose members, namely, Samuel D. Dickson, Henry R. Dickson, Henry Parish, and Daniel Parish, are now, and were at the time of commmencing the said action, citizens of the state of New York.

"And this the said Louisville, Cincinnati, and Charleston Railroad Company are ready to verify. Wherefore they pray judgment whether this court can or will take further cognisance of the action aforesaid."

To this plea there was a general demurrer, which, upon argument, was sustained by the court.

The railroad company then pleaded the general issue, and the cause went on to trial. The jury found a verdict for the plaintiff, and assessed his damages at $18,140.23.

The writ of error was brought to review the opinion of the court upon the demurrer.

Mazyck, for the plaintiffs in error.

Pettigru, *Lesesne*, and *Legare*, (then attorney-general,) for the defendant in error.

The case was submitted upon printed arguments; and, on account of its great importance, the reporter has thought it proper to insert these arguments *in extenso*.

Mazyck, for the plaintiffs in error.

An action is brought by a citizen of New York, in the Circuit Court in South Carolina, against a corporation whose members are alleged to be citizens of South Carolina. A plea to the jurisdiction is set up, in which it is averred: 1st. That two of the members of the corporation sued are citizens *499] of North Carolina. 2d. That the state of *South Carolina is also a member. 3d. That two other corporations are also members, and that some of the members of each of them are citizens of the state of New York.

The objections to the jurisdiction of the court arising out of these facts, (the facts themselves being admitted by demurrer,) are embraced in the following propositions:

1. That a citizen of one state cannot sue a corporation in the Circuit Court of the United States in another state, unless all the members of the corporation sued are citizens of the state in which the suit is brought.

2. That a citizen of one state cannot sue a corporation in the Circuit Court of the United States in another state, if the state be a member of the corporation, though all the other members of the corporation may be citizens of the state.

3. That a citizen of one state cannot sue a corporation in the Circuit Court of the United States in another state, where one of the members of the corporation sued is another corporation, any of whose members are citizens of the same state with the plaintiff.

1. A citizen of one state cannot sue a corporation in the Circuit Court of the United States in another state, unless all the members of the corporation are citizens of the state in which the suit is brought.

Sect. 2, art. 3, of the Constitution of the United States, provides that the judicial power shall extend to controversies "between citizens of different states." In the case of the *Bank of the United States* v. *Deveaux et al.*, 5 Cranch, 84, it was determined that "the artificial being, the mere legal entity, a corporation aggregate, is not a citizen, and cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union. The corporate name cannot be a citizen, but the persons whom it represents may be citizens, and the controversy is in fact, and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom

the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the federal courts. The controversy *is substantially between citizens of one state suing by a corporate name and those of another state." [*500

In other words, when a suit is brought in a Circuit Court of the United States, by or against a corporation, the court with reference to the question of jurisdiction, depending on the character of the parties, overlooks the artifical person, the mere legal entity, which cannot be either citizen or alien, and regards only the natural persons of whom it is composed. They are the substance, the real parties; the corporate character and style are only the form and name under which they are presented.

As far as this question is concerned, the members of the corporation are regarded as individuals jointly suing or being sued.

If they have the requisite character, if they are citizens of a different state or states from the other party to the suit, the case falls within the constitutional provision.

In *Strawbridge* v. *Curtis*, 3 Cranch, 267, it was held that where the interest was joint, and two or more persons were concerned in that interest as joint plaintiffs, or joint defendants, each of them must be competent to sue, or liable to be sued in the federal courts, and the suit was dismissed because some of the plaintiffs and defendants were citizens of the same state.

And accordingly, the members of a corporation being regarded with reference to the question of jurisdiction, as joint plaintiffs or joint defendants in the same interest, it has been determined that if any of them are citizens of the same state with the other party to the suit, the federal courts have no jurisdiction. *Ward* v. *Arredondo*, 1 Paine, 410; *Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.*, 14 Pet., 60.

But in order to give jurisdiction to the Circuit Courts, founded on the character of the parties in a suit between citizens of different states, not only is it necessary that none of the parties on one side should be citizens of the same state with any of the parties on the other side, but the suit must be between a citizen or citizens of the state in which the suit is brought, and a citizen or citizens of some other state or states. In other words, all the parties on one side must be citizens of the state in which the suit is brought, and all

the parties on the other side must be citizens of some other state or states.

It is not denied that under the constitutional provision as to the judicial power, Congress might, if they had thought *501] proper, have given to the Circuit Courts jurisdiction of all cases between citizens *of one or more states on one side, and citizens of one or more other states on the other side, as, for example, a case in which some of the plaintiffs should be citizens of New York, and some of them citizens of New Jersey, and some of the defendants citizens of South Carolina, and some citizens of North Carolina. But though Congress might constitutionally have given to the Circuit Courts jurisdiction of such a case, they have not done so. The 11th sect. of the judicial act of 1789, provides that the Circuit Courts shall have cognisance of all suits, &c., where "the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." If the parties on one side are citizens of a different state from that in which the suit is brought, and some of the parties on the other side are citizens of the state in which the suit is brought, and some of them are citizens of a third state, the suit is clearly not a suit between a citizen or citizens of the state in which it is brought, and a citizen or citizens of another state.

This suit, for example, being brought in South Carolina, by a citizen of New York, against citizens of South Carolina and North Carolina, is not a suit between citizens of the state in which the suit is brought, and a citizen of another state. It is true that if you regard only the citizens of South Carolina who are defendants, it is a suit between citizens of the state in which it is brought, and a citizen of another state. But, if you regard only the citizens of North Carolina who are defendants, (which is just as reasonable,) it is not a suit between citizens of the state in which it is brought and a citizen of another state. In truth the suit is between the plaintiff and all the defendants, and as all the defendants are not citizens of South Carolina, it is not a suit between citizens of the state in which the suit is brought, and a citizen of another state. The same rule of construction which would make this "a suit between citizens of the state where the suit is brought, and a citizen of another state," within the provision of the act of 1789, would, if applied to the constitutional provision, make it a case "between citizens of different states," even though some of the defendants were citizens of New York; for if you regarded only those who are citizens of South Carolina, it would be a case between citizens of different states, yet it has

been repeatedly determined, that to bring a case between citizens within the jurisdiction of the federal courts, on account of the character of the parties, all the parties on both sides must be citizens of different states. *Strawbridge v. Curtis, 3 Cranch, 267; Cumberland Bank v. Willis, 3 Sumn., 472; Ward v. Arredondo, 1 Paine, 410; Commercial and Railroad Bank of Vicksburg v. Slocomb et al., 14 Pet., 60. [*502

The case of Gracie v. Palmer, 8 Wheat., 699, was an action against citizens of New York, brought in the state of Pennsylvania, but that was not a case between citizens of different states, but a case "to which an alien was a party," the plaintiffs being subjects of Great Britain, and the defendants, though citizens of New York, being found in Pennsylvania, or voluntarily appearing there, which the court deemed equivalent to an acknowledgment of process served there.

But it will be said that the act of 1839, (9 Laws of United States, 962,) has enlarged the jurisdiction of the federal courts so as to embrace this case. That act provides that, "where in any suit in law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer." In the case of the Commercial and Railroad Bank of Vicksburg v. Slocomb et al., 14 Pet., 60, the court gave the following construction to that act: "The 11th section of the judicial act declares that no civil suit shall be brought before either of the (Circuit) Courts against an inhabitant of the United States by 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. Many difficulties occurred in practice in cases in which it was necessary to join several defendants, some of whom were not inhabitants of the district in which the suit was brought. The act of 1839 was intended to remove these difficulties, by providing that persons not inhabitants, or not found in the district, may either not be joined at all, or if joined, and did not waive their personal exemption by voluntary appearance, the court may go on to judgment against the parties before it, as if the others had not been joined. But it did not contemplate a change in the jurisdiction of the courts, as regards the

character of the parties, as prescribed by the judicial act, and expounded by this court."

*503] *Before the act of 1839, a creditor, citizen of one state, having two joint debtors citizens of two other states could only proceed against them jointly. If a citizen of South Carolina, and a citizen of North Carolina, were jointly indebted to a citizen of New York, he could not proceed against one of them without joining the other. If he could find them both in the state of New York, he might have sued them there in the Circuit Court of the United States, because his suit would then have been "a suit between a citizen of the state in which it was brought, and citizens of other states, but he could not have sued them in the Circuit Court, either in North Carolina, or South Carolina, because in neither case would the suit have been a "suit between citizens of the state in which it was brought, and a citizen of another state." But the act of 1839, by enabling him to proceed against them separately, enables him to sue each of them in the Circuit Court of the United States in the state of which he is a citizen, for then each suit is "a suit between a citizen of the state in which it is brought, and a citizen of another state."

This is the whole effect of the act of 1839. But such as it is, it is entirely inapplicable to a suit against a corporation. It provides that the judgment, or decree, shall not conclude or prejudice other parties not regularly served with process, or voluntarily appearing. Now, of two or more individuals, joint debtors, each is liable for the whole amount of the debt; and there is, therefore, no reason in the nature of the obligation why separate judgments should not be awarded against them. But the members of a corporation are not individually liable for its obligations at all, and therefore from the nature of the obligation, there can be no judgment against them individually, nor against a part of them; the judgment must be against the body corporate, which includes all the members. And, accordingly, in the case last cited, *Commercial and Railroad Bank of Vicksburg* v. *Slocomb et al.*, the court say: "There is another reason why this act cannot apply to this case. It expressly declares that the judgment, or decree, shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing. Now, defendants being a corporation aggregate, any judgment against them must be in their corporate character, and the judgment must be paid out of their corporate funds, in which is included the interest of the two Louisiana stockholders, consequently such judgment must prejudice those parties."

2. A citizen of one state cannot sue a corporation in the

Circuit *Court of the United States in another state if the state be a member of the corporation, though all the other members of the corporation may be citizens of the state in which the suit is brought.

A corporation is not a citizen of any state, and therefore an action brought by a citizen of one state against a corporation in another state, is not within the jurisdiction of the federal courts, as "a suit between citizens of different states," unless each member of the corporation is a citizen of a different state from the plaintiff, as prescribed by the constitution, and as it is still further restricted by the judicial act of 1789, "a citizen of the state in which the suit is brought." As far as the question of jurisdiction is concerned, the members of the corporation are regarded as the real defendants, sued by the name of the corporation, and each, and all of them, must have the requisite character. *Cumberland Bank* v. *Willis*, 3 Sumn., 472; *Ward* v. *Arredondo*, 1 Paine, 410; *Commercial and Railroad Bank* v. *Slocomb et al.*, 14 Pet., 60.

Now, the state is certainly not a citizen, and therefore the state being a member of the corporation, one of its members has not, and cannot have the requisite character to give jurisdiction to the court.

But it will be said that the case of *The Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat., 904, has settled this point in favor of the jurisdiction. It is not so. There is a very wide distinction between that case and this. That case, so far from having decided this question, did not involve it, nor depend upon it at all. It was not a case in which the jurisdiction was founded on the character of the parties. It was not a case between citizens of different states, for some of the corporators of the Bank of the United States were citizens of Georgia, as appeared by the pleadings, and therefore if the jurisdiction had depended on the citizenship of the parties, it could not have been sustained. It was a case in which the jurisdiction of the federal courts depended altogether upon the nature of the case, and not at all on the character of the parties. The act of Congress, incorporating the Bank of the United States, authorized it to sue in the Circuit Courts of the United States, and it was held in the case of *Osborne* v. *The Bank of the United States*, 9 Wheat., 738, that therefore, every suit brought by the bank was a case arising under a law of the United States, and as such fell within the jurisdiction of the federal courts, without respect to the character of the parties.

Chief Justice Marshall, delivering the judgment of the court, in *the case of the *Bank of the United States* [*505

v. *Planters' Bank*, says—"This is not a case in which the character of the defendant gives jurisdiction to the court. The suit is not to be sustained, because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court who is not withdrawn from its jurisdiction by the Constitution or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it." And again—"The bank does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States."

In that case, the court having jurisdiction on another ground, it was not necessary to look beyond the corporation to find a ground of jurisdiction in the character of its members.

The suit could be entertained against the corporation as a mere artificial being, and it was not material that the corporators should be citizens of Georgia, or who or what they were. The objection that the state was a corporator, would have been as strong in a state court having general jurisdiction as in the federal courts, whose jurisdiction is limited, the case being, from its nature, within the jurisdiction; for a state can no more be sued in a state court than in the federal courts, and as it could not have prevailed in a state court, so neither could it in the federal courts. The answer is, the action and the judgment are against the corporation, and the corporation is not the state, though the state may be a member of it. But in this case, in order to give jurisdiction to the federal court, it is necessary that all the members of the corporation should be citizens of the state, and the objection is, not that one member of the corporation is the state, which cannot be sued, but that one member of the corporation being the state is not a citizen of the state, and therefore, it is not a case in which all the members of the corporation are citizens of the state in which the suit is brought, or citizens of a different state from the plaintiff. There is nothing in the character of the defendants to deprive the court of jurisdiction, if the court possessed jurisdiction independently of that character; but then there is nothing in their character to give jurisdiction, and there is
*506] not, as in the *Bank of the United States* v. *Planters'* **Bank of Georgia*, a ground of jurisdiction independent of the character of the defendants.

3. A citizen of one state cannot sue a corporation in the Circuit Court of the United States in another state, where one of the members of the corporation sued is another corporation, any of whose members are citizens of the same state with the plaintiff.

It has been sufficiently shown that a corporation is not a citizen, and that a suit brought by a citizen of one state against a corporation in another state, is not within the jurisdiction of the federal courts, unless all the members of the corporation are citizens of the state in which the suit is brought, or at least citizens of a different state from the plaintiff. If one of the members of the corporation sued is another corporation, and you regard the latter only as an artificial being, then one of the members of the corporation sued is not a citizen, and the suit is not a suit "between citizens of different states." But if you follow up the process which was adopted in the first instance, and looking beyond the stockholder corporation to the individuals of whom it is composed, with reference to the question of jurisdiction, regard them as the real stockholders, and the corporation only as the mode and name in which they hold their shares, then if they are citizens of a different state from the plaintiffs, it is a suit between citizens of different states, but otherwise it is not. If the same individuals without being incorporated were joint owners of the same shares, and some of them were citizens of the same state with the plaintiff, the suit would certainly not be a suit "between citizens of different states." And if for the purpose of determining the jurisdiction, the corporate character is overlooked, and only the individuals are considered, the case must be the same as if they were not incorporated at all. If the court will not look beyond the service of the constituent corporation to the character of its members, the jurisdiction cannot be sustained. If it will, and should find them to be all citizens of the state in which the suit is brought, would they not be regarded as the real parties for the purpose of sustaining the jurisdiction? Then if any of them are found to be citizens of the same state with the plaintiff, must they not be equally regarded as the real parties, and so defeat the jurisdiction?

Suppose that the corporation against which the action was brought, was found to be composed entirely of corporations, (which is a very possible case,) and that all the members of the several constituent corporations were citizens of the state in which the suit was brought, *would the court refuse to entertain jurisdiction? Would it not in such a case, with reference to the jurisdiction, regard the members of the constituent corporations as the real defendants, and [*507

assume the jurisdiction? They would be as truly the real parties as the individual members of a corporation consisting of individuals, and being the immediate defendant; the corporation being only the modes in which they are associated, affecting very materially the nature and extent of their rights and obligations, the forms of proceeding, and the nature and extent of the remedies for or against them, but not at all affecting their liability to the jurisdiction of the federal courts. For if they did, then all men might be withdrawn from the jurisdiction of the federal courts by charters of incorporation. But if in the case of a corporation, consisting entirely of several corporations, the court would look beyond the constituent corporations to the character of their members, it must also in a case of a corporation, consisting in part of individuals, and in part of another corporation, and if any of the members of the constituent corporations are citizens of the same state with the plaintiff, the jurisdiction cannot be sustained.

Pettigru and Lesesne, for the defendant in error.

This was an action of covenant by T. W. Letson, a citizen of New York, against the defendants, described as a corporation consisting of citizens of South Carolina.

After a summons and distringas, the defendants appeared, and pleaded to the jurisdiction. 1. That Mr. Baring and Mr. Rutherford are members of the company, and citizens of North Carolina. 2. That the state of South Carolina is a member of the company. 3. That the Bank of Charleston, South Carolina, is a member of the company; and that Edmund Laffan, a shareholder in said bank, is a citizen of New York. 4. That the South Carolina Insurance and Trust Company is a member of the company that is sued; and that Samuel Dickson, a shareholder in the South Carolina Insurance and Trust Company, is a citizen of New York.

The plaintiff below demurred to the plea, and the court sustained the demurrer. The defendants then pleaded to the action, and a verdict was had against them, judgment entered up on the demurrer and verdict. To reverse the judgment, this writ of error is prosecuted.

1. The first objection assumes that all the defendants must belong to one state. But there is no such rule. According to the authorities, *it is sufficient that all the members of the corporation that is sued are citizens of some state, other than that of which the plaintiff is a citizen. *Cumberland Bank* v. *Willis*, 3 Sumn., 373. It may, perhaps, be questionable, whether the citizenship of any but the persons who have the government of the corporation should be inquired into.

*508]

In *Curtiss* v. *Strawbridge*, 3 Cranch, 267, it was settled, that each distinct interest must be represented by persons, all of whom are entitled to sue or be sued in the federal courts. But this leaves open the question, whether all the private members of a corporation are properly the persons by whom a distinct interest is represented, when the corporation sues, or is sued. The interest of the corporation is, in fact, represented by the official members of the company. The real plaintiffs are those who have the right to sue, and the defendants those who may be compelled to plead. But a private member of the company has no power to sue, nor to prevent a suit in the name of the company; nor can his admissions be given in evidence, as in the case of a plaintiff. Greenleaf on Ev., 383. And when the corporation is sued, there is the same want of privity between a private member and the party to the record. He cannot be summoned or distrained to answer to a demand against the corporation, or to any rule or order connected with the cause. "Where a corporation is impleaded, the sheriff cannot distrain a private man;" Bro. Ab. Trespass, 135. "For a duty or charge on a corporation, every particular member is not liable but process ought to go in their public capacity." Vent., 351. In practice a summons goes in the first instance, and is served on the head of the company, and in case of refusal, a distress issues against the company's goods, &c., to compel an appearance, (Tidd. Prac., 115,) but no appearance could be enforced by any proceedings against a particular member. Now it is difficult to conceive of a defendant, without some process to compel him to appear; but if that be essential to the character of a defendant, the private member of a corporation is excluded. If every member of the corporation has a right to be heard as a party objecting to the jurisdiction, it must be competent to the plaintiff to treat any member of the company as a defendant throughout. But a corporation in South Carolina cannot be sued in North Carolina by proceeding against a private member domiciled there. It seems a solecism to hold that the plaintiff cannot proceed in the federal court against the corporation, because A. is a defendant; and yet that A. cannot be sued for the same cause of action anywhere, or in any court. It is *as much as to say that A. is a [*509 defendant, and no defendant—a party, and not a party, at one and the same time. The result of these considerations is, that in suits by or against a corporation, the relation of the official members to the rest of the company is not that of partners, but of trustee and *cestui que trust*. If this be admitted, there is an end of the matter, for nothing is more familiar than the difference between an interest in the suit, and the character of

a party to the record. There is no rule of pleading, or of evidence, that will apply to a particular member of a corporation, as a party to the record; he cannot be called on to answer, or to accept notice; his release would not affect the action; his admissions are not evidence; and, in fact, he never was taken notice of as a party, except to defeat the jurisdiction in this court. It may well be questioned whether such an anomaly can be reconciled with legal principles.

Nor does this reasoning militate against the decision of the *Bank* v. *Deveaux*, 5 Cranch, 61, which is admitted to be the leading case. It was necessary in that case, to look beyond the corporate character to see who were the persons that were suing in the corporate name. The court decided that they would take notice of the individuals who composed the corporation. But this rule is satisfied if the court ascertains that the individuals who effectually represent the company are amenable to the jurisdiction. There are other instances in which it has been necessary to look beyond the corporate name for the real actors; but in such cases, the official members only have been considered. We have the benefit of precedents here. The residence of a corporation can only be ascertained by reference to the natural persons composing it. Just as the court will inquire who sue in the corporate name, to ascertain whether they are citizens; the same question is sometimes asked to ascertain where they live. *Rex* v. *Gardiner*, Cowp., 85. But it is to the official, not to the private members, that the court refers in such case, to determine the occupancy or residence of the corporation. It is held to reside where its principal office is. *Bank* v. *Mackenzie*, 2 Brock., 393. And so in the grant of administration where the question of *bona notabilia* occurs; a share in a company that extends to both provinces, is considered assets in that province where the office of the company is situated. *Smith* v. *Stafford*, 2. Wil. Ch., 166. There can be no reason for making a difference between residence and citizenship. If the condition of the official members is decisive of the question of domicil, it is equally so of citizenship.

*510] *A corporation is but a state in miniature; but in political societies, the persons in whom the powers of government are vested, are everywhere considered trustees for the rest of the community. Public acts are done in the name of the whole community, and all are bound by them; but the real authors of them are the persons who have the administration; nor are such acts referred personally to anybody else. In public questions, the demand is made on the government; and in private causes, the same course is pursued, when the

injured party has any judicial redress. The Supreme Court has jurisdiction between the states of the confederacy, and before the 11th amendment, the states were liable to be sued as corporations. But though the corporate interests of the whole community are at stake in such a controversy; agreeably to the principles of legal procedure, no notice is taken of any person as defendant, but those who have the right to exercise the powers of government. In the English courts, when a foreign state is the suitor, the head of the state is the only person that is recognised as the plaintiff. *The Columbian Government* v. *Rothschild*, 1 Sim., 94. Every analogy confirms the conclusion, that the parties who are invested with the corporate powers, as governors of the company, are trustees; and in legal procedure should be treated so throughout.

The case of *London* v. *Wood*, 12 Mod., 669, is the authority which the court followed, in the *Bank* v. *Deveaux*, taking notice of the natural persons who sue in the corporate name. But that case is a striking illustration of the distinction contended for, between the official and the private members of the corporation, as parties before the court in their natural persons. Wood was sued in the mayor's court by the mayor and commonalty of London; and the judgment was reversed for error, because the mayor was both judge and plaintiff. It was not an answer to the objection, that he was plaintiff in his corporate character, and judge in his natural person, for it was the same individual. But if the cause had been tried in the Common Pleas, before a judge who was a freeman, and therefore one of the commonalty of London, the objection would not have applied. The argument for reversing the judgment against Wood is confined to the incongruity of the mayor being plaintiff in the same case in which he was judge. But no objection is made to the aldermen who were a constituent part of his court, although they must have been included in the general designation of the commonalty. Suits in the name of the people of the state are tried before a judge who is one of the same *people, and no one imagines [*511 that he is both party and judge. And so suits in which the city is a party are without any incongruity tried before a citizen.

The distinction between the official and the private members of the corporation corresponding exactly with that of trustee and *cestui que trust*, is founded on the plainest principles; and has never been overlooked in any case, but in that of the jurisdiction of this court. Yet there is no reason why this case should be an exception. On the contrary, every reason in favor of the jurisdiction applies with great force to

a controversy between a stranger and a large corporation. In legal reason, the president and directors are trustees for the company; and in point of fact, the contest is between the plaintiff and the persons who have the government of the company; and so falls within the letter as well as the spirit of the Judiciary act; as a suit between citizens of the state in which the action is brought and a citizen of another state.

A corporation has not the qualities of a person. But it acts by the agency of natural persons, and the acts which they do in the execution of the corporate powers are strictly their personal acts. The bringing or defending of a suit in the corporate name is the act of the official members in their natural persons; but is not the personal act of their constituents. The private members of the company are concerned in the suit in their corporate character merely, and the only persons having any personal relation to the suit are the official members. The private members cannot be called parties to the suit of a corporation without confounding the distinction between the natural and corporate character. In their corporate character they are parties; but as persons or citizens they have nothing more to do with the suit than a private man with a state prosecution. When, therefore, to defeat the jurisdiction, it is alleged that such or such a person, a private member of the corporation, is a party to the suit, the allegation is neither accurate in reason nor true in fact. The private persons are represented by the corporate name, not as persons, but as a faculty. The only persons who have any individuality in the corporate name, or can be called persons suing, are the official members.

Waiving, however, this discussion, which is not essential to the case, the objection that two of the members of the corporation are citizens of North Carolina, cannot avail. There is *512] nothing in the constitution or in the act of Congress, which requires that all the defendants *must be citizens of the state in which the action is brought. The act of 1838, 9 Laws United States, 699, seems to be only declaratory. By the constitution, the jurisdiction of the federal courts extends to cases generally between citizens of different states. The Judiciary act confers jurisdiction on the Circuit Court in narrower terms, between a citizen of the state where the suit is brought and a citizen of another state. But when the parties to the contract reside in different states, the party who is sued cannot plead the nonjoinder of the party who is out of the jurisdiction. The proviso in the 11th section exempts persons from being arrested in one district for trial in another, and from any process to compel appearance in any other than

that in which the party is found. But the defendant may waive this exemption, and if he voluntarily appears to a suit properly brought against his co-defendant, and which might have been properly brought against him in his district, it is no error. *Gracie* v. *Palmer*, 8 Wheat., 699.

No attempt has been made to arrest Mr. Baring or Mr. Rutherford, in the district of North Carolina, for trial in this district. Nor has any attempt been made to bring a suit against either of the defendants in any district in which they were not found. The original process was directed to the marshal of South Carolina, and executed in his district. If the members who are alleged to be citizens of North Carolina are before the court, they have either appeared voluntarily or they have been found in South Carolina. If the plea is considered the plea of the absentees, it contradicts itself; they cannot appear and object to appear. If they have been found in South Carolina, they are rightly suable there with co-defendants who are citizens of that state, by the plaintiff, a citizen of New York. If they have not been found in South Carolina, how can they allege that they are parties? But if the plea to the jurisdiction be considered as the plea of the other members objecting that they cannot be sued without joining persons who are inhabitants of North Carolina, the answer is that they are joined. All the members of the company in their corporate character are residents at Charleston; and for any cause of action which concerns the corporation, they cannot be sued anywhere else. A defendant who is arrested in one district for trial in another, may waive his privilege; and if he appear to the suit he cannot object to the jurisdiction. But in a suit against a corporation, the defendants are not liable to be sued anywhere except in the district in which the corporation can be compelled to appear. By becoming members of the company they have submitted generally to the jurisdiction; by *appearing to the writ they have submitted to the [*513
jurisdiction in this particular case; and the plea to the jurisdiction is doubly irregular.

2. The second objection is conclusively answered by the *Bank of the United States* v. *The Planters' Bank*, 9 Wheat., 904. It is, however, argued that the decision in that case depended on the charter of the bank authorizing the said bank to sue in the federal court. But the Judiciary act authorizes the plaintiff to sue the citizens of South Carolina in the federal court. The bank charter did not authorize the bank to sue a state, nor does the law authorize the plaintiff to sue a state; but the state, by becoming a party to a company, whether corporate or not, does not exempt the company from

suit; and so the cases of the plaintiff, and of the *Bank of the United States* v. *The Planters' Bank*, are identical in principle.

3. The third objection resolves itself into the question whether Mr. Laffan is a defendant in this suit; or, in other words, a member of the Louisville, Cincinnati, and Charleston Railroad Company. The negative is so evident that it is difficult to illustrate what is so clear. If he was a member, he would be entitled to the same privileges with other members; but he is in fact incapable of doing any act which it requires a member of the company to do. He may vote in the choice of an agent or proxy to represent the Bank of Charleston in the charter-meetings of the company. But to call him a member of the company is to overlook the distinction between the representative and the constituent. It is not the charter of the company, but that of the bank, under which he acts when he votes for an agent of the bank. If his right to vote for an agent or proxy were contested, it is to the charter of the bank, and to that alone, that he must refer for his authority.

Again; if he was a member of the company he would be liable to the same burdens as the rest of the company; but he is entirely exempt from their obligations and bound by none of their by-laws. They could not expel him or forfeit his stock. It is true that he has an interest, though a remote one, in the company. It is an interest of the same kind as that which creditors or legatees have in the testator's assets, or a *cestui que trust* in the trust-estate. But such an interest, though immediate and direct, would not make him a party to the suit in which the subject was contested by the executor or trustee. *Chappedelaine* v. *Decheneau*, 4 Cranch, 306. "It may be laid down as a rule without exception, that when *514] jurisdiction depends on the party, it is the party named on the record." *Madrazzo* *v. *The Governor of Georgia*, 1 Pet., 110. Mr. Laffan then, is not a defendant, and the third objection fails.

But it is said that the Bank of Charleston is a defendant in its corporate character, and that against a corporation as such, the federal court has no jurisdiction. In answer, it is sufficient to say that the court has jurisdiction, because all the persons who are sued are citizens of South Carolina. The members of the company must be understood to be persons. It is enough that against the persons sued the court has jurisdiction. There is no such thing as the communication of an immunity from justice. It would have been competent for the legislature of South Carolina to exempt the Bank of Charleston from the ordinary jurisdiction. But the privilege would not have extended to every joint-stock company in which the

bank might become a shareholder. A corporation, as a mere faculty or legal entity, cannot be a member of an incorporated company, for by members is meant the natural persons of whom the body politic is made up. The property in the shares is a different matter. The stock of the company may be appropriated to objects animate or inanimate. A slave, an alien, an enemy, or even a dead man, might be a shareholder; or the shares might be dedicated to the repairs of a house, to the improvement of land, or to the use of persons unborn. But it would be a frivolous objection to a suit against the corporation that some of its shares belonged to nobody. When shares in one corporation are held by another corporation, they belong to the government of the corporation which is the shareholder, as trustee for the corporate uses. In fact, the Bank of Charleston would have been incompetent to make the contract on which the action in this case is founded; and if this could be regarded as an action against the bank, it might have been resisted as founded on an illegal contract.

4. The fourth objection is the same precisely as the third, and must be overruled for the same reasons.

Legare, (then attorney-general,) on the same side.

The argument of Mr. *Petigru*, for the defendant in error, contains such a clear and able exposition of the question arising under the demurrer, that I will submit it to the court, by way of an opening, and cast my own in the form of a reply to Mr. *Mazyck's*, for the plaintiffs.

But I will, in the first place, barely recall to the recollection of the *court, that this is an action brought [*515 by a citizen of New York against a corporation chartered by the state of South Carolina, having its principal, if not only, office in Charleston, conducted by a president and directors who are all citizens and residents of the latter state, and composed of stockholders, among whom, two only are so much as surmised to be absent from the state, (but neither of these resident in New York;) and a third is another corporation, in all respects exclusively an institution—a creature of the law of South Carolina, identified with it even in name—viz.: the Bank of Charleston.

If this court has not jurisdiction to protect the rights of a citizen of New York, whose whole fortune — the fruit of his labor — is involved in a controversy with a trading company, thus created, thus composed, thus situated, under that article of the Constitution of the United States which gives to the federal courts cognisance of "controversies between citizens of different states," everybody will admit

that there is somewhere a great chasm in our laws, and a serious grievance in our practice.

But I am bold to assert, that the paradox which I have just stated does not exist in our jurisprudence. All will admit that the burden of proof is upon him who affirms the existence of such a state of the law. In an age when, more than ever, and in a country where, most of all, from obvious peculiarities of position and of polity, the spirit of association goes hand in hand with that of commerce; and all great enterprises, without exception, throughout the whole extent of this vast confederacy, are carried on by incorporated companies, local in nothing but their name and origin, it will be admitted to be, *a priori*, a most improbable proposition, that in any courts, under any circumstances, in any cause in which mere voluntary partnerships would have a remedy, all redress is denied to a company, because it is clothed by law in the attributes of a partnership expressly adapted, by a peculiar organization, to the most important ends. This is putting the case in the least adventurous manner; for, in truth, in the eye of the law, a corporation, while it is a partnership for all the good purposes of such a company, differs from it in this, that its business can be transacted, and its existence perpetuated, without the complexity and embarrassments of rights, responsibilities, and representations incident to a change of individual members in a mere voluntary concern. Bell's Comm.; *Adley* v. *Whitestaple Company*, 17 Ves., 323. It is a legal unit—a distinct and well defined person—immortal, unchangeable; capable, as such, of taking, holding, conveying, *administering, and defending property; known to the law by its corporate name only; speaking (formally and strictly) its will only by its seal; appearing in the courts only by its attorney, with a warrant under seal; represented only by its regularly constituted trustees or managers—the feoffees, so to speak, to its uses; and having a *persona standi in judicio* in this representative capacity, and by this name, and none other. Therefore, as I shall contend, it ought to be less embarrassed in the judicial pursuit of its rights than an unincorporated company; but say that it is liable to the same and no greater disadvantages, the question is whether, in the present state of the law, it would be any answer to the demand of the defendant in error for justice in a federal court—the Circuit Court of South Carolina—against a partnership with its office in Charleston, and carrying on its business there, as the domicile of the company, that one of those interested in it, as a dormant partner, for so a mere stockholder is, or even as an open and proclaimed

*516]

partner, resides in a third state, neither that of the plaintiff nor of the defendant.

If the act of 1839 was not made to prevent the possibility of such a denial of justice, what is it good for?

That act dispenses with the appearance, in a suit, of a party confessedly necessary, at common law, to a complete representation of all the interests in controversy. It ordains, that when there shall be several defendants, any one or more of whom shall not be found within a district, or be inhabitants of it, or shall not voluntarily appear, the court may proceed to adjudication between the parties properly before it, and the non-joinder shall not be pleadable in abatement.

Admit, therefore, that Baring and Rutherford, members of this partnership or company, are inhabitants of North Carolina, who do not choose to appear, and have not been found in Charleston; and admit further, (what is not the fact,) that they are necessary parties as defendants—I say, put aside the corporation, which merges entirely their legal interests, and makes their appearance in person a legal impossibility, and violating every principle of pleading and practice known in an English court—admit them to be full, open, and avowed co-partners, and competent co-suitors, of the defendants below—yet their appearance to this suit is dispensed with. If they appear, the jurisdiction is unquestionable, by the express words of the act, and the judgment binds them as parties; if they do not appear, they are not parties to the judgment, as they are not parties in interest, and *it will be time [*517 enough to plead their absence (if such a plea be possible in our law) when any suit shall be prosecuted against them personally on the strength of the judgment in this case. But how can their appearance or non-appearance affect the question of jurisdiction, which depends, even in the case of necessary parties, on the fact of citizenship? Who ever heard before that the voluntary appearance of a citizen of a state gives jurisdiction to the federal courts, in a case in which that jurisdiction depends, not on the character of the cause, or the state of the pleadings, or the service of process—still less the will of an individual—but simply on the fact of citizenship or no citizenship, or, as it is commonly expressed, on the character of the parties—that is, on a distinct and ascertained civil *status* in the parties.

But this is putting the case much too favorably for the plaintiffs in error. It is admitting Baring and Rutherford to be necessary parties; that is, parties having a legal capacity to represent the interests in controversy, and indispensable to an adjudication on the subject of those interests. This, how-

ever, is not the fact. These gentlemen, even considered as partners, were dormant partners, not known in the transaction —never heard of by the plaintiff below—no parties (except by legal distant consequence) to the covenant he sues upon; and, therefore, laying the charter and the metaphysical being of the corporation out of the case for the present, and considering them as members of a mere voluntary partnership, it is not true that they could have come in and pleaded at all to the declaration; still less that the president and directors, who did contract and covenant with the plaintiff below, would be allowed to plead that these unknown, unheard of, foreign persons, ought to be made parties to the suit, for the purpose of defeating it. The law is settled that dormant partners, as defendants, are not only not necessary parties, but are not allowed to become parties to the record where they were not so to the contract, and thus to defeat by surprise (which might be a fraud) a plaintiff who had never heard of them. *De Montford* v. *Saunders*, 1 Barn. & Ad., 398.

It does not lie in their mouths, as the legal phrase is, after treating as A., B., and C., to say, they represented the whole alphabet. To say that this is true in all contracts whatever, except where they are to be passed on by a federal court, would be simply absurd. It might just as well be pleaded to a separate action on a joint and several bond against a citizen of South Carolina, that the co-obligor resided in North Carolina.

*518] *Analagous to this equitable rule is that which makes a distinction between the form of an objection for non-joinder of parties in an action. If the plaintiff comes into court without making all who have a joint interest in the subject of the controversy a legal interest, that is, parties to the suit, it is a defect of which (if it appear upon the pleadings) advantage may be taken by demurrer, or in arrest of judgment. But in a non-joinder of defendants, there is only one way and one time of taking the exception—it must be done by plea in abatement. It is no bar, it is no ground for nonsuit on variance, and if the cause is allowed to go on at all, it is too late to object that some parties to the contract have not been held to their responsibility. *Whelpdale's case*, 5 Co., 119 a; 1 Saund., 154, n. 1, 291 b, n. 4, &c.

Those well-established general principles should seem to make it very clear, that by the law as it stands, especially since the passing of the act of 1839, Messrs. Baring and Rutherford were either no parties to this suit at all, as having nothing to do with the transaction of the ordinary business of the company, or might be dispensed with under that act as absent defendants.

It is beyond all controversy, that were this a mere voluntary partnership and they avowed members, their appearance might be dispensed with, and their existence, as citizens of North Carolina, would not affect the jurisdiction. This is the act of 1839.

It is, if possible, still clearer, that were they only dormant partners of a firm, the aid of the act of 1839 would not be at all wanted to dispense with their appearance. They would not be allowed at common law to come in and plead even in abatement, much less in bar, that they were parties; neither would the visible and legally responsible members of such a partnership be permitted to put in any such plea.

It is certain that, if they appeared voluntarily, the court would have jurisdiction, for so says the act of 1839, in the words just cited: "if the absent do not voluntarily appear." So said this court in *Gracie* v. *Palmer*, 8 Wheat., 699, and this notwithstanding the words of the 11th sect. of the Judiciary act, in that very proviso of which the act of 1839 was intended to mitigate or prevent the evil effects. That act, after conferring the jurisdiction in general terms, goes on to make an exception, which proves the extent of the rule it modifies and restricts. It authorizes suits to be brought "between a citizen of the state where the suit is brought and a citizen of another state," with *this important qualification, "that no inhabitant of the United States shall [*519 be suable 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." Nothing can be more express than this proviso, but the court said these words were to be understood there, "if he saw fit to object to it."

It is the settled law of this court, that a defendant may renounce the privilege extended to him in this proviso, and if he be suable at all in the Circuit Court, that is, if he be a citizen of a state different from that of the plaintiff, he may be sued by consent in any court; for it is only in matters of personal privilege that consent gives jurisdiction. This I say is settled law, and so clear and unquestionable that the learned counsel for the plaintiff in error admits that before the act of 1839, if a creditor having two debtors, citizens of different states, could find them both in his own, (New York,) he might have sued them there in the Circuit Court of the United States, because his suit would then have been a suit between a citizen of the state in which it was brought and citizens of other states. (p. 7.) But suppose he did not find them there, and they chose to appear, or, which is the same thing, to be regarded in law as found in the state of one of them, how

could the privileged partner at once waive and assert his personal exemption?—appear and not appear? Or, what is still more important, if consent can give jurisdiction in such a case in one place, why should it not have the same virtue in another?

The truth is, the moment it is admitted that a party may appear voluntarily, or be held in any other way to answer in any state, which is neither his own nor that of his adversary, the whole matter is settled to be one of mere procedure and service of process; jurisdiction is no wise involved in it, for that is matter of fundamental law, and not at the discretion of parties.

And so is the act of 1839. It applies to the very case of a joint contract between parties residents of different states, (both different of course from that of the plaintiff, for only in such a case was it competent for Congress to give jurisdiction,) and it provides expressly, that if the absent party will not waive his privilege by appearing, as this court in *Palmer's* case, 8 Wheat., 699, ruled that he might, the Circuit Court should go on without him.

The case appears to me so very simple, upon the principles and authorities already cited, that I should leave it here, but
*520] that the counsel for the plaintiff in error founds himself upon a recent decision of *this court, which he seems to think has made a law for corporations aggregate, altogether different from any law applicable to natural persons, either as individuals or as partnerships, and altogether different, I must say, from any law known to any system of jurisprudence with which I am acquainted.

He lays down these propositions:

1. "That a citizen of one state cannot sue a corporation in the Circuit court of the United States in another state, unless all the members of the corporation are citizens of the state in which the suit is brought."

I have demonstrated that if this company be considered as a mere partnership, or voluntary association, the residence in another state, as well as the non-appearance of Messrs. Baring and Rutherford, would be wholly immaterial under the act of 1839.

If the company be considered as a corporation, the same consequence follows, with the single anomalous exception which I shall presently notice, *a fortiori.*

The first great difference between a corporation and a private partnership or voluntary association is, that in the former the company acts only by its constitutional organs, whether a committee of directors or appointed officers; while, in the

latter, the obligations of a single member, or number of members, by the subscription of the firm, will bind the society. 2 Bell's Com., 556, 5th ed.

A corporation, or to speak in the more accurate and scientific language of the continental jurists, "a juridical person," is, as I have said, a creature of the law, known to it under a given name, whose essence is in that name, and the social identity it implies—whose capacities are defined in its charter—whose will is expressed under its seal—whose unity is affected by no change in the parts that compose it—and whose existence survives the deaths of its members.

It is, properly considered, a personification of certain legal rights under a description imposed upon it by the power that created it. Its name is a thing—it is everything: this creature of law is a standing fiction and style—*stat nominis umbra.*

The first consequence of this definition is, that the whole is essentially and unchangeably different from all the parts, which are as completely merged and lost in it as the ingredients are in a chemical compound.

This personification of the rights of property has, as a necessary instrument, a *persona standi in judicio* of its own; and it appears, defends, *and pleads in the court, [*521 as it transacts all its other business, *ex necessitate rei*, by means of living agents, generally organized in a particular form, proceeding in prescribed modes, and testifying the will of the ideal unity by authentic acts.

A corporation aggregate is the most common—in this country perhaps, strictly speaking, the only form of this juridical person; but, the common condition of all of them, whether sole or aggregate, lay or ecclesiastical, civil or eleemosynary, *ordinata* or *inordinata*, is a capacity to enjoy the rights of property, without the capacity of contracting in regard to them, except through guardians, trustees, or curators.

They stand in this respect precisely in the same category with minors, lunatics and idiots. For instance, the church is considered in law as a minor; the text is express: *fungitor vice minoris. * * Infra ætatem et in custodia domini regis est.* 2 Inst., 3.

Therefore, as we have seen, for all the purposes of valid agreement or judicial remedy and representation, this ideal *cestui que trust* or ward, wills, speaks, acts, pleads, only in the name of its constitutional curator or trustee.

It is all-important to anything like correct thinking on the subject of corporations, that this distinction between the members as constituents of an organized body, and as unorganized individuals, should never be lost sight of. The principle is

inflexible that in a corporation all the parts are not the whole. This is not only true of the conduct or administration of a corporation; it is true also of its rights of property. They are referred, not to all the members, but entire and undivided to the judicial person as a unity in law.

Hence, for the purpose of a suit, the corporation must appear by its constitutional organs or curators; the appearance of each and every member is no appearance at all. Bro. Corporation, 28; Co. Litt., 66 b.

A corporation, when it is a *universitas ordinata*, may be so organized that one or a few of its officers, or a small minority of its members, may exercise all its legal rights and powers, *Union Turnpike* v. *Jenkins*, 1 Cai. (N. Y.), 381; but even were the whole body of the society required to pass upon every corporate act, in the spirit of a perfect democracy, yet a majority would be a quorum, and a majority of that quorum would have, in the absence of any restraints in the charter, the supreme disposal of its concerns. The fundamental maxim here is, *ubi est major pars, ibi est tota, (universitas.)*

*522] *On principle, therefore, and in the absence of all positive authority to the contrary, it must be considered as wholly immaterial, with a view to the validity of any legal act, what one or a few members of a numerous incorporated society have thought, or wished, or done in regard to it. "A corporation," as the greatest jurist of our day expresses it, "consists of the whole, formed of its members. The will of a corporation is not merely the concurring will of all its members, but that even of a bare majority of them. Therefore, the will of a bare majority of all its existing members is to be regarded as having the disposal, and being invested with all the rights of the corporation. This rule is founded on the law of nature, inasmuch as, if unanimity were demanded, it would be quite impossible for any corporation to will and to act. It is also confirmed by the Roman law." (Savigny's System of the Roman Law, as it now is, vol. 2, p. 329, sect. 97, cites L., 160, sect. 1, reg. jur., Dig., 50, 17. *Refertur ad universos quod publicé fit per majorem partem.*)

And so it is by the common law, of which I have just cited the received maxim on this head. Indeed, as Savigny remarks, it must be so in the nature of things; and the consequence is irresistible, that, to set up the will of a few members of a society, artificially organized into a body corporate, against that of the majority or the governing part of it, is to violate fundamental principles, and to confound all ideas of such an association.

Take the case before the court; domicile, supposing it to

depend on the will of the members of a corporation, is, perhaps, a subject of more vital importance than any other that can be submitted to their decision. Great interests of all sorts, as we see in this case, depend upon it. And is it to be tolerated for a moment, as a doctrine of law, that such a question shall be determined by the caprice of every member of the body? According to such a doctrine, no corporation can possibly have a "local habitation" with its "name," or if it have one, be sure of keeping it for any time, although the rule of the common law is the very reverse of this, and requires every corporation to be named of some particular place, evidently with a view to this subject of jurisdiction. 10 Co., 123.

Nothing can be more irresistible than the conclusion to be drawn from these premises, that a plea to a suit brought against a corporation created, established, and transacting all its business in South Carolina, with its president, directors, and all its constitutional organs there, that one or two individual stockholders reside in a neighboring *state, [*523 and so that the body is exempt from suit in the *forum domicilii*, is frivolous and impertinent. (See the analogy of commercial partnership, with its house in enemy's country, and one or two members residing in neutral territory, the *Antonia Joanna*, 1 Wheat., 159). It is a legal absurdity, if there ever was one. A plea that an abbot or prior was an *alien né* was never good, for the reason that he was *civiliter mortuus*, as a monk professed in his natural capacity, and in his corporate character he was a subject of the crown of which his land was held.

But then, it seems, however cogent, and indeed conclusive, all this reasoning may be, it is too late to urge it. The law has been long settled in this court, that the federal courts will look beyond the charter to see whether the individual members are citizens who have a right, under the Constitution of the United States, to sue in those courts; and while I admit and deplore what I consider a deviation from clear principles, I do not desire any judicial innovation on a rule so well established, however wrong in itself. But what I confidently expect of the court is, that it will push this perverse doctrine not a step beyond the adjudged cases—*quod contra rationem juris receptum est, non est producendum ad consequentias;* but, on the contrary, looking at the immense inconveniences likely to result from it, will rather narrow it down once more to what it originally was; more especially as the great consideration which moved the judges who decided the first and leading case on the subject was, that unless they were permitted to look beyond the charter there would be a total failure of

justice in the federal courts, as to all the rights and responsibilities of corporations; for it is quite manifest that if the three propositions advanced by the counsel for the plaintiffs in error, as legitimate corollaries from the decided cases, be recognized as the law of this court, there will soon be an end of all federal jurisdiction in this most important class of cases.

I have said that the court, in weighing the considerations of expediency connected with this subject, will be acting in the very spirit of its decision in the leading case in regard to it. This was the *Bank of the United States* v. *Deveaux*, 5 Cranch, 61. (So, *Lexington Manufacturing Company* v. *Dorr*, 2 Litt., (Ky.), 256, where justice requires it, the court will look into the evidence of the individual members, &c.) The great argument of the counsel of the bank there was, that a corporation not being a citizen of a state, under the words of the Constitution, if the court did not look beyond the charter to the *individuals that composed the company, there would be a denial of justice in a great number of the most important cases.

*524]

This argument was what principally led the court to the conclusion which they adopted. I confess I do not see the alleged necessity of departing at all from the principle which considers a corporation a legal unit and an ideal person. And, accordingly, the court afterwards, in the case of the *Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat., 962, ruled that the jurisdiction of the Circuit Court over a corporation in Georgia was not ousted by the fact that one of its stockholders was the state itself. In other words, they ruled, Chief Justice Marshall expressly declares, that the state *qua* stockholder in a private company laid down its sovereignty, and became a citizen, and might be sued as such. But if a state, which is a corporation, and the greatest of all, can be sued as being, under certain circumstances, a citizen in legal contemplation, why should not any other corporation be considered, for the furtherance of a plain constitutional remedy, as a citizen for judicial purposes.

But conceding that the court was right in this very narrow construction of a great remedial provision in the Constitution, and that it was necessary to look beyond the charter of an incorporated company to give it jurisdiction, the next, and not less important, question was, how far was it necessary or proper to look? Certainly no further than to those who had the control of all the legal interests and rights of the company —to its government, its trustees, representatives, and administrators. This would have been agreeable to all the analogies of the law, which seldom inquires into secondary responsibili

ties and mere equities. At any rate, the most scrupulous adherence to the letter of the Constitution could not require more than an averment that the majority of an incorporated company were citizens of a different state, for that majority wills and acts for the whole—is, indeed, in legal contemplation, the whole, to all judicial intents and purposes whatsoever.

Now this leading case of the *Bank* v. *Devecux* settles nothing on this point. There is no intimation in it of any such legal solecism as that all the members of a corporation, without exception, should be of the same state, whether as defendants or plaintiffs. The court strained a point, according to their own view of the subject, to prevent a denial of justice in that case; but that they did not seriously contemplate pushing the matter further than was necessary for that purpose, is, I think, plain, from their recoiling from the application *of the principle in the *Bank of the United States* v. *The Planters' Bank of Georgia*. The attention of the court is particularly called to this latter decision under this head, as it will be under a subsequent one. [*525

All that they aimed at was to do what the ecclesiastical courts are said to do in England. These tribunals have no power to summon a corporation aggregate to answer before them. 1 Kyd, 277; Skin., 27, 28. They therefore cite the members (that is, the curators, directors, or constitutional organs, who are authorized and bound to appear for the body they represent,) of such companies by their proper names, with the addition of the names of their corporate capacity, but they proceed against them in the latter character, for those courts have no other means of citing them. This is instead of the *distringas* at common law, which is the only means of compelling an appearance in the civil courts; so that if a corporation have no lands or goods, there is no way to make it appear. In the court Christian, however, though the official or representative members are cited by their proper names, it is only in their political capacity. Skin., 27, 28; 1 Kyd, 227.

But although the case of the *Bank* v. *Deveaux* did not go beyond this practice of the ecclesiastical courts, and with a view to jurisdiction, to bring the parties into court, said only that it would look to the character of the members, without saying what members; and so, in legal contemplation, confined their views to the members representing the corporation, and capable of appearing for it; yet I admit that other cases, especially the recent case of the *Bank of Vicksburg* v. *Slocomb*, 14 Pet., did go a step further.

That case decides that where a corporation sues, if any of its members reside in the state of the defendant, or *vice versa*, the court has no jurisdiction.

I admit that this case, if it is to be supported as law settles the doctrine, so far as to treat corporations precisely as if they were private societies or partnerships, but it goes not one step further, even this, as I have attempted to show, is clearly against all principle. But be it so. I have no interest in disputing it for the purposes of this case. This I have already established.

Suppose, as I argued above, this railroad company to be a private partnership, and the controversy is at an end; for beyond all doubt the act of 1839 would cure any defect in the process or pleadings in the case.

*526] *All that the court, in Slocomb's case, ruled, was that the act of 1839 was not to be construed as enabling the parties, by their own contrivance, to give jurisdiction to the court, by severing a joint suit, and omitting some of the necessary parties to it, over whom the federal courts would have had no jurisdiction under the Constitution.

Nothing could be clearer under the decision in *Curtiss* v. *Strawbridge*, 3 Cranch, 267, than that if some of the members of a company or partnership, plaintiffs, were citizens of the same state with the defendant, this case could not be within the act of 1839, because it was not within the provision of the Constitution itself. The act of 1839 was not to be made unconstitutional by construction. Undoubtedly not; but *cessante ratione, cessat lex;* and there is not a word or a hint, that in a case clearly within the Constitution, where, namely, the plaintiff is of a different state from all the defendants, and where, consequently, if he could sever his action, he might, beyond all doubt, sue them all in the federal courts, even at common law—he cannot, under the act of 1839, make that very severance and enjoy his constitutional privilege. I say there is not one word to that effect, and 'twere most strange if there were; for I ask again, if the act of 1839 be not made for that very case, for what case was it made? or what is it good for?

The result of the whole now is, exactly to fulfil the provision of the Constitution in this particular, and to enable every citizen of the United States, who has a claim or complaint against citizens of other states, to assert his privilege under that instrument, whether the ground of action be joint or several. It is a statutable severance of the joint—it is a statutable ratification of the judgment of this court, in *Gracie* v. *Palmer*, as to a voluntary appearance in a several suit.

This, and no more than this, is what we claim, and what the Circuit Court has adjudged we have a right to claim under the law. It is unquestionably our right under the Constitution, and we ask only for that right, and unless the statutes passed to carry it into effect, and therefore to be read in *pari materia* with it, be mutilated by a subtle and unauthorized construction, the remedy is precisely co-extensive with the right, neither more nor less.

Since the act of 1839, which was intended to complete and perfect the system established by that of 1789, this case does not rest on the latter act alone. It might, therefore, be safely conceded, that on a strict and subtle construction, it does not fall within that statute.

But in truth, there is no ground for the objection [*527 founded on a *mere literal interpretation of that statute. The argument proves too much, and so proves nothing. It would exclude all joint suits whatever from the jurisdiction of the federal courts. The words expressly are: "between a citizen (not citizens) of the state in which the suit is brought and a citizen (not citizens) of another state," (not other states.) Now, on what principle, can it be pretended that a joint action may be brought against citizens of another state under the word "citizen," and yet not against citizens of other states? What is there in the word "citizen" in the statute, that admits of an obvious and most reasonable generalization in the plural form, that is not in the word "state?"(*a*)

Only one answer need be given to such interpretation, but it is fatal. It is summed up in a maxim as old as the common law; *qui heret in litera heret in cortice.*

But the court, in Gracie and Palmer, seemed to feel no difficulty at all upon the subject, as in truth none ever existed.

2. As to the objection that the state of South Carolina is a stockholder, much of the reasoning upon the first point is applicable to this. But there is no possible escape from the doctrine of the court in the case of the *Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. Either the state *qua* stockholder in a private company, as Chief Justice Marshall in that case, and the *jus gentium* everywhere affirm, is to be regarded as a citizen, and so suable in the Circuit Court, or it is still a sovereign, and not suable at all. In the former hypothesis, there is no difficulty under the Constitu-

(*a*) Heir in the singular number (even in a deed) held by Mr. Hargrave to be good as a word of inheritance, being *nomen collectivum.* Harg. Co. Litt., 8 b, note 45. But in a will it is indisputably so, and statutes are construed like wills. 3 Co., 27. Butler and Baker's case, and many other analogies might easily be cited.

tion; in the latter, the common law obviates all objections to proceeding without such a party.

The rule of pleading, as to parties (defendants) not legally responsible, is to omit them entirely in an action. This is the case even where they are expressly and on the face of the contract parties to it; *a multo fortiori* where they are only so consequentially and by construction. *Actus legis nemini facit injuriam.* The state of South Carolina is no party *eo nomine* to this covenant; but if her interest as a stockholder makes her so by construction of law, then, being by the supposition not suable as a sovereignty anywhere, she must be
*528] *considered as in legal contemplation not existing at all. 4 Taunt., 468; 1 Wils., 89. If a married woman in New York were one of a partnership or voluntary association carrying on its business in Charleston, as this railroad company does, it would be no sort of objection to the jurisdiction, as between Letson and the others. It would be a ground of nonsuit to join her in a suit with persons legally responsible. So of an infant. Their names must be omitted altogether; and if the non-joinder were pleaded, the reply of infancy or coverture would be conclusive. (When a man is bound to an abbot, and J. N. not styling him monk in the bond, nevertheless the abbot alone shall have the action, and shall surmise that the other obligee was his *commoign* (and so incapable in law) at the time. Bro. Abr. Dette, 191.) It would be an unheard of irregularity, nay, a gross infringement of law, to violate this fundamental rule of pleading and practice, merely to oust the jurisdiction in such a case.

It is obvious that the very same principle applies in the case of a sovereignty, that is, a political person not legally responsible, member of a voluntary joint-stock company, or party to a joint contract, if as a member it is not considered as a mere private person.

Either way the jurisdiction is clear on principle, besides being conclusively settled by the case in 9 Wheat.

3. The third objection is a *reductio ad absurdum* of the principle of the *Bank of Vicksburg* v. *Slocomb*, 14 Pet.

Where shall we stop? Not only do we look beyond the parties to the action, the constitutional organs of the first corporation, to see whether none of its members are citizens of the same state with the plaintiffs, we are now asked to carry this process of perversion *ad infinitum.* If we find out one of the members to be a corporation, we are to look still further, and if it be shown that of this corporation one share has been transferred, it may be in trust, or by way of pledge to another, then the court is not to meddle with an action against the first

corporation. But suppose we find that a member of the second corporation is a third, and of that a fourth in an infinite series: Is this seriously put forth as the doctrine of this court, or is it meant as a jest upon it?

The great moving cause, as I have shown, that influenced the court in *Deveaux's case*, was to authorize its jurisdiction in a category of all others the most important, and to prevent a failure of justice, just as the case in Skinner shows that the courts Christian summoned the natural person, whom they wished to hold responsible *as an artificial one, [*529 *ex necessitate*. But now, it seems, this is to be done for the very opposite purpose, and the plainest rules of law to be broken through, in order to do injustice and to withhold a constitutional right.

To sum up the argument in a few words, a corporation, as such, has no *persona standi in judicio* in the federal courts, where the case is between citizens of one state and citizens of another; but for advancing the remedy and doing justice, and for no other purpose, the court will look beyond the charter to the individual members. In other respects, and to other purposes, the existence of the corporation is not noticed *quoad hoc* in those courts.

On the whole, the case appears to me a very clear one. The mischiefs prevented by the judgment below are of the most serious character; and not only does no legal or constitutional difficulty stand in the way, but every consideration of right and justice, and the very principle of the leading case of the *Bank* v. *Deveaux*, imperatively require that the court should maintain the jurisdiction.

Mazyck, in reply, for the plaintiffs in error.

In addition to the argument formerly submitted, (to which the attention of the court is again solicited,) and by way of reply to the views put forward by the two learned counsel for the defendant in error, it is proposed now to offer some further remarks in support of the objections to the jurisdiction of the Circuit Court. Before noticing in detail the particular points made by the learned counsel on the other side, it may be well, as the clearest and most convenient method of proceeding, to premise one or two general observations, which will perhaps be found to cover them all.

In actions by or against corporations in the Circuit Courts of the United States, in which the jurisdiction depends on the character of the parties, in other words, where there is no other ground of jurisdiction than that the suit is one "to which an alien is a party," or that it is "between a citizen of

the state in which the suit is brought, and a citizen of another state," the court looks beyond the corporation to the individuals of which it is composed, for the purpose of ascertaining whether they have the requisite character, and for no other purpose. That being ascertained, the veil of the corporation is again thrown over the individuals, and in all other respects —in all matters of procedure—in all things concerning rights, obligations and remedies, the Circuit Court, like the ordinary tribunals of general *jurisdiction, loses sight of the individuals, and sees nothing but the legal entity, the corporation. The questions of jurisdiction, and of procedure, are totally distinct from, and independent of each other, and there can be no just reasoning from one to the other.

*530]

Again—the jurisdiction of the Circuit Courts of the United States is limited by their fundamental law, to certain specified descriptions of cases only, and even the consent of parties cannot give them jurisdiction of cases not falling within one or other of the specified descriptions.

A court of general and unlimited jurisdiction, may be unable to take cognizance of a cause, from the want of power to bring the parties before it. For example, a court of unlimited jurisdiction in South Carolina may be unable to take cognizance of a claim against a resident of New York, not found in South Carolina, and having no property there, from the want of means to bring the defendant before the court. So a court of limited jurisdiction, having jurisdiction only of a certain class of cases, may be unable to take cognizance of a case belonging to the prescribed class, from the want of power to bring the parties before it. This is sometimes called want of jurisdiction, but it is a very different thing from the inability of a court having jurisdiction only of a certain class of cases, to take cognizance of a case not within the prescribed class. The one is the want of jurisdiction of the party only, which may be removed by the consent or appearance of the party, the other is a want of jurisdiction of the cause, which cannot be removed by consent of parties. The case of *Gracie* v. *Palmer*, 8 Wheat., 690, so often referred to by the counsel for the defendants in error, furnishes an illustration of this distinction.

That was an action brought in the Circuit Court of the United States in Pennsylvania, by aliens against citizens of New York. Being a suit to which "an alien was a party," it was by the express terms of the 11th section of the Judiciary act of 1789, within the jurisdiction of the court. But though the cause was within the jurisdiction of the court, the defendants were not subject to its jurisdiction, because they were

not inhabitants of the district of Pennsylvania, nor were they found in that district to be served with process, and one of the provisos of the 11th section of the act of 1789 is, that "no civil suit shall be brought before a Circuit or District Court, 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." The defendants, however, voluntarily appeared, and afterwards objected to the jurisdiction of the court, because it did not appear on the record that they were inhabitants of, or found in Pennsylvania at the time of serving the writ. But Chief Justice Marshall, delivering the judgment of this court, said, "the uniform construction of the clause referred to, had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein. It was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district of which the defendant was not an inhabitant, or was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance. If process was returned by the marshal, as served upon him within the district, it was sufficient, and where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter." [*531

That the cause should be within the jurisdiction of the court, that is to say, that it should belong to one of those classes of cases of which alone the court is authorized to take cognizance, is indispensable: that the parties should be before the court is matter of procedure and of the service of process. If the defendant is not an inhabitant of, or found within the district, he cannot be brought before the court by any compulsory process, but if he voluntarily appears, he is before the court, and then the court having jurisdiction of the cause, and having the parties before it, it would be strange if it declined to take cognizance of the matter, for no other reason, than that if the defendant had not voluntarily appeared, he could not have been compelled to appear.

If the principles above stated be kept steadily in view, it is believed, that all the points raised by the learned counsel in answer to the argument against the jurisdiction of the court in this case, will vanish, one after another, as they are approached.

In the first place it is said, that, according to all the authorities, it is sufficient that all the members of the corporation

sued, are citizens of some other state than that of which the plaintiff is a citizen. But there is no authority which says, that where the jurisdiction depends on the citizenship of the parties, a citizen of one state may bring an action in the Circuit Court in another state, against a citizen of that state, and a citizen of a third state. If it had ever been so *532] decided, *the decision would be utterly inconsistent with the highest authority, the Judiciary act itself, which expressly limits the jurisdiction to cases between citizens of the state in which the suit is brought, and citizens of another state, and the court would rather conform to the plain language and meaning of the act, than to a judicial decision or dictum clearly conflicting with it.

But it is now, for the first time suggested, that in an action by or against a corporation, the citizenship of the governing members only need be inquired into, or, in other words, that an action by or against a corporation, is an action by or against the official members alone.

In *Curtiss* v. *Strawbridge*, 3 Cranch, 267, it was said that each distinct interest must be represented by persons, all of whom must be capable of suing, or liable to be sued in the federal courts.

The word "represented," used by the court in that case, is seized upon by the counsel, and it is said, the governing members of a corporation represent the interests of the corporation; therefore, they are the real parties, and it is sufficient, if they have the requisite citizenship, to give the court jurisdiction. But in order to understand the true meaning of the court, we must advert to the fact that the suit was on the equity side of the court, where there may be several defendants having distinct interests from each other, and where it may happen that a complete decree may be made between some of the parties without affecting the interests of others.

Each party having an interest, is said to represent that interest. If several persons have the same interest, they jointly represent that interest, and if they all have the requisite citizenship, and a complete decree can be made as against them, without affecting other defendants having a different interest, notwithstanding such other defendants, or some of them, have not the requisite citizenship, the court will proceed to adjudicate between the complainant and the defendants, who have the requisite citizenship. *Carneal* v. *Banks*, 10 Wheat., 181.

In an action by or against a corporation, the corporate name represents the rights and interests of the corporation, that is to say, the corporate rights and interests of the members of

the corporation, in the subject-matter of the suit—not the governing members only, but all the members; for though the governing members ordinarily manage the business of the corporation, the corporate rights and interests belong to all the members, not according to their official *rank, but in proportion to their respective shares of interest in the corporation. [*533

It is said that the governing members have the right to sue, and may be compelled to plead, and are therefore the real plaintiffs or defendants. But that a private member can neither sue nor prevent a suit, nor can his admissions be given in evidence against the company.

It is true that a single private member cannot sue, nor prevent a suit, nor could one only of the governing members, but the private members, acting together in their corporate capacity, might control the action of the official members, and cause a suit to be brought or defended. It would seem from the principle of the case of *The King* v. *The Inhabitants of Hardwicke*, 11 East, 379, that the admissions of a private member might be given in evidence against the company; for, having an interest in the suit, he could not be made a witness. But if the admissions of a private member could not be given in evidence, so neither could the admissions of a single director. For the acts or declarations of a single director, or of any one not authorized to act alone for the company, are not the acts or declarations of the company, and the interest of a single director, or even of the president, may be less than that of a private stockholder.

Again—it is said that a private member cannot be summoned or distrained to answer to a demand against a corporation. The rule is that for a public concern the sheriff cannot distrain any individual member. 2 Bac. Abr. E. 2 note; *Thursfield* v. *Jones*, Skin., 27. It is true that a summons is served upon the chief officer of the company, but it is a summons of the company, not of the chief officer, who is only the organ through whom it is communicated to the company. If upon this summons the corporation does not appear, there is no further process either against the person or property of the head of the corporation, any more than against the person or property of any private member; but the process to compel the corporation to appear is a *distringas* against the corporate property.

But the manner of requiring the appearance of a corporation is mere matter of procedure, and even if it were allowable to reason from matter of procedure to the question of jurisdiction, so that only the individual upon whom process is

served should be regarded as the real defendant, the summons which is served upon the head of the corporation is not the original process, but a mere preliminary notice which may always be dispensed with. The real process is *the *distringas*, which is not served upon the head or governing members of the corporation, but is levied upon its property. And if the summons were the original process, that is served upon the head of the corporation only, and not upon all the governing members, and by this rule the president would be the only defendant, and it would be sufficient if he had the requisite citizenship.

*534]

If in an action against a corporation, no member can be regarded as a defendant, against whom there is no process to compel him to appear, then no member, either official or private, can be a defendant, for there is absolutely no process by which any one of them can be compelled to appear; the only process is against the property of the corporation, which belongs not to the official members only, but to all the members in their corporate capacity.

It is not pretended that any individual member of a corporation has a right to be heard as a party objecting to the jurisdiction, nor does the objection in this case come from any individual member; it comes from the corporation, that is, from all the members in their corporate capacity. It is not, that Baring and Rutherford object, that being citizens of North Carolina, they cannot be sued in South Carolina, but the corporation objects that the action being against the corporation, and Baring and Rutherford being members of the corporation, it is an action against them, as well as against the other members, and is therefore not a suit between "citizens of the state in which the suit is brought, and a citizen of another state."

A corporation in South Carolina cannot be sued in North Carolina, by proceeding against a private member, or any member domiciled there, neither can it be sued in South Carolina, by proceeding against any member domiciled there. But it is no solecism, that the corporation cannot be sued in the Circuit Court, because A., one of the members, is a citizen of North Carolina, and yet that A. cannot be sued anywhere for the same cause.

If one of the members, or at all events if one of the directors were a citizen of New York, it is conceded that the corporation could not be sued in the Circuit Court in South Carolina, nor could the New York member or director be sued in any court in New York for the same cause, yet where is the solecism in this? It is simply that the Circuit Court is a court of limited jurisdiction, and that the case is not within the jurisdiction.

If the action were brought in a court of general jurisdiction, it would be no objection that some, or even *all of the members of the corporation were citizens of North Carolina or New York. [*535

That the plaintiff cannot sue the corporation in the Circuit Court, because some of the members of the corporation are citizens of North Carolina, is no more than happens to every plaintiff whose case is not within the jurisdiction of that court; justice is not therefore denied him, it is only necessary for him to seek it in another tribunal.

The relation of the governing members of a corporation to the private members, is rather that of agents than of trustees. If they were trustees, suits by and against the corporation ought to be brought in their proper names, and not in the corporate name which represents all the members in their corporate character, and not the governing members alone.

It does not follow, that because in matters of procedure a particular member of a corporation is not noticed as a party, therefore he shall not be noticed in the matter of jurisdiction. In matters of procedure, a particular director is no more noticed as a party to the record than a particular private member; why then should the citizenship of a director determine the jurisdiction any more than that of a private member?

That the particular members of a corporation have never been noticed as parties, except to defeat the jurisdiction of the Circuit Court is not true. In the *Bank of the United States* v. *Deveaux* they were noticed for the purpose of sustaining the jurisdiction, which could not otherwise have been supported.

The residence of a corporation is not determined by the residence of its members, nor by that of the president and directors. A corporation created by a law of South Carolina, and for an object to be pursued in South Carolina, must have its location there, and nowhere else. Its artificial being, as a creature of the law of South Carolina, can only exist where that law is in force. The individual members, or even the president and directors, might be anywhere else, but the body corporate would still be there. It is by no means clear that a corporation is held to reside where its principal office is. In the case of the *Bank of the United States* v. *McKenzie*, 2 Brock., 393, in which it was contended that the bank resided in Philadelphia, and therefore was not affected by the statute of limitations of Virginia, Chief Justice Marshall says, "the counsel for the plaintiff contends that the corporation resides in Philadelphia. How is this to be sustained? The corporate body consists of all the stockholders, and acts by a name *comprehending all the stockholders. These stock- [*536

holders reside all over the United States, but being in their corporate capacity, in which alone they act, a mere legal entity, invisible, inaudible, incorporeal, they act by agents. It may well be doubted, and is doubted, whether the residence of those agents can fix the residence of the corporation," and the statute of limitations prevailed against the bank. Perhaps the true view of the matter is, that the corporate existence of the Bank of the United States, being a law of the United States, the corporation must be held to be wherever that law prevails. But however this may be, there is a wide difference between residence and citizenship. A corporation may have a residence, but, as this court has solemnly decided, it cannot be a citizen.

The supposed analogy between a corporation and a state is rather fanciful than real. When a state is called a corporation, or a corporation a state, it is a mere figure of speech. They are as different from each other as the creator and the thing created. A state is the lawmaker, above and independent of the law. A corporation is a creature of the law, a modified association of individuals, and, like other associations of individuals, subject to the law.

Nor is it invariably true, that in political societies public acts are referred to the persons who have the administration of the government. In England the public property, and other public rights, are vested in the king, and suits concerning them are brought in his name, but in these states the public property and rights are vested in the commonwealth, and not in any individual, and suits concerning them are brought in the name of the commonwealth, and not referred to any individual more than another as the plaintiff. The public business is necessarily done by agents, and these agents, like other agents, are trustees as to the powers with which they are invested, but the acts which they do within the limits of their powers are referred to the commonwealth, and not to them, as individuals.

It is true that before the 11th amendment of the constitution, the states were liable to be sued, but not as corporations. They were liable to be sued as states, because by the Constitution, as it stood before the 11th amendment, the judicial power extended to controversies "between a state, and citizens of another state, and between a state and foreign states, citizens or subjects." Without this provision of the Constitution, it would surely never have been pretended, that because the individuals having the administration of the state government were citizens of the state, or because the state was composed *of its citizens, a suit between two states, or between a state and a citizen of another state, was a suit

*537]

between citizens of different states, and therefore within the jurisdiction of the federal judiciary.

The case of *London* and *Wood*, 12 Mod. 669, does not show that only the official members of a corporation will be noticed as parties. The judgment was reversed, because the mayor was both plaintiff and judge. The strong good sense of the common law would not permit substantial justice to be sacrificed to a legal fiction, by suffering the same person to be plaintiff in one capacity, and judge in another. True, it was said the objection would not have prevailed if one of the aldermen had been plaintiff,—not because he would not have been noticed as a member of the corporation, but because he would not have been both plaintiff and judge. Hatsell, Baron, said —"if one of the aldermen should bring an action before the mayor and aldermen, that may be a good judgment, because it may be a court of mayor and aldermen without him, and the plaintiff would not be an essential part of the court." But the mayor is an essential part of the court. No doubt if each individual of the commonalty had been an essential part of the court, he would have been noticed as a party. As to suits in the name of the people of the state being tried before a judge who is one of the people, that is a matter of unavoidable necessity, and besides, the judge has no more interest in the suit than anybody else, not more than even the defendant himself.

It is true that a corporation acts by the agency of natural persons, but no principle is more familiar than that the acts of an agent, acting within the limits of his agency, are referred to the principal, and regarded as the acts of the principal only, and not of the agent. A corporation sues and defends suits by attorney. He is the natural person by whom the personal acts of suing and defending are done, yet nobody ever imagined that he is the party to the suit. The official members are concerned in the suit in their corporate character as well as the private members, and it is as much confounding the distinction between the natural and corporate character, to call the official members parties to the suit, as it is to call the private members parties. To say that the corporate name represents the private members not as persons, but as a faculty, and the official members alone as individuals or persons, is an incomprehensible refinement—very little better, in fact, than a mere jargon of words without meaning. The truth of the matter is well expressed by Chief Justice Marshall in the *Bank of the United States* v. *McKenzie*, 2 Brock., 393.

*"The president and directors at Philadelphia are neither the nominal nor real plaintiffs. The nominal plaintiffs are the president, directors, and company; the real [*538

plaintiffs are all the stockholders: the corporate body consists of all the stockholders, and acts by a name comprehending all the stockholders."

But in point of fact, this action is brought against all the members of the corporation in their corporate character, and not against the official members only. The corporation is sued as one whose members are citizens of South Carolina. If the official members only are to be regarded as parties, why was it not sued as a corporation whose president and directors are citizens of South Carolina?

It seems to be admitted, that though by the Constitution the judicial power of the United States extends to cases between citizens of different states, the Judiciary act confers jurisdiction on the Circuit Courts only, as between citizens of the state where the suit is brought, and citizens of another state. But it is said that since the act of 1839, when one of two parties to a joint contract is sued, he cannot plead the non-joinder of the other party who resides in another state, and is not found in the district where the suit is brought. This is because the act of 1839 authorizes the plaintiff to sue each of the parties separately, as if the contract were joint and several. But the suit must still be "between a citizen of the state in which the suit is brought, and a citizen of another state." And therefore a citizen of New York, having two joint debtors, one a citizen of Pennsylvania, and the other a citizen of Virginia, could not sue either of them in the Circuit Court in New Jersey, and even the voluntary appearance of the defendant would not give the court jurisdiction of the case. And if they were found in Pennsylvania, and sued jointly in the Circuit Court there, they might plead to the jurisdiction that the case was not one between citizens of the state in which the suit was brought, and a citizen of another state; nor would the voluntary appearance of the citizen of Virginia make it such a case, so as to bring it within the jurisdiction.

The objection in this case is not that some of the defendants are sued in a district in which they were not found, but that a suit is brought in the Circuit Court in South Carolina by a citizen of New York, against citizens of South Carolina, and citizens of North Carolina; for a suit against a corporation is a suit against all the members in their corporate character. If
*539] Baring and Rutherford had happened to be in South Carolina when the suit was commenced, *still being citizens of North Carolina, it would not be a suit "between citizens of the state in which the suit is brought, and a citizen of another state." And the voluntary appearance and consent

of Baring and Rutherford, and every other member of the corporation, each in his natural character, and of all the members collectively in their corporate character, would not remove the objection.

All the members of the corporation may be said, in a certain ideal and fictitious sense, to be residents of South Carolina in their corporate character, because the corporation of which they are members resides there. But the corporation is not a citizen, and therefore they are not citizens of South Carolina in their corporate character. By becoming members of the corporation, they have subjected themselves to be sued in their corporate character in any court of general jurisdiction in South Carolina, but they could not, either by a general or particular consent, give jurisdiction to the Circuit Court, of a cause of which it is not authorized by its fundamental law to take cognisance.

Again, it is said that if the company were a co-partnership, having its office and carrying on business in South Carolina, and Baring and Rutherford, two of the partners, residing in North Carolina, their appearance would be dispensed with; and this position is founded on the act of 1839. Since that act it is conceded that if they were partners in an incorporated company, they might have been omitted altogether, and then all the defendants being citizens of South Carolina, the jurisdiction would be clear. But if they were included in the action, and described in the writ and declaration as citizens of North Carolina, so that it appeared on the record that the suit was not one "between citizens of the state in which the suit was brought, and a citizen of another state," it is very difficult to conceive how the jurisdiction could be sustained. Or if they were described as citizens of South Carolina, and voluntarily appeared and pleaded, not that they were not found in the district of South Carolina, which is mere matter of procedure, and is waived by the appearance, but that they were citizens of North Carolina, so that the case was not between citizens of South Carolina and a citizen of New York, which is matter of jurisdiction, there can be no doubt that as to them the plea must have prevailed. Though, perhaps, the court might then have proceeded against the other defendants as if they had never been joined. But however this may be in the case of a mere partnership, it is wholly out of the question in the case of a corporation. *Who [*540 ever yet heard of an action or a judgment against a part only of the members of a corporation on a contract of the corporation?

Surely if any thing is settled beyond all controversy, it is

that an individual member of a corporation, or any number of members less than the whole united under the corporate name, and in the corporate character, cannot be sued on a contract of the corporation. That indeed is the very thing which constitutes the chief inducement to the formation of incorporated companies.

There could be no action in this contract, but against the corporation, by the corporate name, which includes all the members in their corporate character and connection—those who are citizens of North Carolina, as well as those who are citizens of South Carolina; nor could there be any judgment which would not include the North Carolina members with those in South Carolina. An action against a corporation is an action against all the members of the corporation, in the corporate name and character, which necessarily imply the corporate union and association of all the members, and exclude the idea of any separate identity or liability, with reference to the subject matter of the suit.

But it is said that Baring and Rutherford, considered as partners, were dormant partners, and that dormant partners, as defendants, are not only not necessary parties, but are not allowed to become parties to the record, where they were not so to the contract, and thus to defeat by surprise (which might be a fraud) a plaintiff who had never heard of them.

They were no more dormant partners than any other stockholders, not more even than the directors. There is nothing in the name of the corporation to indicate who are the president and directors, any more than who are the private members, and it is almost as easy in point of fact, for a stranger to ascertain who are the private members as who are the official members. The corporation is sued, as it must be, by the corporate name, and no individual member can come in and say, I ought to be included in the action, and am not, nor can the whole body say, there is a member who ought to be and is not included in the action. Whoever is a member is included under the corporate name, and whoever is not included under the corporate name, is not a member. *DeMautort* v. *Sanders*, 1 Barn. & Ad., 398, is no more than this.

Again—it is said that if Baring and Rutherford appeared voluntarily, it is certain the court would have jurisdic-
*541] tion, for so says the act *of 1839. But the act of 1839 says no such thing. It does not enlarge the jurisdiction of the Circuit Courts, so as to make it extend to all suits between citizens of different states, no matter where brought, provided the defendants can be found in the district, or voluntarily appear. It leaves the matter of jurisdiction depending on the

citizenship of the parties, confined as it was by the act of 1789, to cases "between citizens of the state in which the suit is brought, and citizens of other states," and only provides that when the case is within the jurisdiction, that is, when it is a case "between citizens of the state in which the suit is brought, and citizens of another state," if the defendants voluntarily appear, though not inhabitants of, or found in the district, the court may proceed to adjudicate the cause; or if some of them are found in the district, or voluntarily appear, and others are not found, and do not appear, those who are found, or do appear, may be proceeded against without prejudice to the others. For example, the Circuit Court in New York would have jurisdiction of a suit brought by a citizen of New York, against several defendants citizens of South Carolina and North Carolina, because it would be a case "between a citizen of the state in which the suit was brought, and citizens of other states," but unless the defendants were found in New York, or voluntarily appeared, they could not be proceeded against. Since the act of 1839, if either of them was found in New York, or voluntarily appeared, he might be proceeded against alone, and could not plead the non-joinder of the others. This is the effect of the judicial exposition given to the proviso of the 11th section of the act of 1789, in *Gracie* and *Palmer*, 8 Wheat., 690, and of the act of 1839.

But the Circuit Court in New Jersey would not have jurisdiction of a suit between the same parties, because neither of them being a citizen of New Jersey, it would not be a case "between a citizen of the state in which the suit was brought, and citizens of other states," and even if the defendants were found in New Jersey, or voluntarily appeared, they could not be proceeded against; for to use the language of the attorney-general in this very case, "who ever heard before that the voluntary appearance of a citizen of a state gives jurisdiction to the federal courts in a case in which that jurisdiction depends, not on the character of the cause, or the state of the pleadings, or the service of process—still less the will of an individual—but simply on the fact of citizenship or no citizenship, or as *it is commonly expressed, on the [*542 character of the parties; that is, on a distinct and ascertained civil *status* in the parties."

Now the civil *status* on which the jurisdiction of the Circuit Court depends is, that the parties on one side should be citizens of the state in which the suit is brought, and those on the other side, citizens of one or more of the other states; and as citizens of North Carolina are and must be included as defendants in this action with citizens of South Carolina,

under the corporate name, neither the plaintiff nor defendants are citizens of the state in which the suit is brought, and therefore the parties have not the civil *status* necessary to give the court jurisdiction, and the want of this necessary *status* cannot be supplied by consent.

Again—it is said that corporations aggregate in this country are without the capacity of contracting, except through guardians, trustees, or curators, and that in this respect they are like minors and lunatics; yet nothing is more certain than that in all the corporations with which we are acquainted in this country, the ultimate power of making by-laws for the government of the corporation, and of otherwise controlling the action of the official members, resides in the body of the members, and is frequently exercised by them; but who ever heard of a minor, or a lunatic, prescribing rules for the government of his guardian or curator?

But it is affirmed that in a corporation all the parts are not the whole. Now nothing is more true than that a corporation aggregate, consisting of a given number of individuals, is in legal contemplation, for all purposes of administration, rights, obligations, and procedure, a different thing from the aggregate of the individuals composing it. The legal entity, the corporation, is a different thing from the natural persons, the members, but it is nevertheless true, that the corporation includes all the members, and that any one of them is just as much a part of the corporation as any other. It is not denied that in the language of Savigny, cited by the learned counsel, "a corporation consists of the whole formed of its members," but it is not always true that the will of a bare numerical majority of the members is the will of the corporation, and has the disposal of, and is invested with all the rights of the corporation. That depends upon the charter. In all cases it is necessary that the concurring will of a part of the members should constitute the will of the corporation, since the concurrence of all the members would be generally impracti-

*543] cable.

*But admitting all that is said on this point, the will of one, or a few, or even a majority of the members of a corporation, has nothing to do with the domicile of the corporation. Does any body suppose that if nine-tenths of the members of this corporation were citizens, and residents of New York, the domicile of the corporation would be any less in South Carolina than if all the members were citizens and residents of South Carolina; or that it would be any less liable to be sued in South Carolina in a court of general jurisdiction; or that it could be sued in any court in New York.

It might be frivolous and impertinent in a court of general jurisdiction to plead to a suit brought against a corporation, created, established, and transacting all its business in South Carolina, that one or two individual stockholders reside in a neighboring state, and therefore the corporation is exempt from suit in the *forum domicilii*. Such a plea would be wholly inadmissible if the plaintiff had brought his action in the state court of South Carolina, the real *forum domicilii*. But it is neither frivolous nor impertinent when the action is brought in the Circuit Court in South Carolina, which certainly has no jurisdiction of the cause, unless it is a suit between citizens of South Carolina and a citizen or citizens of some other state, (the corporation itself not being a citizen of any state, and the jurisdiction depending on the citizenship of the members,) to plead that two of the members are not citizens of South Carolina, but citizens of North Carolina.

Again—it is said that in the *Bank of the United States* v. *Deveaux*, the court looked beyond the corporation to the individuals composing it only for the purpose of sustaining the jurisdiction, and the *Bank of the United States* v. *The Planters' Bank of Georgia* is invoked to show that they will not look beyond the corporation to defeat the jurisdiction. The truth is, that the court looks beyond the corporation neither for the purpose of sustaining nor defeating the jurisdiction, but simply for the purpose of ascertaining whether the citizenship of the parties is such as to bring the cause within the jurisdiction. If in the *Bank of the United States* v. *Deveaux*, they had found that some of the stockholders of the Bank of the United States were citizens of the same state with the defendants, so that it was not a case "between citizens of different states," or that one of the defendants was a citizen of some other state than Georgia, so that it was not a case "between citizens of the state in which the suit was brought, and *citizens of another state," they would certainly not [*544 have taken cognisances of the cause.

There is no reason to believe that the course of this court, with respect to suits by or against corporations, was at all influenced by the alleged practice of the ecclesiastical courts in England, of which not the least notice was taken in the leading case of the *Bank of the United States* v. *Deveaux*.

The only point of resemblance is, that both look beyond the corporation to the individual members, but the ecclesiastical courts dealing only in ecclesiastical censures and discipline, which would be powerless and nugatory against the corporation or its property, proceed directly against the persons of the members, who are cited by their proper names with the

addition of their corporate style; whereas, this court looks beyond the corporation only to ascertain whether the citizenship of the members is such as to give it jurisdiction, and that being ascertained, proceeds against the corporation.

The ecclesiastical courts, it is to be observed, take notice of and proceed against all the members, and not the curators or directors only, as the counsel suppose. In the case of *Thursfield* v. *Jones*, Skin., 27, 28, the Master and Wardens of the Waxchandlers Co. were the whole corporation.

It is said that at all events it is sufficient that a majority of the members should have the requisite citizenship; for that a majority wills and acts for the corporation, and is indeed the corporation. But, besides that, it is not always or generally true, that the ultimate power to will and act for a corporation resides in a numerical majority of the members; even if it were true, yet there is a very clear and obvious distinction between the majority of a body of individuals and the whole body. If a majority of the members be indeed the whole corporation, then it follows as a matter of course, that the minority are no part of the corporation. By parity of reasoning, if the members of a mere co-partnership should agree that a majority of the partners should control its affairs, such majority would be the partnership, and suit might be brought against the partnership in the Circuit Court of the United States, by a person who was a citizen of the same state of which the minority of the co-partnership were citizens.

It is admitted by the learned counsel that the case of the *Bank of Vicksburg* v. *Slocomb*, 14 Pet., settles the doctrine so far as to treat corporations precisely as if they were private partnerships; but *this is only with reference to the question of jurisdiction as depending on the citizenship of the parties. That case is very far from having settled that as to the rights and obligations of the individual members, and the mode of judicial procedure a corporation is to be regarded as if it were a private partnership. And it is useless to appeal to the act of 1839 to sustain that position. It is impossible so to torture that act as to make it mean that a party having a demand against a corporation, founded on a contract of the corporation, might sue a part of the members, and obtain judgment against them exclusively of the rest. In the case of a private partnership Congress might authorize the suing of a part of the members of the firm for a partnership obligation, because they are all individually bound, and whether they shall be proceeded against jointly or severally is mere matter of procedure. But nothing is more certain, indeed nothing has been more strenuously insisted on by the

*545]

learned counsel themselves, than that the members of a corporation are not individually bound by the obligations of the corporation. How then can Congress be supposed to have intended to enact, that in the courts of the United States a part of the members of a corporation should be held bound by the contracts of the corporation, and that judgment should be given against them on account of such contracts? Surely such a law, not merely regulating the procedure of the courts, but totally changing the relative rights and obligations of the parties to a contract, and creating new obligations and liabilities entirely different from those which the parties intended to contract, would be utterly inconsistent with the plainest principles of constitutional liberty and common right. And nothing but the most unequivocal language could induce the court to suppose that such was the intention of Congress.

If the defendants in error found themselves upon the act of 1839, to be consistent, they ought to have entered their judgment only against the South Carolina members. That would have been their proper course, and it would have been something novel and original, but they have entered their judgment against the corporation by its corporate name, including the North Carolina members as well as the rest.

It is said that the construction of the act of 1789, for which we contend, is inadmissible, because it would exclude all joint suits whatever from the jurisdiction of the federal courts—that the words are "between a citizen (not citizens) of the state in which the suit *is brought, and a citizen [*546 (not citizens) of another state," and it is asked very triumphantly why a plural signification should be given to the word citizen, so as to permit joint actions to be brought, and not to the word state, so as to embrace actions between citizens of several different states. There is no reason why the word state should not be generalized by a plural construction as well as the word citizen; and accordingly it has been freely admitted throughout the whole argument, that an action might be brought in the Circuit Court by or against citizens of several states, provided it was between "citizens of the state in which the suit was brought, and citizens of other states," as it might well be. But there is a reason so obvious, that it is surprising, and almost incredible, it should have escaped the notice of the learned counsel, why the words "state in which the suit is brought" should not have a plural construction, and that is simply, that the state in which the suit is brought can be but one.

2. As to the objection that the state of South Carolina is a stockholder, it is said that if an infant, or a married woman,

a citizen of New York, were one of a partnership in Charleston, it would be no objection as between the plaintiff, a citizen of New York, and the other partners, citizens of South Carolina, because the infant, or married woman, not being suable at all, would be omitted, and the action would be brought only against the other partners, and so the state of South Carolina, not being suable, cannot be regarded for any purpose as a defendant to this suit, and therefore the other members of the corporation are the only defendants. Passing over the obvious distinction, that the infant and married woman are omitted, because, being incapable of contracting, the contract is in fact only the contract of the other parties, and that the state is capable of contracting, as this court has repeatedly determined. *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Dartmouth College* v. *Woodward*, 4 Wheat., 578; *Green* v. *Biddle*, 8 Wheat., 1. There is another and a conclusive answer to this argument.

There is no doubt that infants and married women may be members of a corporation, and in their corporate character would be bound with the other members by the contracts of the corporation. It is equally certain that an action against the corporation would be as much an action against them as against the other members, and that their coverture or infancy would not protect them in their corporate interests from judg-
*547] ment and its consequences. In other words, *though not capable of contracting or suable in their natural character, as members of a corporation, in their corporate character they are both—and the counsel cannot forget that they themselves, in this very case, have cited *The Bank of the United States* v. *The Planters' Bank of Georgia*, to show that a state, as a member of a corporation, is suable in the corporate name with the other members.

3. The third objection, it is said, resolves itself into the question whether Mr. Laffan is a defendant in this suit, or, in other words, a member of the Louisville, Cincinnati, and Charleston Railroad Company.

According to the law of corporations, Mr. Laffan is not a defendant; and so, according to the same law, no individual member of the railroad company is a defendant. But according to the Constitution of the United States, as interpreted by this court, with reference to the jurisdiction of the federal judiciary, either Laffan is a defendant, or the Bank of Charleston in its corporate character is a defendant; and in either case the jurisdiction cannot be sustained. It is said if he was a member, he would be entitled to the same privileges with other members, but he is incapable of doing any act

which it requires a member of the company to do. By the law of the corporation he is not a member. That law regards only the Bank of Charleston in its corporate character as a member, and does not see or recognize the individuals of which it is composed. But this court is not governed by that law in deciding the question of jurisdiction. With reference to that question, it regards only the individuals composing the Bank of Charleston, and considers them as joint holders of an interest in the railroad company, and in that view Laffan is just as much a member of the company as if he were one of a partnership firm holding shares in it.

It is said, though he has an interest in the corporation sued, it is of the same kind as that which creditors or legatees have in the testator's estate, or a *cestui que trust* in the trust estate. In the case of an executor or trustee, he alone is the legal party—he has the whole legal interest, as is said by this court in the case of *The Bank of the United States* v. *Deveaux*. But in the case of a corporation, the legal interest is in the body corporate—the artificial person, which this court for the purposes of this question regards as a common name and description of the natural persons composing the corporation; and it is impossible to deny in any rational and real sense, that Mr. Laffan is one of the natural persons of which the railroad company *is composed, though he has not, by the [*548
law of the corporation as an individual, a right to vote in the corporation, and is not, as an individual, liable to its burdens, because there is another artificial person interposed between him and the railroad company, which by the law of the corporation exercises the powers and is subject to the burdens of a member.

It is argued that the court has jurisdiction, because all the persons sued are citizens of South Carolina. According to the view taken by this court in the first instance, for the purpose of maintaining the jurisdiction, the persons sued are the natural persons who compose the corporation; and Laffan, as has just been shown, is one of the natural persons composing the corporation, though he is not by the law of corporations in his individual character a corporator. It is true, that if the legislature of South Carolina had exempted the Bank of Charleston from the ordinary jurisdiction, that would not have extended to every joint stock company in which the bank might become a shareholder, but that is because, in the ordinary jurisdiction, it would be immaterial who were the members of the corporation sued, the suit being against the corporation as a legal entity. If the ordinary jurisdiction were expressly limited to cases against corporations, of which all

the members were subject to the jurisdiction; then, if it appeared by the pleadings that the Bank of Charleston was a member of the corporation sued, and that bank was not liable to the jurisdiction, the court certainly would not take cognizance of the suit.

It is not true that the shares of a company may belong to an inanimate object. It may happen that some of the shares of a company may belong to nobody, as in the case of a dead man, whose estate is unrepresented; but in such case the owners of the other shares would be all the members of the company, and it would be no objection to the jurisdiction that some of the shares belonged to nobody. Again, it is said, that when shares in a corporation are held by another corporation, they belong to the government of the corporation, as trustee for the corporate uses; but this is no more true of shares in a corporation held by another corporation than it is of any other property held by them; they belong to the whole body and not to a part; that is, the legal estate is in the whole body and not in the governing members in trust for the others. It is suggested that the Bank of Charleston would have been incompetent to make the contract on which this action is founded; and if this could be regarded as an action *5497] against the bank, it might have been resisted as founded on *an illegal contract. But a corporation might be created for the very purpose of doing, and would of course be competent to do what no individual member of the corporation would be competent to do, yet it would not follow that the corporation had no members, or that an action against the corporation would not be an action against the members in their corporate character.

As to this objection, it might have been sufficient to observe, that the plaintiffs in error are very far from insisting that the court shall look into the composition of the Bank of Charleston and the Charleston Insurance and Trust Company. They are content that those corporations shall be considered simply as legal entities, without regard to the individuals composing them.

It is certain they are not citizens, but they are members of the railroad company, and therefore this action against the company would not be an action against citizens, if the individuals composing those corporations were not regarded. But this court has thought proper, with a view to the jurisdiction of the federal judiciary to regard an action against a corporation as an action against the natural persons composing it. And if it appears that one of the members of the corporation sued is not an individual entering directly into its composi-

tion in his natural character, but another corporation, that is, an association of individuals entering together under a corporate name and in the corporate character into the composition of the first corporation, they are, beyond all question, individuals contributing to make up the corporation sued; and there is no imaginable reason why they should not be regarded as defendants and their citizenship considered, which would not be equally strong against regarding the immediate individual members as defendants, and considering their citizenship. Why should not they be seen through two corporations as well as through one? It is no sound objection that in pushing the analysis beyond the first corporation to the second, you may meet with a third and so on through many. The object of all judicial investigation is truth, and where it is attainable, there is surely nothing absurd or ridiculous in pursuing it through every cover to the end. The search could never prove interminable: it must sooner or later terminate in disclosing some individual not having the requisite citizenship, so as to render its further prosecution unavailing, as in this case, or in reducing the corporation sued to its original elements, and showing that they were all persons possessing the necessary civil *status.*

The whole argument for the defendant in error, is an effort to construe *the Constitution and the Judiciary [*550 act, or rather to evade their natural sense, by means of legal subtleties and fictions. The constitution declares that the party shall be a citizen, that is, a natural person having a domicil and a certain civil *status* in a state. The argument is—a corporation is "a juridical or legal person," why might it not as well be a "legal or juridical citizen?" Let it be called so, and it will come within the constitutional requisition.

The Judiciary act requires that the suit should be between citizens of the state in which it is brought and a citizen or citizens of another state. The suit is brought in South Carolina against a corporation of which some of the members are citizens of North Carolina; the corporate name represents the corporation, which consists of all the members; but it is said, let it be considered, "in legal contemplation," that the corporate name represents only the president and directors, and that the suit is only against them; they are all citizens of South Carolina, and then the suit will be between citizens of the state in which it is brought and a citizen of another state.

Again. If the members of a corporation are all citizens, a suit against the corporation is a suit against citizens, but the state of South Carolina is a stockholder in this corporation, and two other corporations are also stockholders. It is said you have only to rule, that though a state and another corpo-

ration may be stockholders in a corporation, they cannot be members, and then all the members of this corporation will be citizens.

Surely it is not in this court that the Constitution and the law are to be evaded by such easy devices as these.

Mr. Justice WAYNE delivered the opinion of the court.

The jurisdiction of the court is denied in this case upon the grounds that two members of the corporation sued are citizens of North Carolina; that the state of South Carolina is also a member, and that two other corporations in South Carolina are members, having in them members who are citizens of the same state with the defendant in error.

The objection, that the state of South Carolina is a member, cannot be sustained. Cases have been already decided by this court which overrule it. The doctrine is, if the state be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to *551] exercise jurisdiction. *United States* v. *Peters*, 5 Cranch, 115. In the case of the *Bank of the *United States* v. *Planters' Bank of Georgia*, this court ruled "that when a government becomes a partner in a trading concern, it divests itself, so far as it concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character." 9 Wheat., 907. South Carolina stands in the same attitude in the case before us, that Georgia did in the case in 9 Wheat. It is no objection, then, to the jurisdiction of the court, on account of the averment in the plea, that the state of South Carolina is a member of the Louisville, Cincinnati, and Charleston Railroad Company. The true principle is, that the jurisdiction of the Circuit Courts of the United States cannot be decreed or taken away on account of a state having an interest in a suit, unless the state is a party on the record. *Osborne* and the *Bank of the United States*, 9 Wheat., 852. This must be the rule under our system, whether the jurisdiction of the court is denied on account of any interest

which a state may have in the subject-matter of the suit, or when it is alleged that jurisdiction does not exist on account of the character of the parties.

We will here consider that averment in the plea which alleges that the court has not jurisdiction, "because the Louisville, Cincinnati, and Charleston Railroad Company is not a corporation whose members are citizens of South Carolina, but that some of the members of the said corporation are citizens of South Carolina, and some of them, namely, John Rutherford and Charles Baring, are and were at the time of commencing the said action, citizens of North Carolina."

The objection is equivalent to this proposition, that a corporation in a state cannot be sued in the Circuit Courts of the United States, by a citizen of another state, unless all the members of the corporation are citizens of the state in which the suit is brought.

The suit, in this instance, is brought by a citizen of New York in the Circuit Court of the United States for the district of South Carolina, which is the locality of the corporation sued.

*Jurisdiction is denied, because it is said, it is only given, when "the suit is between a citizen of the state where the suit is brought and a citizen of another state." And it is further said that the present is not such a suit, because two of the corporators are citizens of a third state. [*552

The point in this form has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits, until it was made in this case. It has not then been directly ruled in any case. Our inquiry now is, what is the law upon the proposition raised by the plea.

Our first remark is, that the jurisdiction is not necessarily excluded by the terms, when, "the suit is between a citizen of the state where the suit is brought and a citizen of another state," unless the word citizen is used in the Constitution and the laws of the United States in a sense which necessarily excludes a corporation.

A corporation aggregate is an artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its members together; and in which the whole frame and essence of the corporation consist. Bac. Abr. Corp. (A.) It must of necessity have a name, for the name is, as it were, the very being of the constitution, the heart of their combination, without which they could not perform their corporate acts, for it is

nobody to plead and be impleaded, to take and give, until it hath gotten a name. Bac. Abr. Corp. (C.)

Composed of persons, it may be that the members are citizens—and if they are, though the corporation can only plead and be impleaded by its name, or the name by which it may sue or be sued, if a controversy arises between it and a plaintiff who is a citizen of another state, and the residence of the corporation is in the state in which the suit is brought, is not the suit substantially between citizens of different states, or, in the words of the act giving to the courts jurisdiction, "a suit between a citizen of the state where the suit is brought and a citizen of another state?"

Jurisdiction, in one sense, in cases of corporations, exists in virtue of the character of members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts, by a citizen of another state, by the fact, that the subject of controversy between them has arisen upon a contract to which the former are parties, in their corporate and not in their personal character.

*553] *Constitutional rights and liabilities cannot be so taken away, or be so avoided. If they could be, the provision which we are here considering could not comprehend citizens universally, in all the relations of trade, but only those citizens in such relations of business as may arise from their individual or partnership transactions.

Let it then be admitted, for the purposes of this branch of the argument, that jurisdiction attaches in cases of corporations, in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens—does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another state, that all of the corporators must be citizens of the state in which the suit is brought?

The argument in support of the affirmative of this inquiry is, that in the case of a corporation in which jurisdiction depends upon the character of the parties, the court looks beyond the corporation to the individuals of which it is composed for the purpose of ascertaining whether they have the requisite character, and for no other purpose.

The object would certainly be to ascertain the character of the parties, but not to the extent of excluding all inquiry as to what the effect will be, when it has been ascertained that the corporators are citizens of different states from that of the

locality of the corporation, where by its charter it can only be sued.

Then the question occurs, if the corporation be only suable where its locality is, and those to whom its operations are confided are citizens of that state, and a suit is brought against it by a citizen of another state, whether by a proper interpretation of the terms giving to the Circuit Court jurisdiction, it is not a suit between citizens of the state where the suit is brought and a citizen of another state. The fact that the corporators do live in different states does not aid the solution of the question.

The first, obvious, and necessary interpretation of the terms by which jurisdiction is given, is, that the suit need not be between citizen and citizen, but may be between citizens. Then, do the words, "of the state where the suit is brought," limit the jurisdiction to a case in which all the defendants are citizens of the same state?

The constitutional grant of judicial power extends to controversies "between citizens of different states." The words in the legislative grant of jurisdiction, "of the state where the suit is brought and *a citizen of another [*554 state," are obviously no more than equivalent terms to confine suits in the Circuit Courts to those which are "between citizens of different states." The words in the Constitution then are just as operative to ascertain and limit jurisdiction as the words in the statute. It is true, that under these words "between citizens of different states," Congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred. But in the way it is given, the object of the legislature seems exclusively to have been to confer jurisdiction upon the court, strictly in conformity to the limitation as it is expressed in the Constitution, "between citizens of different states."

A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation,—nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state. It may be said that the suit is against the corporation, and that nothing must be

looked at but the legal entity and then that we cannot view the members except as an artificial aggregate. This is so, in respect to the subject-matter of the suit and the judgment which may be rendered; but if it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction, cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.

But we are now met and told that the cases of *Strawbridge and Curtiss*, 3 Cranch, 267, and that of the *Bank of the United States and Deveaux*, 5 Cranch, 84—hold a different doctrine.

We do not deny that the language of those decisions do not justify in some degree the inferences which have been made from them, or that the effect of them has been to limit the jurisdiction of the Circuit Courts in practice to the cases contended for by the counsel for the plaintiff in error. The practice has been, since those cases were decided, that if there be two or more plaintiffs and two or more joint-defendants, each of the plaintiffs must be capable of suing each *555] *of the defendants in the courts of the United States in order to support the jurisdiction, and in cases of corporation to limit jurisdiction to cases in which all the corporators were citizens of the state in which the suit was brought. The case of Strawbridge and Curtiss was decided without argument. That of the Bank and Deveaux after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this—in no way surpassed by those in the former. And now we are called upon in the most imposing way to give our best judgments to the subject, yielding to decided cases every thing that can be claimed for them on the score of authority except the surrender of conscience.

After mature deliberation, we feel free to say that the cases of Strawbridge and Curtiss and that of the Bank and Deveaux were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed. Indeed, it is difficult not to feel that the case of the Bank of the United States and the Planters' Bank of Georgia is founded upon principles irreconcilable with some of those on which the cases already adverted to were founded. The case of the Commercial Bank of Vicksburg and Slocomb was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true princi-

ples of interpretation of the Constitution and the laws of the United States. A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. We remark too, that the cases of Strawbridge and Curtiss and the Bank and Deveaux have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court *have at all times partaken of the same [*556
regret, and that whenever a case has occurred on the circuit, involving the application of the case of the Bank and Deveaux, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of the *Bank of Vicksburg* v. *Slocomb*, 14 Pet., was most reluctantly given upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We cannot follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the Constitution and the condition of our country. It is coincident also with the recent legislation of Congress, as that is shown by the act of the 28th of February, 1839, in amendment of the acts respecting the judicial system of the United States. We do not hesitate to say, that it was passed exclusively with an intent to rid the courts of the decision in the case of Strawbridge and Curtiss.

But if in all we have said upon jurisdiction we are mistaken, we say that the act of 28th of February, 1839, enlarges the jurisdiction of the courts, comprehends the case before us, and

embraces the entire result of the opinion which we shall now give.

The first section of that act provides, "that where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein, shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer." We think, as was said in the case of the *Commercial Bank of Vicksburg* v. *Slocomb*, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the Judiciary act, which declares, "that no civil suit shall be brought *557] before either *of 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, but a re-examination of the entire section will not permit us to re-affirm what was said in that case, that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties. If the act, in fact, did no more than to make a change, by empowering the courts to take cognisance of cases other than such as were permitted in that clause of the 11th section, which we have just cited, it would be an enlargement of jurisdiction as to the character of parties. The clause, that the judgment or decree rendered shall not conclude or prejudice other parties, who have not been regularly served with process, or who have not voluntarily appeared to answer, is an exception, exempting parties so situated from the enactment and must be so strictly applied. It is definite as to the persons of whom it speaks, and contains no particular words, as a subsequent clause, by which the general words of the statute can be restrained. The general words embrace every suit at law or in equity, in which there shall be several defendants, "any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or who shall not voluntarily appear thereto." The words, "shall not be inhabitants of," applies as well to corporators as to persons who are not so; and if, as corporators, they are not suable individually and cannot be served with process, or voluntarily appear in an action against the corporation of which

they are members, the conclusion should be that they are not included in the exception, but are within the general terms of the statute. Or, if they are viewed as defendants in the suit, then, as corporators, they are regularly served with process in the only way the law permits them to be, when the corporation is sued by its name.

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition, that in order to found the jurisdiction in cases of corporations, it is necessary there should be an averment, which, if contested, was to be supported by proof, that some of the corporators are citizens of the state by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases in this court, upon which we have been commenting. But there is a broader ground upon which we desire to be understood, upon which we *altogether rest our present judgment, [*558 although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued. And in coming to this conclusion, as to the character of a corporation, we only make a natural inference from the language of this court upon another occasion, and assert no new principle. In the case of *Dartmouth College* v. *Woodward*, 4 Wheat., 636, this court says, "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as were supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality—properties, by which a perpetual succession of many persons are considered as the same and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing

intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being." Again, [in] the *Providence Bank* and *Billings*, 4 Pet., 514, it is said, "the great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." In that case the bank was adjudged to be liable to a tax on its
*559] property as an individual. Lord Coke, says, "every corporation *and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of the statute." In the case of *King* v. *Gardiner*, in Cowper, a corporation was decided by the Court of King's Bench, to come within the description of occupiers or inhabitants. In the Bank and Deveaux, the case relied upon most for the doctrines contended for by the plaintiff in error, it is said of a corporation, "this ideal existence is considered as an inhabitant, when the general spirit and purposes of the law requires it." If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the Circuit Court of the United States, when the plaintiff has the proper residence? Certainly the spirit and purposes of the law require it. We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought. When the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Courts jurisdiction.

Our conclusion makes it unnecessary for us to consider that averment in the plea which denies jurisdiction on the ground that citizens of the same state with the plaintiff are members of corporations in South Carolina, which are members of the Louisville, Cincinnati, and Charleston Railroad Company.

The judgment of the Circuit Court below is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of South Carolina, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs and damages at the rate of six per centum per annum.

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*NATHANIEL BURWELL, COMPLAINANT AND APPELLANT, *v.* DANIEL CAWOOD, WILLIAM C. GARDNER, EXECUTOR OF JOSEPH MANDEVILLE, DECEASED, AND JOHN WEST, DEFENDANTS. [*560

Although by the general rule of law, every partnership is dissolved by the death of one of the partners, where the articles of co-partnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after his death; and in making this provision, he may bind his whole estate or only that portion of it already embarked in the partnership.[1]

But it will require the most clear and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion.[2]

Where it appears, from the context of a will, that a testator intended to dispose of his whole estate, and to give his residuary legatee a substantial, beneficial interest, such legatee will take real as well as personal estate, although the word "devisee" be not used.[3]

THIS was an appeal from a decree of the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, sitting as a court of equity.

The case was this.

In July, 1836, Joseph Mandeville and Daniel Cawood, both of the town of Alexandria, entered into articles of co-partnership, under the firm of Daniel Cawood and Company, which was to continue until the 1st of September, 1838. Numerous stipulations were made, which it is not necessary to mention.

In June, 1837, Mandeville made his will, which began thus:

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[1] FOLLOWED. *Jones* v. *Walker*, 13 Otto, 446; s. c. 2 Morr. Tr., 259; *Boulle* v. *Tompkins*, 5 Redf. (N. Y.), 474, 476. CITED. *Brasfield* v. *French*, 59 Miss., 638. S. P. *Tibbatts* v. *Tibbatts*, 6 McLean, 80. And see *Butler* v. *American Toy Co.*, 46 Conn., 136.

[2] APPROVED. *Smith* v. *Ayer*, 11 Otto, 329.

[3] And on the other hand, personal as well as real property may pass under the word "devise." *Pfuelb's Estate*, Myr. Prob. (Cal.), 38.

"I, Joseph Mandeville, of Alexandria, in the District of Columbia, thankful to Divine Providence, which has ever rewarded my industry and blessed me with a fair portion of health, do hereby direct the disposal which I desire of my earthly remains, after my decease, and of such real and personal property as I may possess when called hence to a future state."

After sundry legacies, he said: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them," and then added:

"John West, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult with, and follow the advice of, my executors in all concerning what I leave to him."

*561] *Robert J. Taylor and William C. Gardner were appointed executors.

In July, 1837, the following codicil was added:

Codicil to the preceding will, made this eleventh day of July, 1837.

It is my will that my interest in the co-partnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood and Company, shall be continued therein until the expiration of the term limited by the articles between us; the business to be conducted by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide.

In witness whereof I have hereto subscribed my name.

JOSEPH MANDEVILLE.

Shortly after adding the above codicil, Mandeville died, in July, 1837. Taylor renounced the executorship, and Gardner obtained letters testamentary upon the estate.

Cawood and Company continued to carry on the business as before.

In July, 1838, the following note was given and draft drawn:

Alexandria, 28th July, 1838.

Dolls. 800.

Thirty days after date, we promise to pay to the order of Mr. N. Burwell, eight hundred dollars for value received, negotiable and payable at the Bank of Potomac.

DANIEL CAWOOD and Co.

Alexandria, 28*th July*, 1838.

Dolls. 1000.

On the 31st inst. pay to the order of Mr. William H. Mount one thousand dollars for value received, and charge to account of yours. NATH'L BURWELL.

To Daniel Cawood and Co., Alexandria, D. C.

Accepted, DAN'L CAWOOD and CO.

Neither the note or draft was paid at maturity, and both were protested.

In December, 1838, Burwell, the appellant in the present case, filed a bill on the equity side of the Circuit Court against Cawood and Gardner, reciting the above facts and praying relief.

In June, 1839, Gardner answered. He admitted those facts, but denied that the assets in his hands as executor were liable to the payment of the debts of the firm of Daniel Cawood and Company, and required the complainant to make proof of it. He further alleged a deficiency of personal assets.

*In October, 1839, Cawood filed his answer, admitting, [*562 in substance, the facts set forth in the bill, but neither admitted nor denied the insolvency of the firm.

The case was referred to a commissioner with instructions to adjust the accounts of the executor and also of the firm of Cawood and Company.

In May, 1841, the commissioner made an elaborate report, the particulars of which it is not necessary to state.

In November, 1841, on the motion of John West, claiming to be interested in the subject-matter of the suit, it was ordered by the court that the complainant have leave to amend his bill and make John West a defendant. The case was again referred to a commissioner with instructions to state, settle, and report to the court the account of William C. Gardner as executor of Joseph Mandeville, deceased, stating the personal estate of the said Mandeville left by him at his death, and how much thereof has come to the hands of the executor, the value of it, and how the same have been disposed of; particularly whether any of the legacies have been paid out of the personal estate, and to what amount; and also the value of the personal assets still in the hands of the executor: and that he report any special matter that he may deem pertinent, or either party may require.

In December, 1841, the complainant, under the above order, filed his amended bill, making West a party.

In April, 1842, West demurred to the bill, because the other

legatees of Mandeville were not made defendants, and because the complainant had not, by his bill, shown a case in which he was entitled to relief.

In May, 1842, the commissioner made a report, under the above reference, stating that Gardner, as executor, had then in his hands, assets, amounting to $1,036.70.

In June, 1842, the demurrer was argued, and the court being of opinion that the general assets of the estate of the said Joseph Mandeville, deceased, in the hands of his executor, William C. Gardner, one of the said defendants, are not chargeable with any debt contracted by the defendant Cawood, in the name of the firm of Daniel Cawood and Co., after the death of the former partner of the firm, the said Joseph Mandeville; and being of opinion that the defendant's said demurrer is well taken and fully sustained in argument, and that the complainant's bill contains no matter, allegation, or *charge laying any foundation for equitable relief in the premises, dismissed the bill with costs.

*563]

The complainant, Burwell, appealed from this decree.

Neale and *Coxe*, for the appellant.
Smith and *Jones*, for the defendants.

Neale, for the appellant, contended,

1. That all the necessary and proper parties were before the court below.

2. That John West was not a necessary or proper party, he being the residuary legatee of the late Joseph Mandeville, and the bill only sought to make the personal estate of Mandeville liable.

3. That the surviving partner being insolvent, the creditors were well warranted in filing their bill in equity against the executor of Mandeville and the surviving partner.

4. That the general assets of the estate of Mandeville are liable for the debts contracted, as well after as before Mandeville's death, by the late firm of Daniel Cawood and Co.

5. That Mandeville's real estate descended upon his heirs-at-law.

If the surviving partner be insolvent, the effects in the hands of the legal representatives of the deceased partners are liable in equity for the partnership debts. Such debts are both joint and several, and equally a charge upon the assets of the deceased partner, and against the person and estate of the surviving partner. 3 Kent Comm., 57; *Hamersly* v. *Lambert*, 2 Johns. (N. Y.) Ch., 508; *Devaynes* v. *Noble*, 1 Meriv. 539; 3 Leigh (Va.), 548.

A creditor of a firm may sue the surviving partner and the legal representative of a deceased partner, for payment out of the assets of the deceased partner, without showing the insolvency of the surviving partner. *Wilkinson* and *Henderson*, 1 Myl. & K., 582.

And relief may be had in equity against the legal representative of a deceased partner, if the surviving partner be insolvent. *Jenkins* and *De Groot*, 1 Cai. (N. Y.) Cas., 122.

In this case, Cawood, the surviving partner, is notoriously insolvent.

A joint creditor may file a bill in equity against the legal representative of a deceased partner, although the surviving partner be not insolvent. He is not compelled to sue the survivor in the first instance. 1 Myl. & K., 582; 1 Meriv., 529, 563; Collyer on Partnership, 343, 346.

[*564 *From the record in the cause, it appears that Mandeville died in July, 1837, more than a year before the time, when the partnership by its terms expired, to wit: the 1st. September, 1838.

Had Mandeville lived until the 1st September, 1838, and the debt of the complainant been contracted before that date, there can be no doubt, that on failure of partnership funds to pay the claim, the separate property of both partners would be liable for the payment of it.

If so, does not the codicil to Mandeville's will place the creditors subsequently to his death, and before the 1st September, 1838, (when the *post mortem* partnership expired,) on the same footing that they would have been had Mandeville lived until the 1st of September, 1838?

If this was not the intention of Mandeville, when he added the codicil to his will, then, in effect it was a fraud upon the public; for it was the general opinion where the *post mortem* partnership was carried on, that Mandeville's estate, or the general assets of his estate, were bound in common with the company or social funds.

By the codicil to his will, Mandeville directs that his interest in the co-partnership of Daniel Cawood and himself, under the firm of Daniel Cawood and Co., shall be continued therein until the expiration of the time limited by the articles of co-partnership. The business to be conducted by Daniel Cawood, and the profit and loss to be distributed in the manner the articles provide.

The articles of co-partnership do not state what is the amount of capital put in by either party, all it states is the money or goods then furnished or that might thereafter be put in by either party, shall stand to his credit in account current,

and bear interest—and all profits and losses to be equally divided.

If, then, the articles of co-partnership would have bound the general assets of Mandeville had he lived until the 1st September, 1838, (assuming that at that time the firm was insolvent,) then we contend that the codicil makes his estate equally liable for all debts contracted by Daniel Cawood & Co. prior to the 1st September, 1838, although Mandeville died in July, 1837. Because, if he could bind his estate by deed while living, so could he, by will, after his death—and in this case the codicil to his will affirms the obligation and continues his liability under the deed of co-partnership, until the 1st September, 1838. It is conceded, that he might have limited his liability, either in the articles of co-partnership or in the *565] codicil to his will, but not having done so in either, and coupling the two papers *together, the only fair construction to be put upon them both, makes his estate generally liable for all debts due from the late firm of Cawood and Co. prior to the 1st September, 1838, less what that firm is able to pay towards their discharge. 7 Pet., 586.

Had the firm of the late Daniel Cawood and Co. made money, to whom would the profits have belonged, after payment of Mandeville's debts and legacies? Clearly and beyond all doubt, to John West, the residuary legatee; and who would have claimed those profits? the answer is, John West; and he could and he would have successfully claimed them, for as residuary legatee, he, and he alone, would have been entitled to them under Mandeville's will, and bad must be the rule which works only one way. Entitled, then, to the profits, with the right to demand them, and, still more, to coerce their payment if refused, he should, upon principles of equality and justice sustain losses if any were made. And it is worthy of remark that although Mr. West removed to the town of Alexandria immediately after Mandeville's death—was present when the will was probated in the Orphan's Court of Alexandria county, September, 1837, and well knew the contents of Mandeville's will and codicil thereto—and was also an eye-witness to Cawood's proceedings under the codicil, yet did he remain entirely silent upon the subject, thereby acquiescing therein, as it would certainly seem, until the November term, 1841, of the Circuit Court of Alexandria county, when, for the very first time, we were informed that he intended to defeat, if he could, all claims on Mandeville's estate, contracted with the firm of Daniel Cawood and Co. subsequent to the death of Mandeville, however just they might be. Does he then come into court with clean hands and for just purposes?

Had he intimated his intention, as here stated, before the credits were given, none would ever have been given; for it was perfectly notorious, to every person dealing with the firm of Daniel Cawood and Co., that the surviving partner was utterly insolvent from the beginning to the ending of his connection in business with the late Mr. Mandeville, unless the business should prove a profitable one.

West being, by the will, the recipient of the profits, after payment of debts and legacies, had a direct interest in the business, and having such interest, may be looked upon as a *quasi* partner therein, and consequently his right to the residuum of Mandeville's estate is in subordination to the paramount claims of *bona fide* creditors.

The essence of a partnership consists in the mutual participation *of profit and loss; there can be no partnership without this. If the testator by his will continues the partnership after his death, (as in this case,) he continues it for the benefit of his representatives; he makes them partners with the surviving partner; they are entitled to a joint participation in the profits, and ought they not, in sheer justice, to bear their portion of all losses? For if they did not, the distinctive features of a partnership would be lost sight of. [*566

Mandeville, by his will, directs the partnership subsisting between him and Cawood to be continued for the period fixed by the articles; and the profit or loss, of the same, to be shared, as provided by them. The articles are thus made part of the will. The intention of the testator must govern; it is the "polar star which is to guide the decision," and the intention must be gathered from the testator's language. In this case, there is neither a patent nor latent ambiguity on the face of the will or the articles of co-partnership—it is therefore clear (judging from the language employed in both) that Mandeville intended a continuance of the partnership, under the terms and conditions of the articles, according to their expressed as well as legal effect. They expressly provide for an equal participation in the profits, and an equal burden in all losses; their legal effect is, to render liable the general estate of both parties, to the just claims of creditors, in the event of losses. Now if the partnership is continued in the same manner after the testator's death, by his express directions, as it existed before, must not his estate be liable to the demands of subsequent creditors?

If this is not so, then in the event of heavy profits his estate is entitled to an equal portion, but if there are losses, however large, his estate is exonerated—the whole falls on the surviving partner—ruinous to him and unjust and fraudu-

lent as to creditors! This negatives the idea of a partnership, which is a communion, not of profit alone, but also of loss. This case is distinguishable from that of *Pitkin and Pitkin*, 7 Conn., 307. The testator in that case directed, that his interest, consisting of so much, to wit: (here he specifically enumerates it,) is to be continued in the firm, after his death, for the term of four years. His interest, which is thus continued, is clearly defined, and clearly restricted, and is not a general direction of the continuance of the partnership. This language is too plain for creditors to misunderstand or misinterpret, and if under such circumstances they trust the partnership, which finally proves insolvent, they have no right to look to the general assets of the testator, *for he has only pledged so much for the partnership engagements, of which the creditors had due notice, and if they suffer, it is the result of their own imprudence. The distinction is plain and obvious: one is a general partnership, wherein the separate estate of each party is liable; the other, a special partnership, of which creditors had notice, and therefore they can only look to those funds specially provided to meet all losses. Were it otherwise, there would be no difference between a general and special partnership.

*567]

But the appellee, in the court below, contended that the demurrer was well taken and would hold, and cited the following authorities in support thereof, to wit:—Edwards on Bills and Pleadings, 123; 1 Johns. (N. Y.) Ch., 438; 1 Sch. & L., 386; 2 Sch. & L., 159; 3 Madd. Ch., 791; Myl. & K., 116. And it was further contended, that upon a fair construction of Mr. Mandeville's will, John West is residuary devisee, and not, as declared by the testator, residuary legatee.

As to a fair construction of the will—is Mr. West a residuary devisee, or residuary legatee?

Mandeville, the testator, by his will, makes him, in plain terms, his residuary legatee, and upon a careful inspection of the whole will it is not perceived how he is to be considered a residuary devisee. Mr. Mandeville was a remarkably intelligent man,—well understood the true import of words, and if he intended to make Mr. West his residuary devisee, why did he not say so? Why speak of his "heirs" if he intended that Mr. West should be his residuary devisee? If residuary devisee, then there was an end to all heirships, and the reason which he assigned for appointing two executors was just as false as it was clearly absurd. Assuming, then, that he well understood the technical meaning of "residuary legatee," then Mr. West should not have been made a party—and touching the construction of wills, we find in the great case of *Thellu-*

son and Woodford, 4 Ves., 329, that the Master of the Rolls, when deciding upon that case, makes, among others, these remarks: "The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain the testator did not so intend." So in *Kennon and McRoberts and wife*, 1 Wash., 130, the president of the court observes: "In *Hodgson and Ambrose*, *Doug., 323, a distinction is made which seems to be a sensible one, to wit: 'If the testator use legal phrases, his intention should be construed by legal rules; if he use those that are common, his intention, according to the common understanding of the words he uses, shall be the rule.'" [*568

The above are a few of the many cases that might be adduced, but they are deemed quite sufficient for the present occasion.

As to the authorities relied on:

So far from ousting the court of jurisdiction in this case, they most conclusively establish it; consequently, they must have been cited and relied on to sustain that part of the demurrer which objects for want of proper parties, and as such we shall shortly review them.

Edwards on Bills and Pleading, 123. In that case it is said: "If a testator directs his debts to be paid out of his personal property, and the deficiency to be made up out of his real estate, and the personal property is not sufficient to pay the debts, a judgment creditor will have to make the personal representative and heir-at-law parties." Is Mr. West an heir-at-law in this case? Again, in the same book and same page, "neither the heir-at-law nor the personal representative were parties; in fact, the will had not been proved; there was no personal estate, and the executor refused to act, but the Master of the Rolls (Leach) ordered it to stand over for administration with the will annexed, and with leave to make the administrator and heir parties."

In the present case, has not the will been proved; the personal estate ascertained and duly administered, and a deficiency of personal assets clearly shown?

Where, then, is the analogy? and was this case decided under the influence of the statute of the 5 Geo. 2, ch. 7, or was it made upon common law principles? This would seem to be a necessary inquiry, because that statute enlarges the remedies of judgment creditors against the real estate of their debtors.

The cases of *Giffard* and *Hart*, reported in 1 Sch. & Lefroy, 386, and *Plunket* and *Joice*, 2 Sch. & L., 158, have no application to the present case, unless it shall first be made clearly to appear that the appellee occupies the same ground that he would do were he the heir-at-law of the late Mr. Mandeville.

Wiser v. *Blachly et al.*, 1 Johns. (N. Y.), Ch., 437. In this case the chancellor permitted the devisee of Vail to be made a party, because he had a direct interest in the event of the suit—was devisee; *and the bill sought to make liable *569] the timber on the very land devised to him. But in the present case, is West devisee? Very different are the rights of devisees and legatees; a difference too well defined and understood to need the slightest notice on our part. But these principles have no application to the present case, inasmuch as the bill does not seek to charge the real assets.

The case *Ex parte Garland*, 10 Ves., 110 *et seq.*, also relied on to defeat this claim, has no bearing upon the merits of this cause. There a certain sum, to wit £600, was embarked in the trade by the testator, and no more; and that trade carried on by the widow and executrix of the testator, and not by a copartner, under original articles of copartnership with the testator, wherein no sum is named, as in this case. In that case, distribution had long been made before the bankruptcy of the executrix; in this case, none has ever been made—in that case, the profits of the trade were to be applied for his widow's use, and for the maintenance and education of his children; but in this case, the profits, (if any) are to become a part of Mr. Mandeville's personal estate. Where, then, is the similarity between the two cases? It scarcely deserves, *en passant*, a notice. The Lord Chancellor in his decree employs the following language: "in this case," he remarks, "I fear I shall be under the necessity of contradicting the authority of a judge I most highly respect, feeling a strong opinion that only the property declared to be embarked in the trade, shall be answerable to the creditors of the trade. If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will which has authorized the trade to be carried on for the benefit of other persons. My opinion upon this case is, that it is impossible to hold that the trade is to be carried on, perhaps for a century, and at the end of that time the creditors dealing with the trade, are, merely because it is directed by the will to be carried on, to pursue the general assets distributed, perhaps, to fifty families."

But in this case, it was to be carried on, for about thirteen or fourteen months only, and without the slightest inconvenience either to "mankind" generally, or to the devisees and legatees of Mr. Mandeville in particular; nor has there been a distribution, either in part, or whole, of Mr. Mandeville's personal estate. Wherein, we again ask, do the cases assimilate?

**Ex parte Richardson et al. in re Hodgson et al.*, 3 Madd. Ch., 79. [*570

This case stands upon the same ground of *Ex parte Garland*, and consequently, this, like that case, is clearly distinguishable from the case now before the court, for the reasons already stated in regard to that case. *Thompson and Andrews*, 1 Myl. & K., 116.

This case bears no analogy whatever to the case now under consideration, and is very similar to the preceding cases of *Ex parte Garland*, and *Ex parte Richardson* and others. In this case, the testator merely expresses a wish, that the trade may be carried on by his widow and son, after his death, "for their joint benefit and mutual advantage." And in furtherance thereof, gives and bequeaths to them, all his "stock in trade of what nature or kind soever," by him "employed or used in said trade," claiming in no manner any future interest therein; consequently they traded on their own property, for their own benefit, and not upon the testator's, for he had embarked nothing therein, and therefore the creditors must have known upon whose responsibility they dealt, and we are entirely at a loss to imagine how this can be considered a *post mortem* partnership, and if not a partnership, by what legal ways and means could the testator's estate be liable.

In support of the 5th point, Mr. *Neale* referred to the following authorities:

3 Bos. & P., 620; 6 Cruise, 206, 207; 3 Mumf. (Va.), 76; 3 East, 516; 2 Mod., 313, 314; 12 Id., 593; 1 Ves. & B., 410; Doug., 739; 2 Cowp., 657; 1 Swans., 201.

Smith, for the defendant West, stated the following preliminary propositions:

1. That by a fair construction of the will, the entire real and personal estate (except the interest in the firm of Cawood an Company) vested in West as general residuary devisee and legatee, subject only to debts and legacies.

After showing, with some minuteness, how far the courts of England had gone in order to carry out the intention of the testator, he referred to the cases of 3 Pet., 346, and 6 Id., 68.

The introductory words of the will show an intention, in the testator, to part with his whole estate. To show the weight which courts have attached to the introductory clause of a will, and also what particular words and expressions, other than words of perpetuity * have been regarded as sufficient in devisees to pass an estate in fee, he cited, Forrester's Rep. (or Cas. temp. Talbot), 157; 2 Atk., 37; 3 P. Wms., 295; 1 Wils., 333; 2 Vern., 690; Preston on Estates, 90 *et seq.* 1st Am. ed.; 6 Com. Law Rep., 191; 1 Johns. (N. Y.), Ch., 494; 3 Cranch, 97; 1 Wash., 96; 3 Rand., 280.

*571]

The word "property" is sufficiently extensive, in connection with the general residuary clause, to pass real and personal estate. 1 Rev. Code of Va., 369, chap. 99, sect. 27; 11 East, 288, 516; 14 Id., 368; 17 Eng. Com. L., 280, 289; 2 Desaus. (S. C.), Ch., 573; 6 Serg. & R. (Pa.), 452; 1 Wash., (Va.), 45, 262; 11 East, 321; 1 Taunt., 288; 2 Vern., 564; 5 Burr., 26, 38; 1 H. Bl., 223; 5 Taunt., 268.

[Mr. *Smith* here analyzed the clauses of the will.]

Even the word "legacy" may be applied to real estate, if the context of the will shows that such was the testator's intention. 1 Burr., 268; 5 T. R., 716; 11 East, 245; 15 Id., 503.

2. That being directly and materially interested in the subject in controversy, West is a proper party. 1 Johns. (N. Y.), Ch., 437; 3 Id., 553.

3. That the general assets of the testator are not liable to the claim of the plaintiff in error; it being contracted since Mandeville's death. And that the testator, by the terms of his will, left nothing more at stake in the concern of Cawood and Company than his interest in the co-partnership at the time of his death.

A testator may sever a portion from the main body of his estate to follow the hazards of a trade; and the general assets, in such case, are not responsible.

The only case denying this is *Hankey* v. *Hammond*, Cooke's Bankrupt Law, 5th ed. p. 67, cited in a note to 3 Madd. Ch., 148. But this doctrine is reviewed in *Ex parte Garland*, a leading case, 10 Ves., 110. The latter case is supported by *Ex parte Richardson*, 3 Madd. Ch., 138, 157; also, in 1 Myl. & K., 116, the case of *Ex parte Garland* is reviewed and sustained. See also, *Pitkin* v. *Pitkin*, 7 Conn., 307, where there is a strong analogy to the case at bar.

The doctrine of *Ex parte Garland* has been incorporated into the elementary books. 3 Com. Dig., 609, pl. 12; 2 Madd. Ch., 651; 2 Roberts on Wills, 123.

[Mr. *Smith*, here compared the case at bar with the cases cited above.]

4. The general assets of the testator, not being liable to the complainant's *demand, and such liability being [*572 the only ground for equitable relief, the demurrer was properly sustained, and the bill dismissed as to all the defendants. 1 Gall., 630; 2 Vern., 292; 1 P. Wms., 682; 2 Ves., 101.

Jones, on the same side, said, that West had a right to be a party. Legatees are generally considered to be represented by executors, but it is not error if a legatee be made a party. Calvert on parties, 20, 21, 149, 171, 172.

It was a matter of discretion in the court below; and this court will not review it.

The executor did not file a proper answer, because he impliedly admitted that the estate was bound. He is a creditor.

The case in 11 Serg. & R. (Pa.), 41, relied on by the other side, is not in point, because there was an article in the original partnership for carrying it on.

Coxe, in reply and conclusion.

The counsel on the other side have not kept within the record. The surviving partner became insolvent, but the record does not show how. All parties considered the firm as the same after the death of Mandeville as it had been before; the executor, surviving partner and all, and the bill only charges the personal estate, not the real.

Was it necessary to make the devisee a party? The authorities are collected in Story's Eq. Plea., 135, 140, 141, 148, 150, 155.

The court would not dismiss the bill because the devisee was not made a party. 4 Wash. C. C., 202, 208; 3 Cranch, 227.

Cawood is certainly liable because he contracted the debt. Have we mistaken our remedy against him? We call upon him to account, which is a matter peculiarly appropriate to equity. If the bill is good against him alone, it ought not to have been dismissed.

A partnership can go on by will. 7 Pet., 594; 11 Serg. & R., (Pa.), 41.

Story on Partnership, sects. 195, 196. If it is restricted or limited, the burden of proving it is on the other side.

In *Ex parte Garland* there was a limited sum left for the use of the firm.

In 3 Madd. Ch., 145, each party put in a specific sum, and the

court ordered an account up to the time of the death; and said it depended on the will how the business was to be carried on.

*573] *Myl. & K., 116, is like the case in Maddock. As to the case in 7 Cow., (N. Y.), 312, limited partnerships are recognised in that state.

Mr. Justice STORY delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of Columbia, sitting in equity in the county of Alexandria.

On the 9th of July, 1836, Joseph Mandeville, deceased, by certain articles then executed, entered into partnership with Daniel Cawood, one of the defendants, for the term of three years from the 1st of September, 1835, under the firm of Daniel Cawood and Company. On the 3d of June, 1837, Mandeville made his last will, by which in the introductory clause he said: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal property as I may possess when called hence to a future state." He then proceeded to make sundry bequests of his real and personal estate to different persons; and then added: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay the same." He immediately added: "John West, one of the defendants, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult with and follow the advice of my executors in all concerning what I leave to him." The testator on the 11th of July, 1837, made the following codicil to his will: "It is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood and Company, shall be continued thereon until the expiration of the term limited by the articles between us; the business to be continued by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide." The testator appointed Robert J. Taylor and William C. Gardner (one of the defendants) executors of his will, and died in July, 1837. His will and codicil were duly proved after his death, and Taylor having renounced the executorship, Gardner took upon himself the administration of the estate under letters testamentary granted to him by the Orphans' Court of Alexandria county.

Cawood, after the testator's death, carried on the copartnership in the name of the firm, and failed in business before the regular expiration thereof, according to the articles.

*The present bill was originally brought against Cawood and Gardner, as executors of Mandeville, by the plaintiff, Burwell, alleging himself to be a creditor of the firm upon debts contracted with him by Cawood, on behalf of the firm, after Mandeville's death, viz. on a promissory note, dated the 28th of July, 1838, for $800, and on an acceptance of a bill of exchange drawn by Burwell on the same day for $1000, in favor of one William H. Mount, both of which remained unpaid. The bill charged the failure of Cawood in trade, and his inability to pay the debts due from the firm. It also charged that Gardner, the executor, had assets sufficient to satisfy all the debts of the testator, and all the debts of Cawood and Company; and it sought payment of the debt due to the plaintiff out of those assets.

The defendant, Gardner, put in an answer denying that he had such accurate information as to enable him to say whether the partnership funds in the hands of Cawood were sufficient to pay the debts of the firm or not; and not admitting that the assets of the testator in his hands were liable to the payment of the debts of the firm, and requiring proof of such liability, and alleging that he had not assets of the testator in his hands sufficient to satisfy the plaintiff's claims, after satisfying two specified judgments.

The defendant, Cawood, not having made any answer at this stage of the cause, the bill was thereupon taken against him *pro confesso*—subsequently he put in an answer; and thereupon it was, by consent of the plaintiff, and Cawood, and Gardner the executor, referred to a master to take an account of the assets of the testator, of the debts due to him, of the value of his real estate, and to settle the accounts and transactions of the firm of Cawood and Company until its termination, and of the individual partners with the firm, to take an account of the assets of the firm, and the outstanding debts of the firm, and the debts due thereto, &c.; and also to ascertain whether the debt due to the plaintiff arose in the partnership transactions, and is now due.

Cawood, by his answer, admitted generally the facts stated in the bill; but he also alleged that he neither admitted nor denied the insolvency of the firm, averring that he had satisfied claims against the firm since it terminated to the amount of about $14,000 from the firm funds, and was engaged in the collection of the outstanding debts due thereto, and that the firm still owed debts to the amount of about $7,000.

The master made his report in May, 1841; the details of which it *is not necessary to mention. In November, of the same year, it was referred to another commissioner [*575

to take an account of the assets of Mandeville in the hands of his executor, who afterwards made a report accordingly. At this stage of the proceedings, John West (the residuary legatee, so called in the will) claiming to be interested in the subject-matter, the bill was amended by making West a party; and he filed a demurrer to the bill. The demurrer was afterwards set down for argument, and the court being of opinion that the assets of Mandeville in the hands of his executor (Gardner) were not chargeable with any debt contracted by Cawood in the name of the firm, after the death of Mandeville, sustained the demurrer, and dismissed the bill with costs. From this decree of dismissal the present appeal has been taken to this court.

The argument has spread itself over several topics, which are not in our judgment now properly before us; whatever may have been their relevancy in the court below. The real question, arising before us upon the record, is, whether the general assets of the testator, Mandeville, in the hands of his executor, are liable for the payment of the debt due to the plaintiff, which was contracted after Mandeville's death. If they are not, the bill was properly dismissed, whatever might be the remedy of the plaintiff against Cawood, if the suit had been brought against him alone, for equitable relief, upon which we give no opinion. In general the surviving partner is liable at law only; and no decree can be made against him, although he may be a proper party to the suit in equity, as being interested to contest the plaintiff's demand, unless some other equity intervenes; and so it was held in *Wilkinson* v. *Henderson*, 1 Myl. & K., 582, 589.

The bill, as framed, states the insolvency of Cawood, and seeks no separate relief against him, and therefore, if it is maintainable at all, it is so solely upon the ground of the liability of the general assets of Mandeville to pay the plaintiff jointly with the partnership funds in the hands of Cawood. In respect to another suggestion, that West was not a necessary party to the bill, in his character of residuary legatee of the personalty, that may be admitted; at the same time it is as clear, that as he had an interest in that residue, if Mandeville's general assets were liable for the plaintiff's debt; and therefore, the plaintiff might at his option join him in the suit, and if West did not object, no other person would avail himself of the objection of his misjoinder.

Then, as to the liability of the general assets of Mandeville in the hands of his executor for the payment of the plaintiff's debt—we are *of opinion that they are not

*576]

so liable; and shall now proceed to state the reasons for this opinion.

By the general rule of law, every partnership is dissolved by the death of one of the partners.(*a*) It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner too may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But, then, in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress.

A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testators's estate, although the partner or executor, or other person carrying on the trade may be personally responsible for all the debts contracted. This is clearly established by the case *Ex parte Garland*, 10 Ves., 110, where the subject was very fully discussed by Lord Eldon, and *Ex parte Richardson*, 3 Madd. Ch., 138, 157, where the like doctrine was affirmed by Sir John Leach (then Vice-chancellor), and by the same learned judge, when Master of the Rolls, in *Thompson* v. *Andrews*, 1 Myl. & K., 116. The case of *Hankey* v. *Hammock*, before Lord Kenyon, when Master of the Rolls, reported in Cooke's Bankrupt Law, 67, 5th ed., and more fully in a note to 3 Madd. Ch., 148; so far as may be thought to decide that the testator's assets are generally liable under all circumstances, where the trade is directed to be carried on after his death, has been completely overturned by other later cases, and expressly overruled by Lord Eldon in 10 Ves., 110, 121, 122, where he stated that it stood *alone, and [*577

(*a*) See *Scholfield* v. *Eichelberger*, 7 Pet., 586.

he felt compelled to decide against its authority. The case of *Pitkin* v. *Pitkin*, 7 Conn., 307, is fully in point to the same effect, and indeed, as we shall presently see, runs *quatuor pedibus* with the present.

And this leads us to remark, that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may all be re-called, if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would, or might postpone the settlement of the estate for a half-century, or until long after the trade or continued partnership should terminate. Lord Eldon, in 10 Ves., 110, 121, 122, put the inconvenience in a strong light, by suggesting several cases where the doctrine would create the most manifest embarrassments, if not utter injustice; and he said, that the convenience of mankind required him to hold, that the creditors of the trade, as such, have not a claim against the distributed assets in the hands of third persons, under the directions in the same will, which has authorized the trade to be carried on for the benefit of other persons. This, also, was manifestly the opinion of Sir John Leach in the cases 3 Madd. Ch., 128; 1 Myl. & K., 116, and was expressly held in the case in 7 Conn., 307.

Keeping these principles in view, let us now proceed to the examination of the will and codicil in the present case. There can, we think, be no doubt, that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words to his will already cited, show such an intention in a clear and explicit manner. The testator there says: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal estate as I may possess, when called hence to a future state." He, therefore, looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect; be-
*578] cause the residuary clause declares John West his "residuary legatee" only, and *not his residuary devisee also; and that we are to interpret the words of the will accord-

ing to their legal import as confined altogether to the residue of the personal estate. This is, in our judgment a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskilful man and not versed in legal phraseology. The cardinal rule in the interpretation of wills is, that the language is to be interpreted in subordination to the intention of the testator, and is not to control that intention, when it is clear and determinate. Thus, for example, the word "legacy" may be construed to apply to real estate where the context of the will shows such to be the intention of the testator. Thus in *Hope* v. *Taylor*, 1 Burr., 269, the word "legacy" was held to include lands, from the intention of the testator deduced from the context. The same doctrine was fully recognized in *Hardacre* v. *Nash*, 5 T. R., 716. So, in *Doe dem. Tofield* v. *Tofield*, 11 East, 246, a bequest of "all my personal estates" was construed upon the like intention to include real estate. But a case more directly in point to the present, and differing from it in no essential circumstances, is *Pitman* v. *Stevens*, 15 East, 505. There the testator, in the introductory clause of his will, said: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts is paid. I hereby appoint Capt. Robert Preston my residuary legatee and executor." The testator then proceeded to give certain pecuniary legacies, and finally recommended his legatee and executor to be kind and friendly to his brother-in-law J. C., &c., and begs him to do something handsome for him at his death, &c. The question was, whether Preston was entitled to the real estate of the testator, under the will; and the court held that he was; and that the words "residuary legatee and executor," coupled with the introductory clause and the recommendation clearly established it. Upon that occasion, Lord Ellenborough, after referring to the words of the introductory clause, said: "Then he appoints Capt. P. his residuary legatee and executor—residuary legatee and executor of what? of all that he should die possessed of, real and personal, of what nature and kind soever; that is, of all he should not otherwise dispose of. The word 'legatee,' according to the cases, particularly *Hardacre* v. *Nash*, may be applied to real estate, if the context requires it, as was said by Lord Kenyon upon the word 'legacy.' Then, in the subsequent parts of the will, he contemplates that his residuary legatee and executor will have the disposition *of his [*579 whole funds, but after some legacies and annuities, he recommends him to be kind and friendly to his brother-in-law, &c."

In the present case it is plain that the testator contemplated

some positive benefit to West, when he designated him as his residuary legatee; and yet, at the same time, he contemplated that his personal property might not be sufficient to cover the amount of legacies given by his will; and in that event he directs his executors to dispose of so much of his real estate as will fully pay his legacies; so that, if we restrain the words "residuary legatee" to the mere personalty, we shall defeat the very intention of the testator, apparent upon the face of the will, to give some beneficial interest to West, in an event which he yet contemplated as not improbable. On the other hand, if we give an enlarged and liberal meaning to the residuary clause as extending to the real estate, it will at once satisfy the introductory clause, and upon a deficiency of the personal assets will still leave an ample amount to the beneficiary, who appears to have been an object of the testator's bounty. But if this interpretation should be (as we think it is not) questionable; one thing is certain, and that is, that the testator did not contemplate that his personal assets would not be more than sufficient to pay all his debts; for he does not charge his real estate with his debts, but only with his legacies, in case of any deficiency of personal assets; and the residuary clause, if it were limited to the mere residue of his personal assets would also show that the testator did not provide for any debts which should arise from any subsequent transactions after his death.

If this be so, then we are to look to the codicil to see whether any different intention is there disclosed in clear and unambiguous terms. In the first place, the language of the codicil is just such as the testator might properly have used, if he intended no more than to pledge his funds already embarked in the partnership for the payment of the partnership debts. The codicil says, "It is my will that my 'interest' in the co-partnership, &c., shall be continued therein until the expiration of the term limited by the articles." Now, his interest in the firm then was his share of the capital stock and profits, after the payment of all debts and liabilities due by the firm. It is this interest, and not any new capital which he authorizes to be embarked in the firm. He does not propose to add any thing to his existing interest, but simply to continue it as it then was. How, then, can this court say, that he meant to
*580] embark all his personal assets in the hands of his executor as a pledge for the future debts, *or future responsibilities or future capital of the firm? That would be to enlarge the meaning of the words used beyond their ordinary and reasonable signification. And besides, it is plain that the testator did not mean to have the payment of his legacies

indefinitely postponed, until the expiration of the articles, and the ascertainment and final adjustment of the concerns of the firm, which might perhaps extend to ten or twenty years. So that to give such an enlarged interpretation to the terms of the codicil, (as is contended for,) for the codicil must be construed as if it were incorporated into the will, would be to subject the legatees to all the fluctuations and uncertainties growing out of the future trade, and might deprive the residuary legatee of every dollar intended for his benefit. There is another consideration of the matter, which deserves notice. Would the real estate of the testator, upon a deficiency of his personal assets, be liable for the debts of the firm contracted after his death, by mere operation of law, as it would be for such debts as were contracted in his lifetime? If it would, then it is apparent, that all the legatees and devisees might in the event of the irretrievable and ruinous insolvency of the firm be deprived of all their legacies and devises, although the legacies were charged upon the real estate. If it would not, then it is equally apparent that the testator did not contemplate any liability of his general assets, real and personal, for the payment of any debts, excepting those which were subsisting at the time of his death. There is yet another consideration, not unimportant to be brought under review. It is, that the whole business of the firm is to be conducted by Cawood alone, and that neither the executor nor the legatees are authorized to interfere with or to scrutinize his transactions. Such an unlimited power over his whole assets by a person wholly unconnected with the administration of his estate could scarcely be presumed to be within the intention of any prudent testator. If to all these we add the manifest inconveniences of such an interpretation of the codicil, thus suspending for an indefinite time the settlement of the estate and the payment of the legacies, it is not too much to say that no court of justice ought upon principle to favor, much less to adopt it.

And, certainly, there is no authority to support it; at least none except *Hankey* v. *Hammock*, which cannot now, for the reasons already stated be deemed any authority whatsoever. On the other hand, the case *Ex parte Garland*, 10 Ves., 110, and *Ex parte Richardson*, 3 Madd. Ch. 138, although distinguishable from the present in *some of their circumstances, were reasoned out and supported upon the broad and general principle that the assets of the testator were in no case bound for the debts contracted after his death by the persons whom he had authorized to continue his trade, but the rights of such new creditors were exclusively confined to the funds [*581

embarked in the trade and to the personal responsibility of the party who continued it, whether as trustee, or as executor, or as partner—unless, indeed, the testator has otherwise positively and expressly bound his general assets. The case of *Pitkin* v. *Pitkin*, 7 Conn., 307, is however, (as has been already suggested,) directly in point. There, the testator, by his will directed, "that all his interest and concern in the hat manufacturing business, &c., as then conducted under said firm, should be considered to operate in the same connection for the term of four years after his decease, &c." The court there held, after referring to the cases in 10 Ves., 110, and 3 Madd. Ch., 138, that the general assets of a testator were not liable to the claims of any creditors of the firm who became such after the testator's death; and that such creditors had no lien on the estate in the hands of the devisees under the will, although they might eventually participate in the profits of the trade. There was another point decided in that case, upon which we wish to be understood as expressing no opinion.

Upon the whole, our opinion is, that the decree of the Circuit Court dismissing the bill ought to be affirmed with costs.

ORDER.

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 now here 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.

SALLY LADIGA, PLAINTIFF IN ERROR, *v.* RICARD DE MARCUS ROLAND, AND PETER HIEFNER, DEFENDANTS.

By a treaty made between the United States and the Creek tribe of Indians, east of the Mississippi river, on the 24th of March, 1832, it was stipulated. *582] 1. That ninety principal chiefs of the tribe should be allowed to select one section each. *2. That every other head of a Creek family should be allowed to select one-half section each; and that these tracts should be reserved from sale, for their use, for the term of five years, unless sooner disposed of by them. 3. That twenty selections should be made, under the direction of the President, for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President should direct. *Held:* That in making the selections for the orphan children, the President had no authority, under the treaty, to choose any land embraced by the two preceding

clauses; and that a grandmother, living with her grandchildren, was the head of a Creek family, and had a right to make a selection; and the sale of her selection under the authority of the President was a nullity.[1]

THIS case was brought up, by writ of error, under the 25th section of the Judiciary act, from the Supreme Court of the state of Alabama.

On the 24th of March, 1832, a treaty was made between the United States and the Creek tribe of Indians, east of the Mississippi river.

The articles of this treaty which bear upon the present case are as follows:

"Article I. The Creek tribe of Indians cede to the United States all their lands east of the Mississippi river.

"Art. II. The United States engage to survey the said land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed to allow ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one-half section each, which tracts shall be reserved from sale for their use for a term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in one body in a proper form. And twenty selections shall be selected, under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President may direct. Provided, however, that no selection or locations under this treaty shall be so made as to include the agency reserve.

"Art. III. These tracts may be conveyed by the persons selecting the same, to any other person for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be *valid till the [*583
President approves the same. A title shall be given by the United States on the completion of the payment.

"Art. IV. At the end of five years all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee-simple from the United States.

"Art. V. All intruders upon the country hereby ceded, shall be removed therefrom in the same manner as intruders may be

[1] RELIED ON, *Chamberlain* v. *Marshall*, 8 Fed. Rep., 409.

removed by law from other public land until the country is surveyed, and the selections made; excepting, however, from this provision, those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from the selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

"Art. VI. Twenty-nine sections in addition to the foregoing may be located, and patents for the same shall then issue to those persons, being Creeks, to whom the same may be assigned by the Creek tribe.

"Art. XV. This treaty shall be obligatory to the contracting parties, as soon as the same shall be ratified by the United States."

Sally Ladiga claimed to be the head of a Creek Indian family, and, as such, entitled to a reservation of land. Being ejected, she brought an action of trespass *quare clausum fregit* to try her title, in the Circuit Court of Benton county, state of Alabama, and recovered. But the case having been carried to the Supreme Court of Alabama, the judgment was reversed. Upon the certificate of the Supreme Court being produced in the Circuit Court, on the second trial, judgment was given for the defendant; which judgment was subsequently affirmed in the Supreme Court of the state.

To review this judgment the present writ of error was brought.

The facts of the case and ruling of the court are set forth in the following bill of exceptions.

Be it remembered that upon the trial of the above entitled cause the plaintiff claimed title to the land in controversy under and by virtue of the treaty made and concluded between the United States of America and the Creek tribe of Indians east of the Mississippi river, on the 24th day of March, A. D. 1832, the plaintiff introduced the following witnesses, viz.: *584] Chr. A. Green, John Goodwyn, Horatio *Griffin, Benjamin Pope, Thomas C. Henderson, John Boyd, Thomas E. Montgomery, and Matthew M. Houston, by whom she proved substantially the following facts:

1. That said plaintiff, at the date of treaty aforesaid, to wit, on the 24th March, 1832, and long anterior to that period, and from thence to the present time, was and is the head of the Creek Indian family residing in and having an improvement

upon the E half of section 2, township 14, range 8 E, &c., in the district of land subject to sale at Mardisville, in the state of Alabama, which land is situate in Benton county, and is the same sued for in this action.

2. That the said land at the commencement of this suit, and ever since, has been, and is worth three thousand dollars and more. That the rents and profits of the same, since the institution of this suit, have been worth more than two thousand dollars. That the rents and profits have been received by defendants, who had the possession of said land at and before the commencement of this suit, and from thence until the present time.

3. It was further proved by said witnesses, that at no time was there any other Indian improvement on the said land, and that the improvement and residence of the plaintiff alone was embraced in said half section by the legal lines of survey, and that plaintiff had lived there for many years, and raised a numerous family of children.

4. It was further proved, by the production of the census roll taken by order of the government of the United States, of the heads of families of the Creek tribe, in conformity with the second article of the treaty aforesaid, that the plaintiff was duly enrolled by the agent of the United States charged with this duty, as one of the heads of families belonging to the said Creek tribe, and as entitled to land under said treaty —her identity being shown by the witnesses.

5. That in 1834, the government, by agents charged with this duty, located the Indians. That the formula of location, as practiced by said agent, consisted in calling the Indians belonging to the respective Indian towns together, and in the presence of the chiefs and head men in the town, the agent would call over the names registered by the enrolling agent as being the heads of families in that town. That the persons whose names were so registered would appear and answer to their names, and their identity and residence, and also their improvements, would be proved, &c., pointed out by the chiefs and head men so assembled; and the agent would then designate by figures and letters, the land opposite the name of each reservee *on said census roll, to which he [*585 supposed them entitled under the treaty.

6. That upon the agent coming into the Tallasahatchee town of Indians, for the purpose of making the locations aforesaid, the plaintiff appeared before him, and being identified as the same whose name was enrolled on the census list of said town, claimed the land in dispute, on which her improvement, at the date of the treaty aforesaid, was situated, and

which she then informed him she had selected as her reservation—there being no other improvement, location, or conflicting claim thereto at that time. That the deputy locating agent, who located the town to which she belonged, not regarding her the head of a family, by reason of her children having married and left her, and none but orphan grandchildren residing with her, refused to recognize her rights under the treaty, or set apart the land so by her selected opposite her name on the roll, as in other cases. That from the date of the treaty aforesaid, until the year 1867, she made continual and repeated applications to the government officers, to assert her rights to said land, and through them to the government itself; until, in 1837, she was forced to leave the country and emigrate to Arkansas, by the armed troops in the employ and under the directions of the government. That she never had abandoned her claim, but insisted on her right under the treaty, to enforce which this action was brought. M. M. Houston, who was the locating agent, testified as to the reasons which induced him to refuse a recognition of plaintiff's right.

The defendant then introduced a patent or grant from the United States, signed by the President, Martin Van Buren, dated the 21st day of December, 1837, which, after reciting that by virtue of the treaty aforesaid of the 24th March, 1832, between the United States and Creek tribe of Indians, the United States agreed that twenty sections of land should be selected, under the direction of the President, for the orphan children of said tribe, and divided and retained or sold for their benefit, as the President might direct; and that the President, in making such selection, had included section 2, township 14, range 8 east, and divided the same into quarter sections; and said tract having been sold pursuant to instructions, Canton, Smith, and Heifner had become the purchasers of the south-east quarter of said section, which purchase had been sanctioned and approved by the President on the 3d November, 1836—gave and granted to said Canton, Smith, *586] and Heifner, the said south-east quarter, to them, their *heirs, &c., forever, as tenants in common, and not as joint-tenants; which grant being properly attested, was read to the jury. Another patent or grant from the government of the United States, similar in all its form to that above named, and containing like recitals, bearing the same date and properly authenticated, conveying the north-east quarter of said section to Richard de Marcus Roland, was offered and read to the jury. And this being all the testimony, the plaintiff's counsel asked the court to charge the jury as follows:

1. That if they believed from the evidence that the defendants were in possession of the land sued for at the institution of this suit, and continued to hold the same adversely, receiving the rents and profits thereof; and that if from the evidence the jury were further satisfied that the plaintiff, at the date of the treaty made and concluded at the city of Washington between the United States of America and the Creek tribe of Indians east of the Mississippi river, to wit, on the 24th day of March, 1832, was the head of a Creek Indian family, and that the United States enrolled her name under the provisions of the treaty aforesaid, requiring a census to be taken, &c., as the head of a Creek family; and that said plaintiff, before and at the time of the ratification of said treaty, and from thence until she was forced to leave the country by the United States, possessed said lands sued for, having an improvement and residence upon the same; and if the jury believe from the testimony that said plaintiff did select the said half section, including her improvement, and that such selection was so made without conflicting with the rights of any other Indian, or the rights or duties of the government reserved, secured, or prescribed by the treaty aforesaid, and if the proper officers of the government were duly notified of such selection by the said plaintiff, and that she had never forfeited her rights by a voluntary abandonment of the lands sued for, but had been compelled by force or coercion on the part of the United States, to emigrate from the country and leave the land, then the plaintiff is entitled to recover in this action.

2. The plaintiff asked the further charge—that under the second article of the said Creek treaty of the 24th March, 1832, each head of a Creek Indian family, after the land ceded by said treaty had been surveyed, was entitled to select a half section of land so as to include their improvement, if the same could be made; and if the jury believed from the proof that the plaintiff was the head of a Creek family, and entitled to a selection under the treaty, and that *after such survey [*587
she could select, and did select, the half section in dispute, and in a reasonable time notified the government of such selection, and had never voluntarily abandoned said land; then plaintiff in such case acquired a vested right to said land inchoate, but sufficient under the laws of this state, coupled with possession, to maintain this action, and that such right could not be defeated by the subsequent disposition of the same by the United States to the defendants.

3. The plaintiff asked the court further to charge the jury: that if the plaintiff was entitled to select a half section of

land, under the treaty aforesaid, as the head of a Creek family, duly enrolled as such, and the selection could have been so made, and was so made, as to include her improvement within the selection; that in such case the treaty itself located the plaintiff; and if the government, with a knowledge of such selection and location, exposed the land to sale, or reserved it for other purposes, such sale or disposition could not prejudice the right of the plaintiff. All which charges the court refused to give, and in lieu of them charged the jury: that notwithstanding the plaintiff was the head of a Creek family, duly enrolled as such by the authorized agent of the government, and entitled to select a half section under the second article of the treaty of the 24th March, 1832; and that although, after the land ceded by the treaty aforesaid had been surveyed, she could have selected, and did select, the half section in dispute, which included her improvement, and of which selection she duly notified the government; yet the refusal of the locating agent to recognise her right and to set apart the land by a designation of it opposite her name upon the roll, as in other cases of location, coupled with the subsequent sale and grants of the same land to the defendants by the United States, whether right or wrong, divested the plaintiff of all right to said land, and vested in the defendants in this action titles paramount, which the plaintiff could not gainsay or dispute. To which refusals of the court to give the charges asked by the plaintiff, and to the charge given in lieu of them by the court, the plaintiff excepts, and now here tenders this bill of exceptions, which is signed and sealed by the court, and ordered to be made a part of the record of this cause, which is accordingly done.

This opinion of the court of Benton county being, as has been said, affirmed by the Supreme Court of the state of Alabama, the present writ of error was brought to review it.

*588] * *Coxe*, for the plaintiff in error.

Coxe referred to the treaty, (8 Laws United States, 1077,) and commented on the several articles of it. He then argued that the treaty, *per se*, vested a title in the plaintiff, and cited the following cases where the point had been decided as arising under a treaty of 1819 with the Cherokees. 3 Yerg. (Tenn.), 445, 452; 7 Id., 46; 8 Id., 249, 461; 6 Port. (Ala.), 327, 413.

Mr. Justice BALDWIN delivered the opinion of the court.

Both parties claim the land in controversy under the United

States, in virtue of the treaty of Washington, made on the 24th March, 1832, between the United States and the chiefs of the Creek tribe of Indians. The decision of the Supreme Court of Alabama was against the title set up by the plaintiff, the case is therefore properly brought here under the 25th section of the Judiciary act of 1789. [The articles of the treaty are set forth in the statement of the reporter.] By an inspection of the second article it will be seen, that there are three distinct classes of selections to be made from the ceded lands, for the benefit of the Indians, after the lands are surveyed.

1. The United States engage to allow ninety principal chiefs to select one section each.

2. And every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census is to be taken of these persons, and the selections are to include the improvements of each person within his selection.

3. And twenty sections shall be selected under the direction of the President, for the orphan children of the Creeks, and divided, retained, or sold, for their benefit, as he may direct.

By article third these tracts may be sold by the persons selecting them, to any persons, as the President may direct, and a title shall be given by the United States, on the completion of the payment of the consideration. The fourth article stipulates, that at the end of five years, those entitled to these selections, who are desirous of remaining, shall receive patents; and by article fifth, all intruders shall be removed from these selections, for five years after the treaty, or until the same are conveyed to white persons. By article sixth, twenty-nine sections more may be located, and patents shall issue to the Creeks to whom the same may be assigned by the tribe. The fifteenth article makes the treaty obligatory on the parties, when ratified by the United States.

[*589 *The engagements of the treaty then are, to allow the chiefs and heads of families to select, for their own use, and reserve from sale for five years, the lands selected, that they may be sold and conveyed with the approbation of the President, and titles to be given by the United States, on payment of the purchase-money, and at the end of five years to give patents to all who are entitled to select and desirous of remaining, and to remove intruders from their selections, during that time, till they are conveyed to white persons.

The lands to be selected for the orphans are placed under the exclusive direction of the President, as to their location

and disposition, and are not embraced in the third or fourth articles, which are confined to selections made by the Indians themselves,—these are expressly reserved from sale for five years, whereas the selections for orphans may be made and the lands sold at any time the President directs.

No authority is given to the President to direct the selection of the twenty sections for orphans, on or out of those made by the chiefs or the heads of families, or those sections which the tribes may assign under the sixth article; all the lands so selected or located are placed beyond the power of any officer, consistently with the obligatory engagements of the treaty on the United States. In directing the selections for orphans, the treaty did not intend, and cannot admit of the construction, that they might be made on lands selected according to the first part of the second article. The provisions of the treaty were progressive—that relating to orphans is entirely prospective. "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward, and are never to be construed retrospectively, unless the language of the act should render that indispensable. No words are found in the act which renders this odious construction indispensable." 2 Pet., 434. The last clause in this article cannot have been intended to annul or impair a title which was valid under the first clause, and guarantied from intrusion under the fifth article for five years, unless sooner sold. S. P. 9 Wheat., 479.

Thus taking the treaty, and applying it to the evidence given at the trial, the instructions prayed of the court, and those given to the jury, it will not be difficult to decide in which party is the right of this case.

The plaintiff "proved substantially the following facts." [For the facts proved upon the trial, see the statement of the reporter.]

*590] From the evidence it appears that the plaintiff claimed under the *first, and the defendants under the second clause of the second article of the treaty; that the plaintiff was the head of a family within the description, and had complied with all the requisites of the treaty, had selected the tract whereon her improvements were, where she resided before, at the time of the treaty, and until her expulsion therefrom by military force, on the frivolous pretence that she was not the head of a family, her children having married and left her, and none but her grandchildren lived with her. The defendants claimed under the second clause of the second article, relating to orphans' selections, by two patents dated in 1837, each for a quarter section, being the two halves of the

half section selected by the plaintiff, which patents issued pursuant to a sale made by the agent appointed by the President, and affirmed by him in November, 1836, five months before the expiration of five years from the ratification of the treaty, and while the land was expressly reserved from sale. The defendants gave no other evidence of title.

This sale was a direct infraction of the solemn engagements of the United States in the treaty. Though approved by the President, if the plaintiff had previously selected it according to the stipulations of the treaty, in such case the sale was a nullity, for the want of any power in the treaty to make it. The President could give no such power, or authorize the officers of the land-office to issue patents on such sales; they are as void as the sales, by reason of their collision with the treaty. The only remaining inquiry is into the plaintiff's title. No other objection has been made to it, than the refusal of the locating agent or his deputy, to recognize her right, under the treaty, or to set apart the land so located by her opposite her name on the roll, as in other cases, solely for the reasons he assigned. We cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty, it must shock the common sense of all mankind to even doubt it. It is as incompatible with the good faith and honor of the United States, and as repugnant to the Indian character, to suppose that either party to the treaty could contemplate such a construction to their solemn compact, as to exclude such persons from its protection, and authorize any officer to force her from her home into the wilds of the far west. Such an exercise of power is not warranted by the compact, and the pretext on which it was exercised is wholly unsanctioned by any principle of law or justice.

Having a right by the treaty to select the land of her residence; *having selected, and been driven from it by lawless forces, her title remains unimpaired. She has not slept on her rights, but from 1832 to 1837 has made continuous and repeated applications to the government officers to assert her rights to said land, and through them to the government itself in 1837. She has never abandoned her claim, but has insisted on her rights under the treaty. [*591

In our opinion, the plaintiff not only has a right to the land in question under the treaty, but one which it protects and guaranties against all the acts which have been done to her prejudice; and we are much gratified to find in the able and sound opinion of the Supreme Court of Tennessee, on the Cherokee treaty of 1819, and the Supreme Court of Alabama

on this treaty, a train of reasoning and conclusions which we very much approve, and are perfectly in accordance with our opinion in this case. These cases are reported in 2 Yerg. (Tenn.), 144, 432; 5 Id., 323; 5 Port. (Ala.), 330, 427.

The judgment of the Supreme Court of Alabama is therefore reversed.

ORDER.

This cause came on to be heard on the transcript of the record, from the Supreme Court of the state of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the state of Alabama in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court of the state of Alabama, that further proceedings may be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

LESSEE OF JOHN POLLARD, WILLIAM POLLARD, JOHN FOWLER AND HARRIET HIS WIFE, HENRY P. ENSIGN AND PHEBE HIS WIFE, GEORGE HUGGINS AND LOUISA HIS WIFE, JOSEPH CASE AND ELIZA HIS WIFE, PLAINTIFF IN ERROR, *v.* JOSEPH F. FILES, DEFENDANT.

It is the settled doctrine of the judicial department of the government, that the treaty of 1819 with Spain ceded to the United States no territory west of the river Perdido. It had already been acquired under the Louisiana treaty.

*592] In the interval between the Louisiana treaty and the time when the United *States took possession of the country west of the Perdido, the Spanish government had the right to grant permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes.[1]

These incipient concessions were not disregarded by Congress, but are recognised in the acts of 1804, 1812 and 1819; and, as claims, are within the act of 1824.

That act (of 1824) gave a title to the owners of old water-lots, in Mobile, only where an improvement was made on the east side of Water street, and made by the proprietor of the lot on the west side of that street. Such person could not claim as riparian proprietor, or where his lot had a definite limit on the east.[2]

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[1] CITED. *Ping* v. *Hatch*, 1 New Mex., 129.

[2] See *Barry* v. *Gamble*, 3 How., 54 *Pollard* v. *Hagan*, Id., 212, 231, 233.

THIS case was brought, by writ of error under the 25th section of the Judiciary act, from the Supreme Court of the state of Alabama.

It was an ejectment, brought by the plaintiff in error, in the Circuit Court of the state of Alabama for Mobile county, to recover a lot in the city of Mobile, on the east side of Water street.

By the original plan of the town, a street was laid off, called Water street, on the margin of the river, running nearly north and south, which was afterwards filled up; and by the improvement, the water, at high tide, was confined to the eastern edge of the street.

Pollard's heirs, claimed under a Spanish grant from Perez, in 1809, to Pollard the ancestor, which grant, as they alleged, was saved in the act of Congress of 1824, and expressly admitted in an act of 1836, entitled "An act for the relief of William Pollard's heirs," under which a patent issued, embracing the premises in question.

The defendant, Files, connected himself with three different branches of title.

1. That of Forbes and Company.
2. That of Curtis Lewis.
3. That of the corporation of the city of Mobile.

1. The title of Forbes and Company.

They held a grant from the Spanish government for a lot fronting upon Royal street (which is the next on the west to Water street) and running back 304 feet to the east, to a water-lot. It was alleged that the act of Congress of 1824 (cited at large in the report of the case of the *City of Mobile* v. *Emanuel et al.*, 1 How., 95, vested a title in the water-lot to them as proprietors and occupants of the lot fronting on the river Mobile.

2. The title of Curtis Lewis.

It was alleged that he had made an improvement upon the water-lot, and thus brought himself within another clause of the act of 1824.

*3. The title of the city of Mobile.

It was alleged that Congress, by the act of 1824, had [*593 granted to the city of Mobile "all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any former act, between high water-mark and the channel of the river," &c.; and that Pollard's claim not coming within any of the exceptions, the title of the United States passed to the city of Mobile. In this view, the United States in 1836, of

course, had no title which they could transfer to Pollard's heirs.

The case was tried in the Circuit Court of the state, and the opinion of the court upon the law was in favor of the defendant, Files: it was carried by Pollard to the Supreme Court of the state, by which the judgment was affirmed, and to review this opinion the present writ of error was brought.

The facts are set forth in the bill of exceptions taken in the court below, which is as follows:

Bill of Exceptions.

Be it remembered, that in the term of the Circuit Court begun and held in and for the county of Mobile and state of Alabama, on the fifth day of May, in the year of our Lord one thousand eight hundred and forty-one, before the Honorable E. S. Dargan, judge of the tenth judicial district, came John Doe, by his attorney, George F. Sallè, and impleaded Bernard De Sylva, in whose stead the landlord, Files, was admitted to defend in a plea of trespass in ejectment, upon the demise of John Pollard, William Pollard, John Fowler and Harriet his wife, late Harriet Pollard, Henry P. Ensign and Phebe his wife, late Phebe Pollard, George Huggins and Louisa his wife, late Louisa Pollard, Joseph Case and Eliza his wife, late Eliza Pollard, for a term of years not yet expired, to a certain lot or parcel of land lying in the city of Mobile, between Church street and North Boundary street, and bounded on the north by the south side of what was formerly called John Forbes and Co.'s canal, on the south by what was called the King's wharf, on the West by Water street, and on the east by the channel of the river; and thereupon issue was joined between the said lessors of the plaintiffs and the said Files, who, at the trial, in pursuance of an act of the legislature of Alabama, passed on the eighth day of January, one thousand eight hundred and thirty-six, entitled "An act for the relief of tenants in possession against *dormant titles," suggested to the court that he and those whose estate he has in the lands or tenements sued for have had adverse possession of the same for three years next before the commencement of such suit, and have made valuable improvements on the lands, so on which suggestion issue was joined; also, on the day and year aforesaid, the said issues so joined, between the said parties as aforesaid, came to be tried by a jury for that purpose duly empannelled and sworn; at which day came there as well the said plaintiffs as the said defendant, by their respective attorneys; and the plaintiffs, in order to maintain the issue on their part, gave in evidence an act of

*594]

Congress passed on the 26th day of May, one thousand eight hundred and twenty-four, entitled "An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city." They further gave in evidence an act of Congress passed July 2, 1836, entitled "An act for the relief of Wm. Pollard's heirs." They further gave in evidence a patent issued on the fourteenth day of March, one thousand eight hundred and thirty-seven, in pursuance of said act of Congress of July 2, 1836, which patent embraced the premises in question. They further gave in evidence a Spanish grant, of which the following is a translation:

Mr. COMMANDANT:—William Pollard, an inhabitant of this district, before you, with all respect represents: that he has a mill established upon his plantation, and that he often comes to this place with planks and property from it, and that he wishes to have a place propitious or suitable for the landing and safety thereof, and that, having found a vacant piece at the river side, between the canal which is called John Forbes and Co.'s and the wharf at this place, he petitions you to grant him said lot on the river bank, to give more facility to his trading; a favor he hopes to obtain of you.

Mobile, 11th December, 1809. WILLIAM POLLARD.

Mobile, 12*th December*, 1809.

I grant the petition; the lot or piece of ground he prays for, on the river bank, provided it be vacant.

CAYETANO PEREZ.

The plaintiff then proved the genuineness of the signature of Cayetano Perez, and referred to the state papers relating to the public lands to show the different periods during which Perez was in command.

The plaintiff then gave in evidence that the premises sued for *were situated between Church street and [*595
North Boundary street and immediately in front of lots known under the Spanish government as water-lots, and that the said lot now sued for was, in the year one thousand eight hundred and twenty-four, and is now, known as a water-lot; that it lies on the east side of Water street; that what is now Water street was, under the Spanish government, and at the date of the grant to Forbes and Co., hereafter attached, a natural ridge, and that the ordinary tides did not overflow said ridge, and very high tides entirely covered said ridge; that to the north of the lots lying immediately west of the lot sued for, near Conti street, there was a depression in said ridge, where

the water at high tide, flowed around upon the eastern part of the lots lying, as before stated, immediately west of the lot sued for, and which were known as water-lots under the Spanish government.

The plaintiffs then gave in evidence that John Forbes and Co. applied for and obtained permission, from the Spanish government, to open or cut the canal which was called John Forbes and Co.'s canal, after they had obtained a grant for the lot lying immediately west of said canal.

The defendant, in order to maintain the issue on his part, gave in evidence a Spanish grant to John Forbes and Company, for a lot of ground eighty feet front on Royal street, with a depth of three hundred and four feet to the east, which is hereto attached and marked A, together with the plat or survey thereto attached, which is made part of this bill of exceptions; and proved that the said lot was situated immediately west of the lot sued for, and was separated from it now only by Water street; but that Water street was not known at the date of this grant, and that said street was laid off in 1820 and 1821. The defendant further gave in evidence a certificate of confirmation for the said lot to John Forbes and Company, who were the successors of Panton, Leslie and Company, the original grantees, which is also made a part of this bill of exceptions, and marked B, by which it will appear that 304 feet were confirmed to Forbes and Company.

The defendant also proved that one Curtis Lewis, some time in 1822 or 1823, sunk some flat boats in the canal called Forbes and Company's, and proceeded to fill up the lots now sued for, but that one James Inerarily, one of the firm of Forbes and Company, dispossessed him in the night, and erected a smith's-shop, and continued in possession about nine months, when Curtis Lewis regained possession by writ of forcible entry and detainer.

*596] *It further appeared in evidence that the ridge in Water street was about fifteen or twenty feet in width, and that it was covered by the ordinary tides for about one-third of its width, up to the year 1822, and that all the land east of Water street, as at present laid out, up to 1813, was below the ordinary high water-mark. It further appeared that the firm of Forbes and Company entered upon the lot granted to them as aforesaid, and made valuable improvements on it, and fulfilled the conditions of the grant, and on the 25th May, 1824, held the land to the west of Water street without dispute.

It further appeared that the first improvements on the lot east of Water street were made by Curtis Lewis, except the canal, and improvements along it, of John Forbes and Com

pany; but it was also in evidence that, in 1811, a witness had seen the servants of William Pollard removing some drift wood and piling some lumber on the lot in question.

The nature and extent of Curtis Lewis's improvements are before stated. The reports of Commissioner Crawford, upon the titles before referred to, were read from 3d volume of the State Papers, and they are understood to form a part of this bill of exceptions.

E. S. DARGAN, [L. S.]

The defendant then connected himself with the title of Curtis Lewis, Forbes and Company, and the corporation of the city of Mobile, which claimed the same by virtue of the act of 1824 above referred to.

In the progress of the trial, when the plaintiffs offered in evidence the Spanish grant to Pollard, the defendant's counsel offered evidence, the object of which was to prove that the date of the grant had been altered, the plaintiffs' counsel objected to the introduction of the evidence for that object, but was overruled by the court, to which he excepted. The defendant then passed the grant to the witnesses, who, upon an inspection of the same, were of opinion that the figures 09, in the date of 1809, on the face of the grant, had been altered.

The plaintiff then offered witnesses who proved, that having inspected it with a spy-glass, the alteration was from 1810 to 1809. Plaintiffs also proved that Cayetano Perez was commandant at Mobile in 1810.

The defendant further gave in evidence that he had made valuable improvements on the lot sued for since the 8th day of January, 1836, to the value of $7,000; whereupon the plaintiffs, by their counsel, prayed the court to charge the jury, First, that the said Spanish grant made to William Pollard was ratified and confirmed by the 8th article *of [*597
the treaty of amity, settlements and limits, between the United States and his Catholic Majesty, dated 22d February, 1819, which charge the court refused to give; to which the plaintiffs, by their counsel, excepted.

The plaintiffs then, by their counsel, prayed the court to charge the jury that the act of Congress of 26th May, 1836, confirmed the said Spanish grant to Pollard; which charge the court refused to give, but on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the premises sued for were vested in Forbes and Company, and that the acts of Congress of 1824 and 1836, and the patent in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of

plaintiff by virtue of said acts of Congress and said patent; to which charge the plaintiffs excepted.

The plaintiffs, by their counsel, then prayed the court to charge the jury, that if they should find that an alteration had been made in the date of Pollard's Spanish grant, advantage could not be taken of it in an action of ejectment, but by a *sci. fa.* in the name of the general government, or a bill in equity; which charge the court refused to give, but, on the contrary, charged, that if they should believe that the date had been altered, that they should find for the defendant, unless they were satisfied from the evidence that, though altered, it was made in fact whilst Perez was commandant; that the alteration of the date would not affect the grant if Perez was commandant at the time of the execution; but that if altered, the law would not presume that the grant was made while Cayetano Perez was commandant, but that this must be shown by the evidence; to which charge, so given, and the refusal to charge as prayed, the plaintiffs excepted.

The plaintiffs then prayed the court to charge the jury, that the act of January 8th, 1836, passed by the legislature of Alabama, entitled "An act for the relief of tenants in possession, against dormant titles," is contrary to the tenth section of the first article of the Constitution of the United States, and is therefore void; which charge the court refused to give, but, on the contrary, charged that it is constitutional; to all which the plaintiff excepted, and prayed the court to sign and seal this his bill of exceptions, which is done.

E. S. DARGAN, Judge. [L. S.]

It has been before stated, that this opinion of the court was affirmed by the Supreme Court of the state of Alabama. The *598] following extract from the opinion of the latter court, is given, in order that the remarks *made by the Supreme Court of the United States may be fully understood.

"If the law, as laid down by a majority of the court, in the *Lessee of Pollard's heirs* v. *Kibbie*, 14 Pet., 353, is to be regarded as decisive of the law applicable to the plaintiff's title, and as excluding all objection to it, then the answer given by the Circuit Court to the second charge prayed is confessedly erroneous. Of the authority of that case we have nothing to say. We may, however, be permitted to remark, with all deference, that we should yield to it more willingly, if it had the sanction of a majority of the Supreme Court. We are aware that, as reported, the judgment seems to have been concurred in by five of the justices; but we have in our possession a manuscript copy of the opinions of Justice Thompson, McLean,

Barbour, and Catron, and the judgment that was rendered; at the foot of which is the following memorandum: 'Dissenting justices, Catron, Barbour, and Wayne. Mr. Chief Justice Taney did not sit in this case.' Attested as follows, 'True copy, test. Wm. Thos. Carroll, C. S. C., U. S.' That Mr. Justice McKinley was absent during the entire term, appears from a note of the reporter. If the attestation of the clerk be correct, then but four of the justices concurred in reversing the judgment of this court. And to all this, it may be added, that Mr. Justice McLean did not agree to the judgment of reversal, so far as we are informed by his opinion, upon the ground that the grant to William Pollard in 1809 was a 'new grant' within the meaning of the act of the 26th of May, 1824. But he yielded his assent to the conclusion of Mr. Justice Thompson (as we understand it), because the second section of that statute required the improvement to be made on the lot east of Water street, and to entitle the proprietor of the lot, immediately west of the water-lot, the improvement should have been made by himself. These were questions, which, it seemed to us, were wholly unimportant to be considered, unless Pollard's was a 'new grant,' since it is an undisputed principle, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's.

"We have taken this view of the case referred to, with the most profound respect for the Supreme Court of the United States, and have only to say, that we hope an opportunity may soon be afforded for a re-examination of the act of 1824."

Coxe, for the plaintiff in error.
Sergeant, for the defendant.

[*599

*Coxe contended,

1. That the judgment below was erroneous, and ought to be reversed.

2. That the Circuit Court erred in refusing to give the instructions as prayed by the plaintiff.

3. That it erred in giving the instructions which were given to the jury.

He considered the principle of the present case as decided in *Pollard's heirs* v. *Kibbie*, 14 Pet., 353. The same grant was there brought under review; and it was decided that the act of 1836 was a private act which Congress had power to pass; that the claim of Pollard was excepted in the 2d section of the act of 1824, and that the term "new" applied to grants made after the cession of Louisiana. Pages 350, 362, 364.

He referred also to 16 Pet., 234, where the question came

up again, and quoted passages from pages 247, 251, 257, 265, 422, 427; from all which he inferred that the question had been decided and the rights under it settled.

Sergeant, for the defendant in error, said he did not mean to question any point decided in 14 Peters, but argued,

I. The plaintiff below had no right.

1. He derived no right from the act of 1824, because he was not within the act; and, also, because the United States had nothing in the premises to grant.

2. He derived no right from the act of 1836, and the patent under it, as well for the reasons already stated, as because the right of the United States, if any they had, was already granted by the act of 1824 to those under whom the defendant claims.

II. The court did not err in refusing to give the instructions asked for by the plaintiffs, nor in giving the instructions which they did give.

III. The court did not err in refusing to instruct the jury that the act of 8th January, 1836, is contrary to the Constitution of the United States; and, if they did, it is immaterial, as the plaintiffs were barred on other grounds.

This is a different case from Kibbie's, and not covered by that decision. There was an error in fact there which misled the court, and which was not discovered until this case was tried. The claim is to a place between high and low water-marks, and the grant called for fast land. The grant was not surveyed or recorded.

*600] *1. The plaintiff derived no right from the act of 1824, because he was not within it. He cannot bring himself within any of the exceptions. He never owned a water-lot, nor made any improvements. 7 Laws United States, 318, act of 26th May, 1824.

If it be said that the plaintiff claims under a new and valid grant, the answer is, that if there was any grant at all, it was issued when Spain had no power to make one. In *Pollard's lessee* v. *Kibbie*, the paper was said to have been executed on December 12, 1809, and the court took this for granted. It was the foundation of the opinion. 14 Pet., 351. But this record shows that the date was altered, and that 1809 was not the true one. The jury found the fact of the alteration from 1810 to 1809, and if issued in 1810, Perez had no authority to make the grant.

The alteration must be presumed to be made after execution. Pet. C. C., 369. And the materiality of the alteration is a question for the court. 1 Pet., 552.

Perez, in 1810, having no power to grant, the basis of the plaintiff's title is gone, and the case infected with fraud.

The act of 1824, says the "Spanish government must have made a new grant or order of survey for the same, during the time at which they had the power to grant the same;" and although the judges differed as to the precise time when Spanish authority ceased, all agreed that it was extinct on the 12th December, 1810. Opinion of Judge Baldwin, pages 368, 369, 370; of Judge McLean, 366; of Judges Catron and Barbour, 426, 428; Thompson, 355.

The proclamation of the President was in October, 1810. The point decided in Kibbie's case was that the grant was issued when the Spanish government had a right to do it, and the case stood upon that. At page 361, Judge Thompson says the grant was dated 12th December, 1809, and was rejected by the commissioner because there were no improvements on the lot.

But possession is required to create a title. 1 How., 95.

2. The plaintiff derived no right from the act of 1836, or the patent under it. That act is only a quit claim on the part of the United States, but they had nothing to grant. All their title had previously been granted to Forbes and Company, or to the city of Mobile, and the defendant unites those titles. The grant to Forbes and Company ran to the water; they had fulfilled all the conditions, had entered and made improvements before the act of 1824 passed. There was no Water street; nothing to divide them from the river. [*601
*The act of 1824 vested a title *per se*, and the parties had nothing to do but go into court and show the facts in evidence. If the act of 1836 be considered as explanatory of that of 1824, it is dangerous to construe a general act by a private one, obtained by a party for his own benefit. The true construction of that of 1824 is that the improvement must be made on the old lot; that every one who went to the water should not be cut off from it. It supposes an inchoate right to the lot in front, because an exception is, if a party has alienated the lot in front. He must, therefore, have had a right to alienate.

In Eslava's case, the record showed that the party who owned the old lot had improved both the old and new. The question, therefore, did not come up.

[The arguments of both counsel as to the right of the state of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the court does not touch upon that point.]

Coxe, in reply.

It is said that the improvement must be upon the old lot, but, in 14 Pet., three of the judges dissented on this ground, and in 16 Pet., the court confirmed the dissent, and said it must be on the new lot. 16 Pet., 247.

It has been said that Forbes and Company were riparian proprietors, running down to the water. But their grant calls only for a certain number of feet; and it was confirmed by the commissioner just in that way.

It has also been said, that the grant of 1809 was void. But the plaintiff has a patent under the act of 1836. If the plaintiff had recovered below, and the defendant had excepted to instructions, the question about the grant would have come up. The President's proclamation was in 1810, but no act of Congress was passed until 1811, and the country was not taken possession of until after that act. The record shows that evidence was given on the trial that Perez was commandant in 1810.

The volume of State Papers referred to, shows that Perez issued a grant in May, 1811, and even as late as November, 1811. Vol 3, Public Lands, 450, 454.

Mr. Justice CATRON delivered the opinion of the court,

*602] For the facts of the case, we refer to the report of it. It presents *the same titles, and, substantially, the same facts, that were before this court in *Pollard's heirs* v. *Kibbie*, 14 Pet., 353.

The first instruction asked by the plaintiff of the state Circuit Court is, that the Spanish grant made to William Pollard was ratified and confirmed by the eighth article of the treaty with Spain of 1819, by which the Floridas were acquired. This the court refused to give; and correctly.

It is the settled doctrine of the judicial department of this government, that the treaty of 1819 ceded no territory west of the river Perdido, but only that east of it: and therefore all grants made by Spain after the United States acquired the country from France, in 1803, are void, if the lands granted lay west of that river; because made on territory acquired by the treaty of 1803; which extended to the Perdido east. It was thus held in *Foster* and *Elam* v. *Neilson*, 2 Pet., 254, and again in *Garcia* v. *Lee*, 12 Pet. 515, and is not now open to controversy in this court.

2. The plaintiffs then, by their counsel, prayed the court to charge the jury that the act of Congress of 26th May, 1836, confirmed the said Spanish grant to Pollard; which charge the court refused to give, but, on the contrary, charged the jury, if they believed the evidence to be true, the fee-simple to the

premises sued for were vested in Forbes and Co., and that the act of Congress of 1824, and 1836, and the patent in pursuance thereof, were utterly void, so far as relates to the premises in question, and that no title vested in the lessors of plaintiff by virtue of said acts of Congress and said patent; to which charge the plaintiffs excepted.

The questions raised by the instruction asked and refused, and that given, will be examined so far only as to decide the present case.

This court held, when Pollard's title was before it, formerly, that Congress had the power to grant the land to him by the act of 1836: on this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama, in the present case refers, (in its opinion in the record,) grew out of the construction given by a majority of the court to the act of 1824, by which the vacant lands east of Water street, were granted to the city of Mobile. That grant excepted out of it, all lots to which, "the Spanish government had made a new grant, or order of survey for the same, during the time at which they had the power to grant the same." If Pollard's was such a "new grant," then [*603
the land *covered by it was excepted and did not pass to the city; and the act of 1836, and the patent founded on it, passed the title to Pollard.

After the country west of the Perdido had been acquired by the treaty of 1803, the Spanish government continued to exercise jurisdiction over the country, including the city of Mobile, for some nine years; the United States not seeing proper to take possession, and Spain refusing to surrender it, on the assumption that the country had not been ceded by that kingdom to France in the treaty of 1800; and of course that it did not pass to this country by our treaty with France. That Spain had no power to grant the soil, during the time she thus wrongfully held the possession, is settled by the cases cited of *Foster & Elam* v. *Neilson;* and *Garcia* v. *Lee*. But the right necessarily incident to the exercise of jurisdiction over the country and people rendered it proper that permits to settle and improve, by cultivation, or to authorize the erection of establishments for mechanical purposes, should be granted. And to this end the concession to Pollard, of December, 1809, was made. He set forth in his petition to the commandant, that he had a mill established on his plantation, and often came to Mobile with planks and property from it; and that he wished a place propitious and suitable for the landing and safety thereof; and having found a vacant piece at the river side, between the canal of Forbes and Co. and the public

wharf, he solicits the commandant to grant him said lot on the river bank, to give more facility to his trading. This lot the governor granted to Pollard for the purpose set forth by him.

The use, for the purpose solicited, during the time the Spanish authorities were exercised, could be properly granted: of this there can be no doubt.

Very many permits to settle on the public domain and cultivate, were also granted about the same time; which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. Pollard's was also of this description. Although the United States disavowed that any right to the soil, passed by such concessions; still they were not disregarded as giving no equity to the claimant: on the contrary, the first act of Congress passed (of April, 25, 1812) after we got possession of the country, appointed a commissioner to report to Congress on them in common with all others originating before the
*604] treaty of 1803 took effect. The third section orders all persons, claiming lands, in *the previously disputed territory "by virtue of any grant, order of survey, or other evidence of claim, whatsoever derived from the French, British, or Spanish governments, to be laid before the commissioner, with a notice in writing, stating the nature, &c., of the claim." On these, (by sec. 5,) the commissioner had power given him to inquire into the justice, and validity of the claims; and in every case it was his duty to ascertain whether the lands claimed had been inhabited and cultivated; at what time the inhabitation and cultivation commenced; when surveyed and by whom; and by what authority—and into every matter affecting their justice and validity.

By sec. 6, abstracts were to be furnished to the Secretary of the treasury, of the claims, arranged in classes, according to their respective merits; and these abstracts, &c., were to be laid before Congress, for their determination thereon, &c.

By sec. 8, the commissioner was ordered to report to Congress at its next session, a list of all actual settlers on the land in his district, who had no claims derived from either the French, British, or Spanish governments, and the time such settlements were made.

In January, 1816, the report of Commissioner (Crawford) was laid before Congress. 3 Am. State Papers, 6, "Public Lands."

The 14th sec. of the act of March 26th, 1804, declares all grants void if made for lands within the territories ceded by the French republic to the United States, by the treaty of the

13th of April, 1803, (and which had been acquired by France from Spain,) that had been made after the date above. Provided, that the law should not be construed to make void any *bona fide* grant made by the Spanish government, to an actual settler on the lands granted, for himself, and for his wife and family, &c. On Pollard's claim the commissioner reported unfavorably, because it had "not been inhabited nor cultivated." 3 State Papers, 18. The bill of exceptions refers to this report as it stands in the book, as part of the bill of exceptions, and as such it is treated by us.

In April, 1818, by a resolution of the senate, it was referred to the Secretary of the treasury to furnish a plan, for an adjustment of the claims reported on by the commissioners east and west of Pearl river: and on the 7th of December, 1818, the secretary made his report in the form of a bill. 3 State Papers, 391. On all the imperfect claims favorably reported on, by the commissioners, derived *from the [*605 authorities of Spain before the 20th of December, 1803, a confirmation was recommended: And the land that had been cultivated on or before that day, should be confirmed also, as if the titles had been completed. And as to all the other claims favorably recommended to Congress by the commissioners, the claimant should be entitled to a grant therefor, as a donation—not to exceed to any one person more than six hundred and forty acres: That all settlers before the 15th of April, 1813, shall receive a grant for the land claimed, not exceeding six hundred and forty acres, if actually inhabited and cultivated.

On this report the act of March 3d, 1819, was founded—and by sec. 2, each settler with title-papers, had confirmed to him his habitation as a donation, not to exceed one thousand two hundred and eighty acres; and this irrespective of the time when the settlement was made, if previous to the 15th of April, 1813; but the grant not to exceed six hundred and forty acres to such settlers as had presented no written evidences of title.

By the 7th, 8th, and 9th sections, those who had filed their notices of claim before the commissioner, and which had not been recommended for confirmation, were allowed to the 1st of July, 1820, to file additional evidence in support of the claim with the register and receiver of the land-offices respectively established by that act, in the country divided by Pearl river; who had the same powers conferred on them that the commissioner previously had. New claims might also be filed. On these the register and receiver were to report; of course, after the 20th of July, 1820. The land-office for the

country including Mobile was at Jackson court-house. Thus the matter stood for eight years.

By the act of March 3d, 1827, further time was given to the first of September, 1827, to claimants whose evidences of claim had been previously filed with the commissioner, to produce further evidence and "to present their titles and claims, and the evidence in support of the same, to the register and receiver of the land-office at St. Stevens." By sec. 2, they were ordered to hold their sessions at the city of Mobile, and there examine the suspended claims on the same principles the commissioner had done.

Thus suspended and protected, stood the title of Pollard when the act of 1824 was passed granting to the city of Mo-
*606] bile the river front. And from any thing appearing to the contrary, it stood equally *protected until confirmed by the act of 1836. It was for the sovereign power to judge of its merits; it had never been rejected, and was awaiting the final action of Congress. Furthermore; it was from its situation as a city lot not subject to entry in a land-office, being in no survey of the public lands: and it is a fair construction of the exception to the act of 1824, to hold Pollard's claim was intended to be within the following exception; as well as the one commented on in *Pollard* v. *Kibbie:* That is—"Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual, or of any body politic or corporate."

We think Pollard's was a claim of an individual within the exception, and was so deemed by Congress; as the United States, by the first section, only profess to grant their right to the city front: and except all lots confirmed by Congress by that, or any previous act—and also such "to which an equitable title existed in favor of any individual under this, or any former act." Then in the second section, the provision examined in the case of *Pollard* v. *Kibbie* has direct reference to protection by excepting lots—"to which the Spanish government had made a new grant or order of survey," &c. It is obvious the previous obscurity and confusion were intended to be explained by the proviso: simply expressed, that nothing which preceded should affect any individual claim—regardless of the fact whether it was good or bad, so it was a recognized claim by the United States. That Pollard's was so, is most apparent by the protection afforded to it: and such is the unanimous opinion of this court, for the reasons formerly and now given, taken together.

Pollard's patent is therefore valid, unless the second instruc-

tion given be true—that the act of Congress of 1836, and the patent founded on it be void, as relates to the subject in controversy; and therefore the lessors of the plaintiff derived no title from these sources, because the fee-simple of the premises was in John Forbes & Co., when Pollard took his title.

It was held in the *City of Mobile* v. *Eslava*, 16 Pet., 247, that the improvements referred to in the act of 1824, by virtue of which a title was given to the owner of the old water-lot west of Water street, to the lot immediately east of it, must have been made on the new, and eastern water-lot: second, that such improvement must have been made by the proprietor of the old lot.

*Forbes and Co. had none such, and therefore took no benefit under the act of 1824. [*607

If the instruction intended to maintain that Forbes and Co., as riparian proprietors of the lot west of Water street, could claim all the land east of it, to the channel of the river, then we think the court erred: and we take it for granted the court so intended; as by no other means could the land sued for be claimed by Forbes and Co. from any evidence in the record. Their lot was a grant of 1802, for 80 feet front, by 304 feet deep, west of what is now Water street; and bounded on the east by the street as it now exists. High tide formerly reached it; low tide did not: But we deem this an immaterial circumstance. Forbes and Co.'s grant was a specific town lot bounded by streets, then existing or expected to exist; it fronted to the east on a contemplated street, reserved to the public use, as ungranted property; and it never was contemplated by the grant to give any right to the soil beyond its fixed boundary east, as actually surveyed. It does conform, and must conform, to the city arrangement of lots: if it was held otherwise, then every other proprietor of an old front lot could claim over the mud-flat to the channel of the river, as a riparian owner; sweeping through the city property as it now exists by filling up, and raising the flat, to the extent east of probably a thousand feet, or more. We deem such an assumption entirely inadmissible: and therefore think the court also erred in the second instruction given, as well as in refusing that asked on part of the plaintiffs.

With the third instruction this court cannot interfere: and the jury having found for the defendant, no question arises on the fourth instruction.

For the reasons assigned, we order the judgment of the Supreme Court of Alabama to be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court of the state of Alabama be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, that further proceedings may be had therein, in conformity to the opinion of this court, and as to law and justice shall appertain.

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*608] *JOHN L. MCCRACKEN, PLAINTIFF IN ERROR v. CHARLES HAYWARD.

A law of the state of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it will bring two-thirds of its valuation, according to the opinion of three householders, is unconstitutional and void.

The case of *Bronson* v. *Kinzie*, 1 How., 311, reviewed and confirmed.[1]

Where the Circuit Court, by a rule, adopts the process pointed out by a state law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of Congress or the state law professedly adopted.[2]

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the district of Illinois.

The case was this: In 1840, McCracken, the plaintiff in error, recovered a judgment in the Circuit Court against Hayward for the sum of $3,986.67 cents and costs.

In February, 1841, the state of Illinois passed the following law:

"An act regulating the sale of property.

"Sect. 1. Be it enacted by the people of the state of Illi-

[1] APPLIED. *Von Hoffman* v. *City of Quincy*, 4 Wall., 551; *Pritchard* v. *Norton*, 16 Otto, 132; *People ex rel.* v. *Otis*, 90 N. Y., 52. DISTINGUISHED. *New Orleans* v. *Morris*, 15 Otto, 603. FOLLOWED. *Curran* v. *Arkansas*, 15 How., 310, 319; *Edwards* v. *Kearzey*, 6 Otto, 601; *Travelers Insurance Co.* v. *Brouse*, 83 Ind., 66. CITED. *Cook* v. *Moffat*, 5 How., 315; *Planters' Bank* v. *Sharp*, 6 How., 328, 330, 332; *West River Bridge Co.* v. *Dix*, 6 How., 540; *Howard* v. *Bugbee*, 24 How., 465; *Butz* v. *City of Muscatine*, 8 Wall., 583; *Daniels* v. *Tearney*, 12 Otto, 419; S. C. 1 Morr. Tr., 289; *Kring* v. *State*, 4 Crim. Law Mag., 562. See *United States* v. *Bank of the United States*, 5 How., 391 *n*.

[2] CITED. *Ex parte Boyd*, 15 Otto, 651.

nois, represented in the general Assembly, That when any execution shall be issued out of any of the courts of this state, whether of record or not, and shall be levied on any real or personal property, or both, it shall be the duty of the officer levying such execution, to summon three householders of the proper county, one of whom shall be chosen by such officer, one by the plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer shall choose for them: which householders, after being duly sworn by such officer so to do, shall fairly and impartially value the property upon which such execution is levied, having reference to its cash value, and they shall endorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property shall be offered for sale, it shall not be struck off unless two-thirds of the amount of such valuation shall be bid therefor: Provided, always, that the plaintiff in any execution issued from any court of record of this state, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution. And in all other executions issued from any of the courts of this state not being courts of record, the plaintiff in execution may elect on what personal property he will have the same *levied; [*609 excepting and reserving, however, to the defendant in execution, in all cases, such an amount and quantity of property as is now exempt from execution by the laws of this state: And provided, further, that all sales of mortgaged property shall be made according to the provisions of this act, whether the foreclosure of said mortgage be by judgment at law, or decree in chancery. The provisions of this act shall extend to judgments rendered prior to the first day of May, eighteen hundred and forty-one, and to all judgments that may be rendered on any contract or cause of action accruing prior to the first day of May, eighteen hundred and forty-one, and not to any other judgments than as before specified.

"Sect. 2. When any property shall be levied on and appraised in the manner required by this act, and the same shall be susceptible of a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs, at two-thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection.

"Sect. 3. This act shall be in force from and after its passage, and the secretary of state is hereby required to have a

thousand copies thereof printed immediately after its approval, and transmit them to the clerks of the county commissioners' courts of the several counties in this state for distribution among the proper officers thereof. Approved February 27, 1841."

In June, 1841, the Circuit Court of the United States adopted the following rule:

"When the marshal shall levy an execution upon real estate he shall have it appraised and sold under the provisions of the law of this state, entitled 'An act regulating the sale of property,' approved 27th February, 1841, if the case come within the provisions of that law; and any two of the three householders selected under the law agreeing, may make the valuation of the premises required."

In May, 1842, a pluries execution was issued on the judgment, under which the marshal levied upon real estate, and advertised it for sale in the ensuing August. It was appraised by three householders, and no person bidding two-thirds of the valuation, it was not sold.

*610] In March, 1843, the plaintiff sued out a *venditioni exponas* to sell *the property levied upon as above stated; and in May served a written notice on the marshal, directing him not to have the property valued, but to sell it to the highest bidder, regardless of the statute of Illinois. The marshal replied that he conceived it to be his duty to be governed by the rule of court.

In June, 1843, the plaintiff, by his counsel, made the following motion to the court:

"1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return to the pluries execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two-thirds of appraised value.

"2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having it valued again.

"3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

"4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the act of February, 1841, of the legislature of Illinois, and of

January, 1843, regulating the sale of property, above referred to."

This motion was sustained by an affidavit, setting forth the facts in the case.

Upon the argument of the motion, the judges were divided in opinion upon the following points.

"1st. Whether the said motion shall be granted in manner and form as the same is asked, or refused, or any part thereof.

"2d. Whether the return of the marshal on the execution above set forth, dated May 16, 1842, under which the property was appraised and not sold, because two-thirds of appraised value was not bid therefor, shall or shall not be set aside as insufficient.

"3d. Whether the court shall or shall not make an order directing the marshal to sell the property levied on in the usual mode at public auction to the highest bidder, without having the same valued by three householders, and without regard to valuation which has *been made, and [*611 without requiring two-thirds of said valuation to be bid therefor.

"4th. Whether the court shall or shall not direct the marshal to proceed and sell the property levied upon without regard to the provisions of the act of February 27, 1841, of the legislature of Illinois, and the rule adopting said law at the June term, 1841.

"5th. Whether the court will or will not direct the enforcement of said judgment according to the laws regulating the remedy when said judgment was entered and the contract made."

Upon which certificate of division the cause came up to this court.

The case was submitted upon a printed argument by *Isaac N. Arnold*, counsel for the plaintiff, which the reporter regrets his limits will not allow him to re-publish.

Mr. Justice BALDWIN delivered the opinion of the court.

It appears from the record in this case, that the plaintiff obtained a judgment against the defendant, in June, 1840, on which a *pluries fi. fa.* issued at May term, 1842; real property was levied on; appraised according to the provisions of a law of Illinois, passed on the 27th February, 1841, and the rule of the Circuit Court of that state, adopted in June of the same year, which law and rule are inserted in the statement of the case by the reporter.

The property levied on was advertised for sale by the mar-

shal, in August, 1842, but was not sold, as no one bid two-thirds of the appraised value. In March, 1843, the plaintiff sued out a *venditioni exponas*, with directions to the marshal to sell the property, regardless of the state law, which the marshal refused to obey, conceiving himself bound by the aforesaid rule of court. Whereupon the plaintiff moved the court for an order directing the marshal to sell to the highest bidder, without valuation, or any regard to the state law.

"1. The plaintiff, by Arnold, his attorney, comes and moves the court to set aside the return to the pluries execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two-thirds of appraised value.

"2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having valued it again.

*612] *"3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

"4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the act of February, 1841, of the legislature of Illinois, and of January, 1843, regulating the sale of property above referred to."

On the argument of this motion, the court were divided in opinion on the points mentioned in the statement. These questions must be considered in two aspects, 1. In reference to the Constitution. 2. The laws of the United States, as the tests of the validity of the law of Illinois and the rule of court, which, it is said, affect only the remedy, but not the right of the plaintiff arising on the contract between the parties, and the judgment rendered upon it.

In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obli

gation to perform them by the one party, and the right acquired by the other.[1] There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

*This principle is so clearly stated and fully settled in the case of *Bronson* v. *Kinzie*, decided at the last term, 1 How., 311, that nothing remains to be added to the reasoning of the court, or requires a reference to any other authority, than what is therein referred to; it is, however, not to be understood that by that, or any former decision of this court, all state legislation on existing contracts is repugnant to the Constitution. [*613

"It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitation, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provision of a law may be so unreasonable as to amount to the denial of a right, and call for the interposition of the court." 3 Pet., 290.

The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out

[1] QUOTED. *Palmer* v. *Hixon*, 74 Me., 449.

and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions.[1] If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the Constitution made inviolable; and it can make no differ-
*614] ence whether such right is conferred by the terms or law of the contract. Any subsequent law which *denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case, as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. This was the ruling principle of the case of *Bronson* v. *Kinzie*, which arose on a mortgage containing a covenant, that, in default of payment, the mortgagee might enter upon, sell, and convey the mortgaged premises, as the attorney of the mortgagor; yet the case was not decided on the effect and obligation of that covenant, but on the broad and general principle, that a state law, which professedly provided a remedy for enforcing the contract of mortgage, effectually impairing the rights incident to, and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal, to sell and convey the property levied on, under an execution. He is the constituted agent of the defendant, invested with all his powers for these purposes. The marshal can do under the

[1] DISTINGUISHED. *Smith* v. *Atwood*, 3 McLean, 546.

authority of the law whatever he could do under the fullest power of attorney from the execution debtor; and no state law can prohibit it. It follows that the law of Illinois now under consideration, so far as it prohibits a sale for less than two-thirds of the appraised value of the property levied on, is unconstitutional and void.

The second aspect in which this case must be considered, is with reference to the acts of Congress relating to process and proceedings in the courts of the United States in cases at common law. All the early laws on this subject were carefully and most ably reviewed by this court, in *Wayman and Southard*, and the *Bank of the United States* v. *Halstead* in which it was held, that the proceedings in the *courts [*615 of the United States should be the same as they were in the several states at the time of passing the acts of Congress, subject to be altered by the Circuit Courts, or regulations of the Supreme Court. That the proceedings on executions were to be governed by such laws until final satisfaction was obtained, regardless of any subsequent changes by state legislation. 10 Wheat., 20, 51.

Prior to 1828, Congress had passed no process acts applicable to the states admitted into the union after 1789. To remedy this defect, and to confirm the decisions in the above cases, the act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon, shall be the same in each state as are now used in the courts of such state, &c.; thus adopting the same principles which had been established by this court in the construction of the acts of 1789 and 1792. Consequently no state law passed since May, 1828, can have any effect on the proceedings on executions issued from the courts of the United States, unless such laws are adopted by those courts under the proviso in the third section of the act.

The rule adopted by the Circuit Court of Illinois does not fall within this proviso, which declares, "that it shall be in the power of the courts, if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts."

This authorizes the court to adopt the change so made by a state law, but not to adopt it only in part, or alter it in any respect. The law directs the appraisement to be made by three householders, one to be selected by the defendant, one by the officer, and one by the plaintiff, without any authority to any two to make it, and, consequently, requiring the concurrence of all. The rule of court adopting this law provides, "that

any two of the three householders selected under the law agreeing, may make the valuation required,"—such an adoption is not warranted by the act of 1828; it is legislation in effect, by prescribing a new rule unknown to any act of Congress, or the state law professedly adopted. But had the adoption been in the terms of the law, it could not be recognized, inasmuch as the appraisement therein directed, with the prohibition to sell at less than two-thirds of the valuation, is repugnant to the Constitution of the United States. It also conflicts with the process acts, as construed *in *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, and the repeated decisions of this court in later cases—that no state law can be adopted under the act of 1828, which is in collision with any act of Congress. 16 Pet., 94, 312—314.

*616]

It must therefore be certified to the Circuit Court, that the motion made by the plaintiff's counsel ought to be granted, and that the directions to the marshal prayed for by the plaintiff, ought to be given in the manner stated in the second, third, fourth, and fifth points certified.

Mr. Justice CATRON.

The third section of the act of 1828, provides, "that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, (except their style,) in each state, respectively, as are now used in the courts of such state."

A system of rules has been adopted in the Circuit Court of the Kentucky district, regulating final process, and giving a widely different effect to such process from what it had by the laws of Kentucky; a violent controversy was the consequence in that state, and which gave rise to the cases of *Wayman* v. *Southard*, and *United States Bank* v. *Halstead*, reported in 10 Wheat. The agitation it is understood, was one prominent reason for the introduction of the act of Congress of 1828. It repealed all rules made by the courts of the United States regulating final process, in all the districts, and adopted the execution laws of the respective states, as they then stood; and if nothing more had been done, future legislation on the subject, by the states, would have been cut off. Congress, however, foreseeing new states might come into the Union, to which the act would not apply; and that it might be proper to adopt future state laws, in the existing states, provided—"that it should be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which

may be adopted by the legislatures of the respective states for the state courts."

An adoption of the state law, as the legislature had made that law, is the extent of the power conferred. If the courts can alter the law in one respect, it may be altered in all respects, this is not "conformity," but an exercise of the same power the act of 1828, *prohibited. The rule before [*617 us will illustrate it. The state law of Illinois enacts that, three valuers shall determine the value of the property levied on by the sheriff; one chosen by the plaintiff; one by the defendant, and the other by the sheriff; that the three must agree in the valuation; and if the property does not bring two-thirds of such valuation, it shall not be sold.

The rule provides, that if the appraisers disagree, the value fixed by any two of them shall be sufficient to authorize the marshal to sell. The debtor will naturally select one, who he supposes will set the highest value on the property; the creditor one he supposes will fix the lowest value; the marshal may be favorably disposed to the one side or the other; most probably to the absent creditor—the appraiser of his selection, and the one selected by the debtor, may agree, and usually would. This will cut out all the advantages the statute secured to the creditor, as his selection would have no effect: Take it the other way and the operation will be the same.

If this change were sanctioned, then, in Pennsylvania and other states, where there are statutes by which lands are directed to be valued by a jury of twelve, to ascertain whether the rents and profits will pay the debt in a given number of years; in which case, the debtor is compelled to take the accruing profits in satisfaction as they arise; and if not, then the lands are to be sold to the highest bidder, could also be altered, and by a rule of court, a majority of two-thirds of the jury be authorized to assess the annual income. It is manifest, if amendments and alterations can be made by the courts, of the state statutes, they must, of necessity, run into an unlimited discretion, if any one feature of the state law is retained. I therefore think the rule of court, adopting the statute of Illinois, with the foregoing amendment, is merely void; and that no part of the state statute is in force in the Circuit Court of the United States in the district of Illinois.

And not having been adopted, it is not before this court for construction; and that it is unnecessary and improper to inquire into the constitutionality of the state law, as the laws in force in 1828 must govern. In this respect, the opinion in the *United States Bank* v. *Halstead* is followed, where the precise question arising in the case before us was presented, (the

rule aside,) and in which this court then declined giving any
*618] opinion on the valuation law of Kentucky. I have formed no opinion, whether the statute of Illinois is *constitutional or otherwise. The question raised on it is one of the most delicate and difficult of any ever presented to this court; and as our decision affects the state courts throughout, in their practice, I feel unwilling to form or express any opinion on so grave a question, unless it is presented in the most undoubted form, and argued at the bar.

On the questions propounded by the certificate of division, I agree in the answers given by my brethren, because the execution is governed by the laws of Illinois as they stood at the passing of the act of Congress of 1828, without going farther, as I know the constitutional question will affect other states beside Illinois; many, not to say most of them have had, and some now have, valuation laws; in which no distinction is made between contracts made before the passing of the act, and those made afterwards, and that the decision against their validity as to past contracts, will reach a great way farther than may be supposed on a slight examination.

ORDER.

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 Illinois, 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, agreeably 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: 1st. That the motion made by the plaintiff's counsel ought to be granted in manner and form as the same is asked; 2d. That the return of the marshal on the execution as set forth, dated May 16, 1842, under which the property was appraised and not sold, because two-thirds of the appraised value was not bid therefor, should be set aside as insufficient; 3. That the court should direct the marshal to sell the property levied on in the usual mode at public auction to the highest bidder, without having the same valued by three householders, without regard to the valuation which has been made, and without requiring two-thirds of said valuation to be bid therefor; 4th. That the court should direct the marshal to proceed and sell the property levied upon without regard to the provisions of the act of Feb. 27, 1841, of the legislature of Illinois,
*619] and the rule adopting said law at the June term, 1841; and, 5thly and lastly, That the court should *direct the

enforcement of said judgment, according to the laws regulating the remedy when said judgment was entered and the contract made. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the judges of the said Circuit Court.

EDMUND P. GAINES AND WIFE *v.* BEVERLY CHEW, RICHARD RELF, AND OTHERS.

It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.[1]

A bill filed against the executors of an estate and all those who purchased from them, is not, upon that account alone, multifarious.

Under the Louisiana law, the Court of Probate has exclusive jurisdiction in the proof of wills; which includes those disposing of real as well as personal estate.[2]

In England, equity will not set aside a will for fraud and imposition, relief being obtainable in other courts.

Although by the general law, as well as the local law of Louisiana, a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoliated. And it is a matter for grave consideration, whether it cannot go further and set up the lost will.[3]

Where the heir at law assails the validity of the will, by bringing his action against the devisee or legatee who sets up the will as his title, the District Courts of Louisiana are the proper tribunals, and the powers of a Court of Chancery are necessary, in order to discover frauds which are within the knowledge of the defendants.

Express trusts are abolished in Louisiana by the law of that state, but that implied trust, which is the creature of equity has not been abrogated.

The exercise of chancery jurisdiction by the Circuit Court of the United States, sitting in Louisiana, does not introduce any new or foreign principle. It is only a change of the mode of redressing wrongs and protecting rights.

THIS case was a sequel to that which came before the court twice before, and is reported in 13 Pet., 404, and 15 Id., 9.[4]

[1] ADHERED TO. *Barney* v. *Latham*, 13 Otto, 215; s. c. 2 Morr. Tr., 649. APPROVED. *Oliver* v. *Piatt*, 3 How., 411. CITED. *Stafford Nat. Bank* v. *Sprague*, 8 Fed. Rep., 379; *Sheldon* v. *Keokuk &c. Packet Co.*, Id., 770; *Sheldon* v. *Keokuk &c. Packet Co.*, 10 Biss., 473; *De Wolf* v. *Sprague Manuf. Co.*, 49 Conn., 298; *Eastman* v. *Savings Bank*, 58 N. H., 421. See *Patterson* v. *Gaines*, 6 How., 550, 582.

[2] See *Adams* v. *Preston*, 22 How., 488; *Trustees* v. *Wilkinson*, 9 Stew. (N. J.), 142; *Southworth* v. *Adams*, 9 Biss., 523.

[3] See *Broderick's Will*, 21 Wall., 512.

[4] The same litigation is continued in various forms in the following cases: *Patterson* v. *Gaines*, 6 How., 550; *Gaines* v. *Relf*, 12 Id., 472; *Gaines* v. *Hennen*, 24 Id., 553; *Gaines* v. *New Orleans*, 6 Wall., 642; *Gaines* v. *De La Croix*, Id., 719; *New Orleans* v. *Gaines*, 15 Wall., 624; *Gaines* v. *Fuentes*, 2 Otto, 10; *Davis* v. *Gaines*, 14 Id., 386.

It came up again from the Circuit Court of the United States for the eastern district of Louisiana, sitting as a court of equity, on a certificate of a division of opinion in that court, upon the three following questions:

*620] *1. Is the bill multifarious? and have the complainants a right to sue the defendants jointly in this case?

2. Can the court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

3. Has the court jurisdiction of this case? or does it belong exclusively to a court of law.

The case was this, as set forth by the complainant; the defendant not yet having answered the bill.

It is stated with some particularity, because the counsel for the complainants dwelt strongly upon the injustice that would follow if such a case (supposed in the argument to be admitted by the demurrer) should prove remediless in a court of chancery. It is proper to refer to the report of the argument of the counsel for the defendants, in which he affirmed that the important facts alleged to exist by the complainant would be denied and disproved, if the court should be of opinion that the cause should go on. Some of the circumstances mentioned came out upon cross-examination.

In the year 1796, there was a French family by the name of Carriere, residing in New Orleans. One of the daughters was named Zuline, and about sixteen years of age. A person by the name of De Grange, came there and married her; they continued to live together for several years, until about the year 1800, when it was reported that De Grange had another wife living. A separation took place between him and Zuline. In 1802, she went to New York (where it was said De Grange's former marriage had been celebrated) to obtain proof of it; but the registry of marriages having been destroyed, the proof was not obtained. She then went to Philadelphia, where Mr. Gardette was living, who was one of the witnesses of the prior marriage, and confirmed it. Whilst she was there, she had a daughter, to whom the name of Caroline was given, and who is the same person spoken of in the proceedings in this suit, by the name of Caroline Barnes. Clark treated her as his child, and afterwards placed her to live with his mother.

In 1803, De Grange's first wife came from France to New Orleans, and he, being there also, was seized and prosecuted for bigamy. He was arrested and thrown into prison, but effected his escape, and never afterwards returned. Clark was

*621] married to Zuline in Philadelphia, in the same year, but required the marriage to be kept secret *until judi-

cial proof could be obtained of the nullity of her marriage with De Grange.

In 1805, Clark having returned to New Orleans and established Zuline in a separate establishment from his own, the commercial firm of Davis & Harper was formed, and rested almost entirely upon the credit furnished by Clark. In 1806, Zuline was about to give birth to another child, and, at the instance of Clark, arrangements were made by Davis for its being received into his (Davis's) family. It proved to be a daughter, and was called Myra. She was suckled by Mrs. Harper, who put out an infant of her own to enable her to do so. Clark treated her as his daughter, furnished her with expensive clothing and playthings, and purchased a servant for her use.

Shortly afterwards, Clark became a member of Congress, and was absent from New Orleans for a considerable length of time. During his absence, a report reached New Orleans that he was about to contract a marriage at the north, and Zuline, whose feelings were fretted and irritated by his refusal to promulgate their marriage, sailed for Philadelphia, to obtain the legal proofs of her own marriage. When she arrived there, she was told that the priest who had performed the ceremony, was gone to Ireland. Being informed by counsel, whom she consulted, that she would not be able to establish the validity of her marriage, she determined to have no further communication with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia.

Clark returned to New Orleans. In 1811, being about to visit Philadelphia on a special emergency, he made a provisional will, as follows:

Daniel Clark. In the name of God: I, Daniel Clark, of New Orleans, do make this my last will and testament.

In primis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the state of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate my friend, Richard Relf and Beverly Chew, my executors, with power to settle every thing relating to my estate.

Ne varietur. New Orleans, 20th May, 1811.

Signed J. PITOT, *Judge.*
DANIEL CLARK.

*About the time of executing this will, he conveyed [*622

to Joseph Bellechasse about fifty lots in the city of New Orleans, in the suburbs or fauxbourg St. John's, near the bayou of that name, in fee-simple, with the confidential understanding that they were to remain under his control for the use and benefit of his daughter Myra.

On the 27th of May, 1811, Clark, being so far upon his voyage, wrote to his friend Mr. Davis, the following letter:

Dear Sir:—We are preparing to put to sea, and I hope I shall have a pleasant passage, my stay will be but short in Philadelphia, unless a forced one. In case of any misfortune to me, be pleased to deliver the enclosed to General Hampton; I count on him as a man of honor to pay the amount of notes mentioned in my letter to him, which in that case you will dispose of as I have directed. It will naturally strike you that the letter to the general is to be delivered only in case of misfortune to me. Remember me kindly to Mrs. Davis and all your family. Yours,

Signed DANIEL CLARK.

P. S. Of the enclosed letter you will say unless in case of accident, when you may communicate it to Chew and Relf.

S. B. Davis.

The direction alluded to in the above, was to place the amount of the notes to the best advantage for his daughter Myra's interest. Having arrived safely at Philadelphia and remained there until July, he addressed the following letter to Mr. Davis, on the eve of his sailing for New Orleans, on his return:

Philadelphia, 12*th July*, 1811.

My dear Sir:—In case of any accident or misfortune to me, be pleased to open the letter addressed to me, which accompanies this, and act with respect to the enclosures as I directed you with respect to the other affairs committed to your charge before leaving New Orleans. To account in a satisfactory manner to the person committed to your honor, will, I flatter myself, be done by you when she is able to manage her own affairs; until when, I commit her under God to your protection. I expect to sail to-morrow for New Orleans in the ship Ohio, and do not wish to risk these papers at sea.

Yours,

Signed DANIEL CLARK.

S. B. Davis, Esq.

*623] *Upon Clark's safe arrival in New Orleans, Davis returned to him the package enclosed in the above let-

ter, and also the letter addressed to General Hampton in the letter which he had written from the Balize.

Upon Clark's return, Bellechasse also offered to reconvey the lots, which Clark declined, and Bellechasse continued to hold them until Clark's death, when he conveyed them in equal portions to Myra and Caroline, being influenced to include the latter by the representations of some of Clark's friends.

In 1812, Davis removed to the north with his family, carrying with him Myra, who passed for his daughter, and bore his name. He had then in his hands funds of Clark to the amount of $2,360, the interest of which, by arrangement between them, was to be applied towards her education.

In 1813, Clark died. It was alleged, that before his death he made an olographic will, leaving the bulk of his fortune to his daughter Myra. The circumstances under which he is represented to have made it, are thus detailed by some of the witnesses.

Dusuau de la Croix says, "that he was very intimate with the late Daniel Clark for a great many years, and up to the time of his death; that some few months previous to the death of Daniel Clark, he visited deponent on his plantation, and expressed a wish that he, deponent, should become his executor; deponent at first refused, but after a little, from the persuasion of said Clark, he consented to become his executor; that in this conversation, Clark spoke of a young female then in the family of Captain Davis, named Myra, that said Clark expressed a wish that deponent should become tutor to this female, and that she should be sent to France for her education, and that Mr. Clark would leave her a sufficient fortune to do away with the stain of her birth; that a month or two after this conversation at the plantation of deponent, he, deponent, called to see Clark at his house on the Bayou road, he there found him in his cabinet, and had just sealed up a packet, the superscription of which was as follows: 'pour etre ouvert en cas de mort.' Clark threw it down in the presence of deponent, and told him that it contained his last will and some other papers which would be of service; deponent did not see the will, nor does he know any thing about its contents; he only saw the packet with the superscription on it as before related."

*Bellechasse says: "A very short time before the [*624 sickness that ended in his death, he, Clark, conversed with us about his said daughter Myra in the paternal and affectionate terms as theretofore. He told us that he had completed and finished his last will. He, Clark, therefore. took from a small

black case his said last will, and gave it open to me and Judge Pitot to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and it was dated and signed by the said Clark in his own handwriting. Pitot, De la Croix, and myself were the executors named in it, and in it the said Myra was declared to be his legitimate daughter, and the heiress of all his estate. Some short time afterwards I called to see him, Clark, and learned from said Relf that the said Clark was sick in bed, too sick to be seen by me; however, I, indignant at an attempt to prevent me from seeing my friend, pressed forward into his room. He, said Clark, took him by the hand, and with affectionate reprehension said, 'How is it, Bellechasse, that you have not come to see me before since my sickness? I told Relf to send for you.' My answer was, that I had received no such message or account whatever of his sickness from Relf. I said further, 'My friend, you know that on various occasions I have been your physician, and on this occasion I wish to be so again.' He looked at me and squeezed my hand. Fearful of oppressing him, I retired, and told Relf that I would remain to attend occasionally to Clark. Relf said there was no occasion for it, that the doctor or doctors had ordered that he, Clark, should be kept as quiet as possible, and not be allowed to talk. I expressed apprehension for the situation of Clark, but Relf expressed a different opinion; and on his, Relf, promising to send for me if there should appear to be any danger, I departed. On the next day, without receiving any message from Relf, I went and found Clark dead."

Mrs. Harper (afterwards Mrs. Smyth) says: "In 1813, some few months before Mr. Clark's death, he told me he felt he ought no longer to defer securing his estate to his daughter Myra by a last will.

"Near this period, he stopped one day at my house, and said to me he was on his way to the plantation of Chevalier de la Croix, for the purpose of requesting him to be named in his will one of his executors, and tutor to his daughter Myra. On his return, he told me with much apparent gratification
*625] that De la Croix had consented to serve, and that Judge Pitot and Col. Bellechasse had consented to *be the other executors. About this time he told me he had commenced making his last will. Between this period and the time he brought his last will to my house, Mr. Clark spoke very often of being engaged in making his last will; he always spoke of it in connection with his only and beloved daughter Myra; said he was making it for her sake, to make her his sole heiress, and to insure her being educated according to his

wishes. At the times Mr. Clark spoke of being engaged in making his last will, he told me over and over again, what would constitute its contents; that he should in it acknowledge the said Myra as his legitimate daughter, and bequeath all his estate to her, but direct that an annuity of $2,000 a year should be paid his mother during her life, and an annuity of $500 a year to a young female at the north of the United States, named Caroline De Grange, till her majority; then it was to cease, and $5,000 were to be paid her as a legacy, and that he would direct that one year after the settlement of his estate $5,000 should be paid to a son of Judge Pitot, of New Orleans, as a legacy; at the same period $5,000 as a legacy to a son of Mr. Du Buys, of New Orleans; that his slave Lubin was to be freed, and a maintenance provided for him. In his conversations respecting his being engaged in making his last will, he talked a good deal about the plan of education to be laid down in his will for his daughter Myra; he expressed frequently his satisfaction that the Chevalier de la Croix would be the tutor in his will; he often spoke with earnestness of the moral benefit to his daughter Myra from being acknowledged by him in his last will as his legitimate daughter, and he often spoke of the happiness it would give his mother; he expressed the most extravagant pride and ambition for her; he would frequently use the emphatic language, that he was making her a bill of rights; he mentioned at these times, that this would contain a complete inventory of all his estate, and explanations of all his business, so as both to render the administration on his estate plain and easy to his friends, Chevalier de la Croix, Judge Pitot, and Col. Bellechasse, and as a safeguard to his estate, in case he should not live long enough to dissolve and adjust all his pecuniary relations with others. About four weeks before his death, Mr. Clark brought this will to my house; as he came in, he said, 'Now my will is finished,' my estate is secured to Myra beyond human contingency, 'now if I die to-morrow, she will go forth to society, to my relations, to my mother, acknowledged by *me, in my last will, as my legitimate daughter, and [*626 will be educated according to my minutest wishes, under the superintendence of the Chevalier de la Croix, and her interests will be under the care of Chevalier de la Croix, Judge Pitot, and Col. Bellechasse; here is the charter of her rights, it is now completely finished, and I have brought it to you to read;' he left it in my possession until the next day; I read it deliberately from beginning to end. In this will, Mr. Clark acknowledged Myra Clark as his legitimate daughter and only heir, designating her as then living in the family of S. B.

Davis; Mr. Clark in this will bequeathed all his estate to the said Myra, but directed that an annuity of $2,000 should be paid to his mother during her (his mother's) life, and an annuity of $500 should be paid to Caroline De Grange, till she arrived at majority, when the annuity was to cease, and $5,000 were to be paid her as a legacy. He directed that one year after his estate was settled, $5,000 should be paid as a legacy to a son of Judge Pitot, of New Orleans; and that one year after his estate was settled $5,000 should be paid as a legacy to a son of Mr. Du Buys, of New Orleans; he provided for the freedom and maintenance of his slave Lubin; he appointed Mr. Dusuau de la Croix tutor to his daughter Myra; he gave very extensive instructions in regard to her education; this will contained an inventory of his estate, and explanations of his business relations; he appointed Mr. Dusuau de la Croix, James Pitot, and D. D. Bellechasse, executors; the whole of this will was in Mr. Clark's handwriting; it was dated in July, 1813, and was signed by him; it was an olographic will; it was dated in July, 1813, and was signed by him; I was well acquainted with said Clark's handwriting. The last time Mr. Clark spoke to me about his daughter and his last will, was on the day he came out for the last time (as far as I know) from his house, which was the last time I saw him; he came to my house at noon, complained of feeling unwell, asked leave to have prepared for him a bowl of tea; he made his visit of about two hours' duration, talking the whole time of his daughter Myra, and his last will; he said a burden of solicitude was removed from his mind from the time he had secured to her his estate beyond accident, by finishing his last will; he dwelt upon the moral benefit to her in society from being acknowledged by him in his last will as his legitimate daughter; he talked about her education, said
*627] it would be the greatest boon from his God to live to bring her up, but what was next to *that were his comprehensive instructions in his will in regard to her education, and her being committed to the care of the Chevalier de la Croix, who would be a parent to her."

After Clark's death, the will of 1811 was presented to the Court of Probate, and proved; letters testamentary were issued to the executors; a power of attorney was given to them by Mr. Clark's mother, and various pieces of property were sold under it and under the will.

In 1832, Myra married William Wallace Whitney, and about the time of her marriage became acquainted with her true name and parentage; and in 1836 filed a joint bill, with her husband, in the Circuit Court of the United States for the

district of Louisiana against Relf and Chew, the executors in the will of 1811, the heirs of Mary Clark, and all the purchasers and occupants of the estate of which Clark died in possession, claiming to be the heir and devisee of Clark, and calling upon them all to account for the rents and profits of the several portions of the estate. The bill charged that the will of 1813 was fraudulently suppressed, that its existence and suppression were notorious, and that all the purchasers did, in their consciences, believe that the will of 1811 had been fraudulently admitted to probate. In addition to the prayer for an account, it prayed for general relief.

In the progress of the suit, Whitney having died, Edmund P. Gaines, sometime afterwards, married the widow and became a party to the suit.

The defendants all demurred, but filed separate demurrers. Barnes and wife demurred upon six grounds:

1. The want of equity in the bill.
2. That there existed a complete remedy at law.
3. Multifariousness and misjoinder.
4. That the will of 1813 was not probated.
5. That forced heirship gave title to but one-third, which was recoverable at law.
6. That the New Orleans and Carrollton Railroad Company, with whom they were conjoined, was not shown to be a corporation.

Chew and Relf demurred generally, and also pleaded to the jurisdiction of the court.

Upon the argument of the demurrers, the three questions arose which are mentioned at the commencement of this statement, and *upon which the court were divided. [*628 These questions were the subject for consideration by this court.

Henderson, *Coxe*, and *Barton* (leave having been obtained for three counsel to address the court on the same side) for the defendants below, who had demurred.

R. Johnson and *Jones*, for Gaines and wife.

Henderson.

As to the 1st point. Is the bill multifarious? If the interests of the defendants are distinct, it is unlawful to make them join in the defence.

[The counsel here examined their relative interests.]

2. Can the court entertain jurisdiction without a probate of the will?

Some of the parties are aliens, living in England and Ireland. How can they be brought into court? Yet they must be, because they are all interested in the will of 1811. The equity power of this court is limited by the Constitution and Judiciary act to the usual powers of the English chancery; but it cannot possess all those powers, because our institutions are different. If the chancery power of England could not reach a state court, this cannot. Its powers must be uniform. If a state strips its courts of jurisdiction over mortgages, for example, this court must part with the power too. 4 Wheat., 115, 180.

Local laws cannot confer jurisdiction on the courts of the United States. 11 Pet., 184. The states may prescribe rules of proceeding, but not jurisdiction. 9 Pet., 632; 13 Id., 259. The powers of this court cannot exceed or even come up to those of the English chancery. In England there is a distinction in chancery between real and personal property. It will entertain a bill to establish a will, when repeated decisions have been made about it, which is called a bill of peace. But the chancellor does not decide a will without referring it to a jury. This is the measure of the power of this court; it cannot go further. But can it go this far? The probate courts of Louisiana have the exclusive power of establishing wills as to personal property. Why not real also? In England the probate courts have not the power, and, therefore, the chan-
*629] cellor comes in. The decision of a probate court is final as to *real as well as personal estate. 2 Vern., 9, 76, 441; 2 Atk., 324, 334.

The court cannot set aside a will by decree. In this case, the court must clash with the Probate Court, because it must revoke the probate of the will of 1811, before that of 1813 can be established. The prayer of the bill here is to carry into effect the will of 1813, to do which, this court must first take probate of it, and then execute its provisions. No case in the books goes as far as this.

While a probate stands, it is not examinable in chancery. 2 Vern. 9.

Where personal estate is concerned, chancery declines to interfere. 2 Vern., 76, 441.

A probate is conclusive until repealed. 1 Str., 670, 673, 408; 1 Lord Raym., 262; 3 T. R., 129; 4 T. R., 159.

That jurisdiction over wills belongs exclusively to those courts which represent the ecclesiastical courts of England. See 12 Wheat., 375; 9 Pet., 176; 2 Har. & G. (Md.), 49, 51; 3 Dev. (S. C.), 341; 1 Nott & M. (S. C.), 327; 3 Leigh. (Va.), 817, 819, 32; 3 Davy's, 326; 3 Litt. (Ky.), 275; 1

Story 525, 503; 3 Mo., 245; 6 Miss., 177; Walk. (Miss.), 323; 2 How. (Miss.), 351; 1 La., 51; 1 Id., 250; 5 Id., 393; 10 Id., 595; 10 Wheat., 469; 12 Id., 153.

In Louisiana, under their state law, courts of probate have exclusive jurisdiction over wills. Civil Code, sects. 1637, 1650; Code of Practice in civil cases, pages 924, 928, 936, 937.

The bill charges that the will of 1813 is suppressed or destroyed. If it is suppressed, there is power in those courts to reach it. Code of Practice, &c., 604, 607, 608, 609, 611.

The power of chancery in England extends to cases of spoliation of papers, but not to setting up a will of personalty. 1 Williams's Executors, 209.

To the same point, see 1 Fillmore, 153, 154; 4 Bibb, (Ky.) 553; 3 Port. (Ala.), 53; 4 Mo. 210, 211.

It is the duty of the court to set up and establish lost wills. Civil Code of Louisiana, 2248.

Spoliation of papers does not include a lost will of personal property. 3 Atk., 360; 2 P. Wms., 748; 1 Id. 723, 726.

This bill claims to set up a will of both real and personal estate.

[*630

**Coxe*, on the same side.

The bill is unskilfully prepared. When demurred to, such a bill is often decided upon grounds which do not appear in the record. There are two grounds in this case.

1. The jurisdiction of the court.

2. The multifariousness of the bill.

Myra claims to be the legitimate daughter and heir of Clark, and also under a will of 1813; and the bill is filed not only against the executors, but every one who is in possession of any part of the estate. But there is no allegation in the bill that any part of the real estate passed to the holders under the will of 1811. It is said that Clark died seised; but is silent whether this property was assets in the hands of the executors or not. It alleges that the executors conveyed the land, under a power of attorney, from Clark's mother. If the bill be true, then the possessors are merely tort-feisors, and this is not the remedy against them. All the English cases are those of devisees against heirs—the heir-at-law has a remedy at law. But the complainant here is under peculiar difficulties on account of state legislation. The tendency of this country is to assimilate real with personal property, and in ten states, courts of probate have jurisdiction over both species. These states have power over real estate, and over the jurisdiction of their courts. In Louisiana all trusts are abrogated. A *cestui que trust* cannot set up a title. Can this court say that any

one shall hold land in trust there? Suppose that a devise of real estate were forbidden; could this court recognise it? In Louisiana, a probate is essential, and the courts which have charge of it have the same jurisdiction as the Court of Chancery in England. This court can neither revoke nor set up a will. If an executor sell property under a proved will, the title of the purchaser cannot be impeached, although the will be afterwards set aside for fraud. How can the Circuit Court in Louisiana revoke a proved will, when the English Court of Chancery will not? If the Court of Probate compels the executors to go on, the Circuit Court cannot grant an injunction to stop a state court from proceeding. The decree would therefore be impotent. Chancery will act upon the person, and compel the surrender of a paper, or the entry of satisfaction upon a fraudulent judgment; but in this case it would have to act upon a court.

*631] The bill also prays that the declarations of Clark as to the legitimacy *of the complainant may be established. Under what branch of power is this, and how can the court examine such a point? It also prays that all the sales made by the executors may be set aside. But if any of these were made by order of a court, can they be set aside also?

R. Johnson, for Gaines and wife, complainants.

Is the bill multifarious? The demurrer admits the heirship, the will of 1813, the charge that it was placed in the hands of two of the defendants, that they fraudulently destroyed it, and set up the will of 1811; admits also that the will of 1813 was notorious, and the heirship of the complainant equally so. The argument admits all this, and asks the court to turn away the complainant, because parties are made defendants who ought not to be. The rule is within the sound discretion of the court, and designed to protect the innocent. But if the facts alleged in the bill be true, (and the argument admits them,) it will be here made the means of shielding the guilty. In this case, we need not invoke the discretion of the court, because, according to the authorities, the bill is not multifarious either as to the interests involved, or the parties.

The complainant claims as heir and devisee of the whole estate, and the object is, to have the title to the whole decreed to be valid. The parties are the original parties to the fraud and their confederates, taking with notice of the fraud. The defendants all deny the title of the complainant, and have, therefore, a common object. The rule of chancery is that multiplicity of litigation is to be avoided; but if we were to establish the will in a suit against one, it would be good only as to

that one, and each of the defendants would have to be separately sued. This is not the spirit of the rule. Whoever has an interest to be bound, must be made a party. Mitford's Pleading, 181, 182; 1 Atk., 282; 1 Myl. &. C. 603, 616.

In Myl. & C., it was said to be impossible to lay down an abstract proposition, as to what should constitute maltifariousness. See also, 3 Price, 164; 2 Pet., 417; 4 Pet., 190.

If it be said that our remedy is at law, it is admitting that we have a case. But equity will maintain a concurrent jurisdiction where there is fraud, because it can sift the conscience and compel the delivery of papers. If there is a fraudulent deed, equity strikes it down, never to rise again. If we had gone to law and recovered the estate, complete justice would not have been done, because the will of 1811 *would [*632 have remained standing to defraud the living and injure the memory of the dead. Full and final relief is only to be had in chancery.

If we had a probate of the will of 1813, it is admitted that we could be relieved, and the question is, whether chancery, in England, could relieve without going through the forms of probate. Suppose the court in Louisiana has exclusive jurisdiction of probates, still the question is, whether the bill shows a case proper for the Circuit Court. The demurrer admits that the will of 1813 has disappeared by the fraudulent conduct of the defendants, or that it remains in their possession and they refuse to produce it. Is there nothing here upon which the chancery power of this court can act? The Probate Court of Louisiana has no power commensurate with the case. Its jurisdiction is given by statute. What is it?

It can take probate of wills in the manner directed, but the case of a suppressed will is not provided for.

The power is contained in Code of Practice, art. 924; but 925 says, it has no jurisdiction except in cases enumerated in the preceding article. There is authority given to open, receive, and record a will, but none to bring it out when suppressed. See articles 928, 930, 931, 933, 935, 936, 937. By 937, if the notary or other person refuse to produce it, he shall be arrested, and if he can give no good reason, shall be committed to prison and respond in damages. But a remedy in damages is utterly insufficient in this case. We want the land and property. It is said that a copy can be evidence; but the civil court only makes evidence copies of such papers as are already recorded. The question before the court is, whether we can get on without a probate, which we cannot obtain; for the demurrer admits that the will is either suppressed or destroyed. We want the only evidence which will enable us

to obtain relief; the probate of the will of 1811 would be no obstacle. It must be shown, by the other side, that jurisdiction over the case is vested exclusively in some other court. But in England the case of a spoliated will falls within chancery powers. Lord Hardwicke said, in the case cited from 3 Atkyns, that he would, in such a case, hold an executor trustee for the devisee. 3 Atk., 359.

The other cases are, 1 Ch. Rep., 13, 66; 1 Vern., 296; Prec. in Ch., 3, 123; 1 P. Wms. 287, 731; 2 Vern., 700; 1 Bro. P. C., 250; 3 Bro. P. C., 550.

*633] *These cases establish two propositions,

1. That a probate in England, obtained by fraud, will be relieved against in chancery.

2. That a probate for personalty and realty, obtained by fraud, will make the party a trustee for the person interested leaving the probate to stand, provided the fraud be perpetrated by spoliation or destruction of papers.

The only two exceptions are, where part of the will is fraudulent and part not, and where there is a fraudulent agreement between the heir and devisee. But if spoliation be proved upon the person who sets up the will, chancery will interfere.

The Constitution of the United States, and the Judiciary act of 1789, and the Process act of 1792, give to the federal courts, jurisdiction in all cases of law or equity. All that we have to do is to show that this is a case of equity.

Constitution of the United States, art. 3, sec. 2; Judiciary act, sec. 11; it is a matter of right for all persons who have a case of equity to go into the courts of the United States and ask relief, 4 Wheat., 108; 3 Pet., 433; 3 Wheat. 212; 9 Pet., 655; 13 Pet., 358; 15 Pet., 9, 13. In the last case the same objection was made that has now been made, but the court decided against it.

It is asked how we are to reach the Court of Probate. The answer is found in the Constitution of the United States. If it is a case, &c., all state power falls. It was intended to protect the people from state prejudice; the framers of the instrument knew that local prejudices would exist, and saved the people from their operation. Another answer is, that the Chancery Court acts upon persons, passing by state tribunals. If they interfere, the twenty-fifth section of the Judiciary act meets the case.

It is objected that our argument destroys all state regulations, but this begs the question. We say that Louisiana has recognized the right to transfer property by will, and this right was exercised in the present case. Besides, state power cannot limit the Constitution of the United States and the juris-

diction of this court under it. The bill was filed in 1836. It took the defendants five years to find out that the bill did not make a case, and to file their demurrer.

Jones on the same side.

The first objection on the other side is, that the confederates are *not charged to have derived their titles from [*634 the will. The printed abstract does not say so, it is true, but the record itself does. The bill charges, that they claim under color of title from pretended executors, referring directly to the will.

The next objection is on account of the aliens, living in England and Ireland. But we have done all that we can as regards them. The court cannot lose jurisdiction because some of the parties reside abroad.

Is the bill mulifarious?

It is the nature of equity to bring in all parties who have an interest. It is said in the books that claims must not be joined together when they are different, nor parties who have not an entire interest. But it is esteemed a virtue in equity that all proper parties are brought in. Thus in the case of a fishery; all came in, although their rights were separate. A demurrer will not hold, if the plaintiff claims under a general right. Mitford's Pleading, 181, 182.

If we were to sue separately, we should have to prove the same thing in every case, and a multiplicity of action is not favored by equity.

As to the jurisdiction of the court.

It is said that a state court here claims exclusive jurisdiction. If a state can say that its courts shall have exclusive jurisdiction, it can by extending the range of subjects, shut out the courts of the United States from all jurisdiction whatever. The only question is, is it a case of equity? If so, no matter how far the claim of exclusiveness of jurisdiction in the state courts may be pressed, the Constitution of the United States comes in with paramount authority. The opposite counsel have confounded the two questions of the exclusiveness of state jurisdiction and the conclusiveness of a final judgment of a court of competent jurisdiction. We agree that the judgment of such a court is conclusive upon all co-ordinate courts, until regularly reversed by an appellate court. But here we do not impeach any such judgment. By the law of Louisiana, a will of real estate has the same effect that a will of personalty has in England. We admit this. And we admit, too, that a probate is necessary to vest a title to real estate, as much so as recording a deed is, to give it validity. If our claim would be

good against a proved will in England, it is good here. The Code of Louisiana is made up of the civil law and Napoleon Code. But what power has a probate court to prove a will which is not produced. They cannot set it up and admit it as a *factum. Civil Code, 1537, 1560; Code of Practice, 924; 3 Mart. (La.), 144; 12 Mart. (La.), 63; 5 Mart. (La.), N. S., 184; 3 La., 99; 6 Har. & J. (Md.), 67.

*635]

The case in 11 La., 593, is thought by the other side to sustain the position that the Court of Probate could prove a will although it was not produced; but the case does not say so.

But it is argued that the will of 1811 must be set aside before that of 1813 can be set up, and that the Circuit Court cannot do this. Why not? It has as much right to do it as the Probate Court; not as an appellate tribunal, reviewing the decision of that court, but in the exercise of a separate jurisdiction. The will of 1811 may stand among the records, but its effect will be destroyed. So it is in England with spoliated deeds. Equity constantly sets aside law instruments when an equitable title is asserted.

What other remedy have we? We cannot go to the Probate Court and ask them to set up the will of 1813. They cannot do it. And even if they could, that would not debar us of this remedy. Code of Practice, 604 to 613; 3 Mart. (La.), 518; 5 La., 393.

If a state court had jurisdiction and the remedy is imperfect, a party must not be driven there. The Probate Court is shackled, and limited to matters of administration. It may compel an administrator to settle, but cannot direct a suit against third persons, and cannot give us the property in dispute. 1 La., 183; 3 La., 520.

It is said that a Probate Court is the only tribunal that can set aside a will. But we deny this. 10 Mart. (La.), 1; 1 Mart. (La.,) N. S., 577; 3 Mart. (La.) N. S., 473; 5 Mart. (La.) N. S., 10, 217; 1 La., 215; 6 Mart. (La.,) N. S., 305.

As to equity jurisdiction. It is a general principle that courts of equity have jurisdiction over all cases of fraud. Although courts of law have it, equity does not lose it. There are two exceptions recognized in the books, but neither of them includes this case. Generally, the heir need not go into chancery, because the title is cast upon him by descent; but where there is a devisee who thus appears to have the legal title, the heir cannot resort to a court of law, but must apply to equity. 13 Price, 721.

Barton, for the defendants, being demurrents, in reply and conclusion.

The facts in the case, although nominally admitted by the demurrer *for the sake of argument, are not in reality admitted. Some of the worthiest citizens of Louisiana [*636 are denounced in the bill, as perpetrating atrocious frauds. If this court shall require them to answer the bill, they will deny all the important facts charged in it. Thirty years have elapsed since the transactions took place; and at the last term, this court refused to open a case after twenty years had expired. This is called a bill of peace. It is not like one. The heirs of Mary Clark sold the land and received the money thirty years ago; and yet those heirs are not made parties so that a cross-bill could be filed against them.

[Mr. *Barton* here referred to a high opinion of Clark which had been expressed in the course of the argument, in which he concurred.]

The will of 1811 gave the whole estate to his mother. Where was his wife, if he had one?

So the will of 1813 is said to have given his wife nothing, in violation of all duties. The bill itself, therefore, attacks his character. It says also that the complainant was kept in ignorance of her true name until she was nineteen years of age. Her own mother is alleged not to have told her, and yet this mother is said to have been the wife of Clark.

Is the bill multifarious?

Story's Equity Pleadings, sects. 271 to 279, has numerous references on this point. See also 1 Jac., 151; 1 Madd., 86; 2 Madd., 294; 6 Madd., 94; 18 Ves., 50; 2 Ves., 486; 2 Mass., 181; Litt. (Ky.) Sel. Cas., 320; 2 Bibb, 314; 4 Johns. (N. Y.) Ch., 199; 8 Pet., 123; 1 Johns. (N. Y.) Ch., 349, 437, 606; 4 Rand. (Va.), 74; 2 Gill & J. (Md.), 14; 5 Paige (N. Y.), 65; 6 Dana (Ky.), 186; 6 Johns. (N. Y.), Ch., 163; Halst. Dig., 168; 5 Cow. (N. Y.), 86.

The bill is not only multifarious as to parties and subject-matters, but also as to jurisdictions. Suppose the will of 1813 were actually probated and the plaintiff claimed under it, would this court act upon such a question, or would they not rather send it to a court of law to be tried?

The plaintiff confounds rights even in herself.

If the claim of legitimacy be established and the will of 1811 should remain, the testator by the old code could dispose of one-fifth of his estate away from his child. (Old Civil Code, p. 212, art. 19, chap. 3. Mary Clark would therefore have one-fifth, and her heirs ought to be parties. And besides, if the legitimacy be established, *the mother of the complainant must of course have been the wife of the [*637 testator, and as such, entitled to half of the estate, of which

he could not deprive her. New Civil Code, art. 148; Old Civil Code, p. 336, art. 63 to 69. And yet the alleged wife is not a party.

So if the will of 1813 be set up, and the legitimacy proven, the wife will have half, and yet she is not made a party, although every one knows that she is living. The executors of the will of 1813 are said to have been Bellechasse and Pigot, the latter one of the judges of the Court of Probate. The commission is two and a half per cent. for executors. Did not Pigot know how to get the will, if there was one? New Civil Code, 2369 to 2376; Old Civil Code, p. 248, art. 179.

There is a multifariousness as to things.

The bill embraces twenty-six pieces of land, and it is not said who owns all these. And so of the slaves; ninety-three are allotted amongst different owners, whilst one hundred and thirty-three are not accounted for. An interest in the mere question is not sufficient to authorize all these persons to be joined in one bill; they must all have an interest in the subject-matter. Persons are also made parties who are said to be in the occupancy of a square of ground. What interest have they, if they are mere occupants? If their testimony would be admissible as impartial persons, they ought not to be parties.

An insuperable difficulty will be found if any of these sales of real estate have been made under a warranty. By the Louisiana law, in such a case, the warrantor may be summoned in at once to defend the title; and if he is not, the warrantee loses his remedy against him. But under the present process this cannot be done, and the benefit of our wise law is lost. Our system has been called a mongrel system, but it is good enough for us. It does not follow that laws are unjust because they emanate from a despotic government. The Napoleon Code was not destroyed by the Bourbons. The practice in Louisiana is a complete equity; either party may arrive at the knowledge of facts in the possession of the other with more simplicity than the English chancery process. The district-attorney of the United States has preferred resorting to the state tribunals in a controversy between the government and Bank of the United States, rather than go into the federal court. To a case like the present, our system is peculiarly applicable. But in the proposed mode, you are deciding here the interests of a vast number of persons not seen at all.

*638] *The position that a state cannot enlarge or restrain the equity power of the Circuit Court of the United States, is laid down too broadly. The parliament of England might have placed the probate and jurisdiction over wills of

real and personal estate exclusively in the ecclesiastical courts; and if so, why cannot Louisiana do the same thing? The sovereignty of a state over its domestic policy is complete, and especially over its land laws. The clause in the Constitution was inserted, undoubtedly, for the security of impartial justice, but justice administered with uniformity by state and federal tribunals. Both were intended to be guided by the same rules. If they adopt different ones, you may obtain impartiality, but where is the uniformity.

There is another case upon the docket of this court by the complainants, in which they have prosecuted their claim singly against Patterson. If they can maintain a suit against one of these numerous parties by himself, it shows that their interests must be distinct.

It is important to keep in view the distinction between overthrowing a proved will and setting up another one. The will of 1811 is not said to be defective or irregular, but it is the probate which is objected to, and that is the judgment of a court of competent jurisdiction. Until appealed from, it is as binding as a decree of this court. Story's Equity Pleading, sect. 511; 2 Roper on Legacies, 532.

In 3 Meriv., 161, the Master of the Rolls says, "it is no question whether a chancery court can set up a will." If an English court can overthrow the dictum of Lord Hardwicke 100 years ago, cannot the legislature of a free state do it?

Probate courts have exclusive jurisdiction over wills, and no other court can interfere, by the laws of Massachusetts. 4 Mason, 461; 16 Mass., 441.

The judgment of a court of probate is good until reversed. 4 Mart. (La.) N. S., 413, 414; 1 La., 21; 2 La., 250; 6 La., 656; 3 La., 519.

In 17 La., 14–16, it was held that where an action was brought in the District Court against one in possession and claiming under a will, if the will was set up, it might be inquired into. But that is not the present case, because it is not averred that Mary Clark's heirs are in possession.

The claim to set up the will of 1813 is attempted to be sustained by being made analogous to the case of a spoliated will in England, and the case in 1 Ves., 286, relied on with great confidence, but it does not apply to the Circuit Court of the United States. There *is no case which has been [*639
cited, in which the chancellor acted upon any other person than the wrong-doer himself. But here the executors are *functus officio*, and third persons, purchasers, are parties.

Can they be imprisoned for not producing the will of 1813? and if Relf should be imprisoned, how can that affect the title

of the city of New Orleans to property which it has held for twenty-five years? It has been said that a party can be decreed to be a trustee for the benefit of the person really interested. But before you can do this, you must repeal the statute of Louisiana, abolishing all trusts. They were abolished by the Code of 1808, and again by the Code of 1825. Civil Code, (new) 1506, 1557.

Can this court fasten upon the people of Louisiana all the doctrine of uses and trusts, against their positive law? Suppose the purchasers are decreed to stand seised to the use of the complainant: you will have created fifty or sixty trusts. And when one of these trustees dies, or makes a *cessio bonorum*, what will be done? Will you sell an estate, the title to which is in one person, and the use in another? But the law of Louisiana positively prohibits this.

A power to compel a man to go before the court and resign his probate, is, in effect, a revocation of the judgment itself and an overthrow of the court. But the decision of that court can never be inquired into by another tribunal. 1 Pick. (Mass.), 547. And the Probate Courts of Louisiana have as exclusive a jurisdiction as those of Massachusetts. The English cases are not applicable. 3 Porter (Ala.), 52, 58; 4 Mo., 210.

It is said by the other side that the Probate Courts of Louisiana are different from other Orphans' Courts. It is not so; but suppose it was. How can a citizen of another state claim more rights than a citizen of the state itself. The Constitution requires all to be placed upon an equal footing, but nothing more. In fact, the Louisiana Courts of Probate have more power than similar courts in Massachusetts. For these propositions, see Code of Practice, 324; 1 Story, 552; 2 Har. & G. (Md.), 51; 4 Bibb (Ky.), 553; 3 Mo., 365; 4 Id., 210; Civil Code, (new), art. 21; Id., (old), art. 246; Code of Practice, art. 130, 936; 8 Mart. (La.), N. S., 520; 5 La., 293; 11 Id., 593, 150.

No court can now set up the will of 1813, because if it were presented to the Probate Court in the shape in which it is alleged to have existed, that court could not receive it for want
*640] of a date. Civil Code, art. 1567 to 1581; 1588, describes what wills are good; *1581 treats of an olographic will, i. e. written, dated, and signed, by the testator, and the next article says, unless these formalities are observed the will is null and void.

Civil Code, (old) art. 160, contains the same provisions. The date here is important, for if a will was written at all, it might have been before 1811, and therefore revoked by it.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before the court from the eastern district of Louisiana, by a division of the judges on certain points, which are certified under the act of Congress.

The complainants in their bill state that Daniel Clark, late of the city of New Orleans, in the state of Louisiana, in the year 1813 died, seised in fee-simple, or otherwise well entitled to and lawfully possessed of, in the district aforesaid, a large estate, real and personal, consisting of plantations, slaves, debts due, and other property, all of which is described in the bill.

That the said Myra was the only legitimate child of the said Clark. That about the month of July, 1813, he made his last will and testament, according to law, and in which he devised to his daughter Myra all his estate, real and personal, except certain bequests named. Col. Joseph Deville, Degontine Bellachasse, James Pitot, and Chevalier Dusuau de la Croix were appointed executors of the will, and the said Chevalier de la Croix was also appointed tutor to the said Myra, who was then about seven years of age. In a few days after making the will the said Clark died.

From her birth, the said Myra was placed, by her father, in the family of Samuel B. Davis, who at the time resided in New Orleans, but in 1812 removed to Philadelphia, where the said Myra resided until her first marriage, being ignorant of her rights and her parentage.

In the year 1811, being about to make a journey to Philadelphia, and fearing some embarrassments from a partnership transaction, the said Clark conveyed property to the said Samuel B. Davis and others, to the amount of several hundred thousand dollars to be held in trust for the use of the said Myra. And about the same time he made a will devising to his mother, then residing out of Louisiana, his property, and appointed Richard Relf and Beverley Chew, two of the defendants, his executors. That afterwards, on his return from Philadelphia, he received back a portion of the property conveyed in trust as aforesaid; and by the will of 1813 revoked that of 1811.

*The bill charges that immediately upon the death of [*641
the said Clark, the will of 1813 came into the possession of the said Relf, who fraudulently concealed, suppressed, or destroyed the same, and did substitute in its place the revoked will of 1811; that the will of 1813 was never afterwards seen except by the said Relf and Chew, and their confederates.

It is further charged that the said Relf fraudulently set up the revoked will of 1811, and obtained probate of the same:

that he, with the said Chew, being sworn as executors, fraudulently took possession of the real and personal estate of the deceased, and also his title papers and books. That they appropriated to their own use large sums of money and a large amount of property of the estate, and in combination with the defendants named, who "had some knowledge, notice, information, belief or suspicion, or reason for belief or suspicion and did believe," so that the said Relf and Chew had acted fradulently in setting up and proving the will of 1811. And the complainants pray that effect may be given to the will of 1813, and that the will of 1811 may be revoked; and that the defendants may be decreed to deliver up possession of the lands purchased as aforesaid, and account for the rents, &c.; and that the executors may be decreed to account. The complainants also represent that the said Myra is the only heir-at-law of the said Clark; and that his property descended to her, &c. In addition to the special relief asked, the complainants pray for "such other and further relief in the premises, as the nature of the case may require."

To the bill, several of the defendants filed a special demurrer. On the argument of the demurrer, the opinions of the judges were opposed on the following points:

1. Is the bill multifarious? and have the complainants a right to sue the defendants jointly in this case.

2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed.

3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law. The demurrer is not before the court, but the points certified. In considering these points, all the facts stated in the bill are admitted.

Whether the bill be multifarious or not is the first inquiry.

The complainants have made defendants, the executors named in the will of 1811, and all who have come to the possession of property *real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death. That a bill which is multifarious may be demurred to for that cause is a general principle; but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms a bill is said to be multifarious, which seeks to enforce against different individuals, demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all

*642]

the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. It has been decided that an author cannot file a joint bill against several booksellers for selling the same spurious edition of his work, as there is no privity between them. But it has been ruled that a bill may be sustained by the owner of a sole fishery against several persons who claimed under distinct rights. The only difference between these cases would seem to be, that the right of fishery was necessarily more limited than that of authorship. And how this should cause any difference of principle between the cases is not easily perceived.

It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay*, 7 Sim., 564, and in 1 Myl. & C., 603, "to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

In a course of reasoning in the above-cited case, Lord Cottenham observes, "If, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a proposition, [*643 *(he says,) to which I do not assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject-matter of contest split up into a variety of separate bills." The same doctrine is found in Story's Equity Pleading, sect. 534; *Attorney-General* v. *Cradock*, 3 Myl. & C., 85; 7 Sim., 241, 254.

In the above case against Cradock, the chancellor says, "The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule, if it were to impose upon the

plaintiffs, and all the other defendants, two suits instead of one."

The bill prays that the defendants, Relf and Chew, may be decreed to account for moneys, &c., which came into their hands, as executors, under the will of 1811; and that the other defendants, who purchased from them real and personal property, may be compelled to surrender the same, and account, &c., on the ground that they had notice of the fraud of the executors.

The right of the complainant, Myra, must be sustained under the will of 1813, or as heir-at-law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties.

On the part of the complainants there is no misjoinder, whether the claim be as devisee or heir-at-law. And the main ground of the defence, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill.

The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to co-defendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, *without subjecting the defendants to inconvenience or unreasonable expense. There are, however, two exceptions to this remark, one of which relates to Caroline Barnes and her husband. She is represented to be a devisee in the will of 1813, and, consequently, can have no common interest under the will of 1811. The other exception is the prayer of the bill that the executors may account. In the rendition of this account the other defendants have no interest, and such a matter, therefore, ought not to be connected with the general objects of the bill. The bill in these respects may be so amended, in the Circuit Court, as to avoid both the exceptions.

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We come now to inquire "whether the court can entertain jurisdiction of this case, without probate of the will set up by

the complainants, and which they charge to have been destroyed or suppressed."

The bill charges that the will of 1813 was fraudulently suppressed or destroyed by Relf; and that he fraudulently procured the will of 1811, in which he and Chew were named as executors, to be proved.

It is contended that the Court of Probate in Louisiana has exclusive jurisdiction of the probate of wills, and that a Court of Chancery can exercise no jurisdiction in such a case.

In the Code of Practice, art. 924, it is declared, that "Courts of Probate have the exclusive power:"

1. "To open and receive the proof of last wills and testaments, and to order the execution and recording them." There are thirteen other specifications which need not be named. By art. 925, it is declared that "the Courts of Probate shall have no jurisdiction except in the cases enumerated in the preceding article, or in those which shall be mentioned in the remaining part of this title."

In regard "to the opening and proving of wills," after providing where application for probate shall be made, and the mode, the following articles are adopted:

Art. 934. "If the will be contained in a sealed packet, the judge shall order the opening of it at the time appointed by him, and shall then proceed to the proof of the will."

Art. 936. "If the petitioner alleges under oath in his petition, that he is informed that the will of the deceased, the opening of which and its proof and execution are prayed for, is deposited in the hands of a notary or any other person, the judge shall issue an order to such notary or other person, directing him to produce the will or the packet containing it, at a certain time to be mentioned, that it *may [*645 be opened and proved, or that the execution of it may be ordered."

Art. 937. "If the notary or other individual to whom the said order is directed, refuses to obey it, the judge shall issue an order to arrest him, and if he does not adduce good reasons for not producing the will, shall commit him to prison until he produces it; and he shall be answerable in damages to such persons as may suffer from his refusal."

From the above provisions it is clear that, in Louisiana, the Court of Probates has exclusive jurisdiction in the proof of wills; and that its jurisdiction is not limited, like the ecclesiastical court in England, to wills which dispose of personal property. Has a court of equity power to set up a spoliated will, and carry it into effect?

Formerly it was a point on which doubts were entertained,

whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where chancery has exercised such a jurisdiction. *Maundy* v. *Maundy*, 1 Ch., 66; *Welly* v. *Thornagh*, Pr. Ch., 123; *Goss* v. *Tracy*, 1 P. Wms., 287; 2 Vern., 700. In other cases, such a jurisdiction has been disclaimed, though the fraud was fully established, as in *Roberts* v. *Wynne*, 1 Ch., 125; *Archer* v. *Moss*, 2 Vern., 8. In another class of cases the fraudulent actor has been held a trustee for the party injured. *Herbert* v. *Lawnes*, 1 Ch., 13; *Thynn* v. *Thynn*, 1 Vern., 296; *Devenish* v. *Banes*, Pr. Ch., 3; *Barnesly* v. *Powell*, 1 Ves., 287. These cases present no very satisfactory result as to the question under consideration. But since the decision of *Kenrick* v. *Bransby*, 3 Bro. P. C., 358, and *Webb* v. *Cleverden*, 2 Atk., 424, it seems to be considered as settled, in England, that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and at law, on a devise of real property. *Bennett* v. *Vade*, 2 Atk., 324; 3 Id., 17; *Gingoll* v. *Horne*, 9 Sim., 539; *Jones* v. *Jones*, 3 Meriv., 171.

In the last case the Master of the Rolls says, "it is impossible that, at this time of day, it can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined."

In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may *646] be difficult to assign any very *satisfactory reason for this exception. The exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given.

By art. 1637 of the Civil Code, it is declared that "no testament can have effect unless it has been presented to the judge," &c. And in *Clappier et al.* v. *Banks*, 11 La., 593, it is held, that a will alleged to be lost or destroyed and which has never been proved, cannot be set up as evidence of title, in an action of revendication.

In *Armstrong* v. *Administrators of Kosciusko*, 12 Wheat., 169, this court held, that an action for a legacy could not be sustained under a will which had not been proved in this country before a court of probate, though it may have been effective, as a will, in the foreign country where it was made.

In *Tarver* v. *Tarver et al.*, 9 Pet., 180, one of the objects of the bill being to set aside the probate of a will, the court said, "the bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal

from the Court of Probate, according to the provisions of the law of Alabama."

The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say, that both the general and local law require the will of 1813 to be proved, before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants, in regard to the above wills. These answers being obtained may be used as evidence before the Court of Probate to establish the will of 1813 and revoke that of 1811.

In order that the complainants may have the means of making, if they shall see fit, a formal application to the Probate Court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the Circuit Court. For if the Probate Court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or on any other ground, and there shall be no remedy in the higher courts of the state, it may become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probates, and consent to the proof of the will of 1813 and the revocation *of that of 1811. [*647
And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of *Barnesly* v. *Powell*, 1 Ves. Sr., 119, 284, 287, above cited, Lord Hardwicke decreed, that the defendant should consent, in the ecclesiastical court, to the revocation of the will in controversy and the granting of administration, &c. If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana law. The twenty-first article of the Civil Code declares that, "in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in refer-

ence to the will of 1813, though it has not been admitted to probate.

The third point is, "has the court jurisdiction in this case, or does it belong exclusively to a court of law?"

Much that has been said in relation to jurisdiction on the second point, equally applies to this one. Indeed, they might have been considered under the same general head.

The bill is inartificially drawn, and, to reach its main objects, may require amendment in the Circuit Court. It presents the right of the complainants in two aspects:

1. Under the will of 1813.

2. As heir-at-law of the deceased.

The first has been examined, and we will now consider the second.

In prosecuting their rights as heir-at-law by the complainants, no probate of the will of 1813 will be required. The complainants must rest upon their heirship of the said Myra, the fraud charged against the executors, in setting up and proving the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give the proper relief without decreeing the revocation of the will. Such a proceeding at law in regard to real estate is one of ordinary occurrence in England. And it is upon the ground that such a remedy is plain and adequate, that equity will not give relief. There can be no doubt, as between the *648] heir-at-law and devisee, in ordinary *cases, the proper remedy is to be found in a court of law. Without enlarging on this point, at present, we will refer to the doctrine on this subject as established by the Louisiana courts. The case of *O'Donagan* v. *Knox*, 11 La., 384, was "an heir-at-law claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will, as instituted heir and universal legatee." The defendant pleaded to the jurisdiction of the District Court, on the ground that the Court of Probates for the parish St. Landry had exclusive jurisdiction of the matters and things set up in the petition.

The district judge held, "that as the will sought to be annulled had been admitted to probate, and ordered to be executed, the court had no jurisdiction, but that the Probate Court had exclusive jurisdiction of the case."

After stating the above decision of the District Court, the Supreme Court say, "The plaintiff sets up a claim under the law of inheritance of lands, slaves, and a variety of mova-

ble property; that these are proper subjects for the exercise of the jurisdiction of district courts cannot be doubted. But the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds the property in controversy. Before what court then must the validity of this will be tested?"

The court consider the jurisdiction of the Court of Probates, and then proceed to say, "It appears that the jurisdiction of the Court of Probates is limited to claims against successions for money, and that all claims for real property appertain to the ordinary tribunals, and are denied to courts of probate. The plaintiff in this case was, therefore, compelled, in suing for the property of the succession, to seek redress in the District Court, and whether she attacked the will or the defendant set it up as his title to the property, the court having cognisance of the subject must of necessity examine into its legal effect."

"When in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended," say the court, "that a court of ordinary jurisdiction, having cognisance of the principal matter, shall suspend its proceedings until another court of limited powers shall pronounce upon the subject." "If the ordinary courts should examine into the validity of testaments, drawn in controversy before them, they will do no more than we have often said a court of limited jurisdiction may do, even in relation to a question it could not directly entertain." The court cite **Lewis's heirs* v. *His executors*, 5 La., 387, and say [*649 there is no conflict, as indeed there is none, between that case and the one before them. They say that in the case before them the functions of the executor had expired, the probate of the will had taken effect, and the devisee had entered into possession under it. The decision of the District Court was reversed on the ground that it had jurisdiction of the case.

The above doctrine is fully affirmed in *Robert* v. *Allier's agent*, 17 La., 15. "On the question of jurisdiction arising from the state of the case, we understand," say the court, "the distinction repeatedly made by this court to be, that whenever the validity or legality of a will is attacked, and put at issue (as in the present case), at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, courts of probate alone have jurisdiction to declare it void." "But when an action of revendication is instituted by an heir-at-law, against the testamentary heir or universal legatee who has been put

in possession of the estate, and who sets up the will as his title to the property, District Courts are the proper tribunals in which suits must be brought." 6 Mart. (La.), N. S., 263; 2 La., 23.

The functions of the executors under the will of 1811 have long since terminated, and the property of the deceased, both real and personal, has passed into the hands of purchasers.[1] If the heir-at-law and the devisee were the only litigant parties, a suit at common law might afford an adequate remedy. But the controversy is rendered complicated by the numerous parties and the various circumstances under which their purchases were made. Besides, many facts essential to the complainant's rights are within the knowledge of the defendants, and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud before their purchase, alleged against the other defendants.

If the frand shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may be-
*650] come necessary. The powers of a Court of Chancery, *in this view, are required to do complete justice between the parties.

This remedy under the Louisiana law, and before the Louisiana courts, of ordinary jurisdiction, would be undoubted. For, although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that state, the forms of procedure, being conformable to the civil law, are the same in all cases. But the Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other state, preserves distinct the common law and chancery powers. In either the state or federal court the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that state.

Art. 1507 of the Civil Code declares, "that substitutions and *fidei commissa* are and remain prohibited." "Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null.

[1] See *Partee* v. *Thomas*, 11 Fed. Rep., 773.

even with regard to the donee, the instituted heir or the legatee," &c.

This abolishes express trusts, but it does not reach nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case the Louisiana law affords redress as speedily and amply as the law of any other state. There is, therefore, no foundation for the allegation, that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust, for the rightful owner.

In answer to the objection, that the validity of the will of 1811, collaterally, can only be tested by an action at law and on an issue *devisavit vel non*, it may be said, that such an issue may be directed by the Circuit Court.

Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have involved no new or foreign principle in Louisiana. In deciding controversies in that state the local law governs, the same as in every other state. Believing that *the mode of pro- [*651 ceeding there in the state courts, was adequate to all the purposes of justice; and knowing with what pertinacity even forms are adhered to, I was averse to any change of the practice in the federal courts. But I was overruled; and I see in the change only a change of mode, which produces uniformity in the federal courts, throughout the Union. No right is jeoparded by this, and to say the least, wrongs are as well redressed and rights as well protected, by the forms of chancery as by the forms of the civil law.

From the foregoing considerations, the court answer the first point certified in the affirmative, subject to the amendments of the bill, as suggested. And they answer the second and third points, with the qualifications stated, also in the affirmative.

Mr. Justice CATRON.

I agree the points certified must be answered favorably to the complainants; but I do not altogether agree with the reasoning that has led a majority of my brethren to this conclusion.

The answer to the second question, controls the answers to

the others; it is, "Can the Circuit Court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed, or suppressed?"

The will of 1813, cannot be set up, without a destruction of the will of 1811;[1] this will has been duly proved, and stands as a title to the succession of the estate of Daniel Clark; nor can the Circuit Court of the United States set the probate aside: this can only be done by the Probate Court.

Nor can the will of 1813, be set up in chancery, as an inconsistent and opposing succession to the estate, while the will of 1811, is standing in full force. Such is the doctrine in the English Court of Chancery, as will be seen by the cases of *Archer* v. *Mosse*, 2 Vern., 8; *Beale* v. *Plume*, 1 P. Wms., 388—and which are confirmed by the case of *Kenrick* v. *Barnsby* in the House of Lords, 7 Bro. P. C., 437. Nor do the doubtful suggestions of Lord Hardwicke in *Barnsby* v. *Powel*, 1 Ves, Sr., 119, 284, conflict with the previously settled doctrine, as I understand that case. The argument that a fraudulent probate is a fraud on the living, and therefore chancery can give relief by setting aside such probate, is a mistaken idea of the chancery powers. Surely the probate of a fraudulent or forged paper, is a fraud on the living, as much as the suppression of the last will, and the causing to be proved, a revoked one; still chancery has not assumed *jurisdiction to set aside the probate of a will alleged to have been forged or to be fraudulent, after the testator's death; as will be seen by the cases cited; although he who committed the fraud, or forgery, procured the probate to be had of the paper, in the Probate Court.

*652]

It by no means follows, however, that the court below has no jurisdiction of the case made by the bill in one of its aspects. Mrs. Gaines claims to be the only child and lawful heir of Daniel Clark. This we must take to be true. By the Civil Code of 1808, ch. 3, sec. 1, art. 19, p. 212, it is declared "That donations either *inter-vivos*, or *mortis causâ*, cannot exceed the fifth part of the property of the disposer, if he leaves at his decease one or more legitimate children or descendants, born or to be born."

By the case made in the bill, Mr. Clark could only dispose of one-fifth part of his property at the time of his death; provided he had no wife living; and if she was living, then only of the one-fifth part of one-half. It follows, if the will of 1811 is permitted to stand as Daniel Clark's last and only will, that

[1] EXPLAINED. *Gaines* v. *Hennen*, 24 How., 566.

Mrs. Gaines can come in as heir for the four-fifths. On this aspect of the bill she can proceed to establish, and enforce her rights as heir, without making probate of the will of 1813—and the second question must be answered in the affirmative.

By the will of 1811, Mary Clark is the principal devisee. She made her will and died; by this will, Caroline Barnes is entitled to part of Daniel Clark's estate, and ought to be before the court to maintain her rights. I, therefore, do not concur that as to her the bill is multifarious. As to the purchasers from the executors, I have more difficulty. I agree, where there is one common title in the complainant; and this could only be the true source of all the titles in all the defendants, and they have not obtained the first link in the chain of title; that then the true owner may sue them together in chancery although they claim by separate purchases from a spurious source. Such is the general rule; nor do I think the purchasers from Chew and Relf, are exempt from its operation, on the ground that they have no concern with the settlement of the accounts growing out of the administration. I therefore concur in answering the first question—that the bill is not multifarious.

The third question presents no difficulty as to the executors; they are properly sued in chancery for distribution beyond doubt: and so I imagine are the devisees of Mary Clark; they being by the will of *Mrs. Clark [*653 co-distributees with Mrs. Gaines under the will of 1811, as to the one-fifth part of Daniel Clark's estate.

The purchasers are charged with having purchased with knowledge of Mrs. Gaines's superior title; and with having fraudulently purchased from the executors with such knowledge; there being jurisdiction to grant relief against the executors, in chancery, the same court can grant relief against the purchasers, involved in the fraud of the executors. If they could be compelled to account in regard to the real estate when it remained in their hands; purchasers with notice of Mrs. Gaines's rights; and who purchased with the intention to defeat her rights and deprive her of them, can stand in no better situation than the executors, and must account likewise; both being held in a court of equity equally as trustees for the true owner. Therefore, on the face of the bill, a court of equity has jurisdiction; and a court of law has not exclusive jurisdiction, and thus the third point ought to be certified.

ORDER.

This cause came on to be heard on the transcript of the

record from the Circuit Court of the United States for the eastern district of Louisiana, and on the points and questions which were certified to this court for its opinion agreeably 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 first question should be answered in the affirmative; but that the bill should be so amended in the Circuit Court as to avoid both of the exceptions stated in the opinion of this court, and that the second and third questions should also be answered in the affirmative, with the qualifications stated in the opinion of this court. Whereupon, it is now here ordered and adjudged, that it be so certified to the judges of the said Circuit Court.

WILLIAM R. HANSON, JOSEPH L. MOSS, ISAAC PHILLIPS, JOSEPH M. MOSS, AND DAVID SAMUEL, PLAINTIFFS IN ERROR, *v.* LESSEE OF JOHN H. EUSTACE.

A refusal to produce books and papers under a notice, lays the foundation for the introduction of secondary evidence of their contents, but affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them.[1]

*654] *Where the fact sought to be proved by the production of books and papers, is the existence of a deed from one of the partners of a firm to the firm itself, secondary proof, that an entry existed on the books of a transfer of real estate to the firm; that an account was open, in them, with the property; that the money of the firm was applied to the consideration of the purchase; that the persons who erected new buildings on the property were paid by the notes and checks of the firm, which buildings were afterwards rented in the name, and partly furnished through the funds of the partnership, and that the taxes were paid in the same way, this is not sufficient for the presumption of a deed by a jury, as a matter of direction from the court.[2]

Nor are the jury at liberty, in such a case, to consider a refusal to furnish books and papers, as one of the reasons upon which to presume a deed; and an instruction from the court which permits them to do so, is erroneous.

THIS case was brought up by writ of error from the Circuit Court of the United States, holden in and for the eastern district of Pennsylvania. It was an ejectment brought by Eustace, a citizen of the state of Virginia, against the plaintiffs in error for two pieces of property in the city of Philadelphia; particularly described in the declaration. One of them fronted sixty-six feet upon Chestnut street, being upon the west side

[1] S. P. *Riggs* v. *Tayloe*, 9 Wheat., 483; *Delane* v. *Moore*, 14 How., 253.

[2] APPROVED. *Mitchell* v. *Harmony*, 13 How., 147.

of Schuylkill Seventh street, and the other was on the westerly side of South Sixth street, between High and Chestnut streets, fronting twenty-five feet on Sixth street, nearly the whole of the lot being covered with a large building. The plaintiff below, Eustace, claimed title under a sheriff's sale; the defendant, Hanson, also claimed title under a public sale, but made under the authority of the assignees of R. and I. Phillips, who had become insolvent. Eustace alleged that the whole of the proceedings, both before and after the insolvency, were void on account of fraud; and that this being so, there was nothing to impair his own title. The firm of R. and I. Phillips, which carried on a very extensive commercial business, in Philadelphia, was composed originally of Robert Phillips and Isaac Phillips. After the death of the former, which occurred, as will be hereafter stated, the partners were Isaac Phillips and Joseph L. Moss, who continued to use the same partnership name.

In April, 1830, Isaac Phillips was regularly naturalized as a citizen of the United States.

On the 9th of June, 1832, Herring and wife conveyed to Robert Phillips, in fee, the property in Sixth street.

In December, 1833, Robert Phillips died, intestate; Isaac being then in Europe. John Moss, whose daughter Isaac had married, *entered a *caveat* at the office of the probate [*655 of wills, to prohibit any one from taking out letters of administration upon his estate.

On the 29th of August, 1834, three several persons conveyed each a lot upon Mulberry street, or Arch street, being called by either name (the three lots being adjoining to each other, and making in the whole sixty-six feet), to Sarah Moss Phillips, wife of Isaac Phillips, subject to the payment of a ground rent therein mentioned.

In September, 1834, Isaac Phillips entered into a contract with one Linck, a house carpenter, to build a house for him on the lot just mentioned in Arch street, and agreed to pay said Linck $20,000 for it, in the manner stated in the contract.

On the 1st of January, 1835, R. and I. Phillips leased the property in Sixth street to one Saint for four years; R. and I. Phillips agreeing to assist in furnishing to the amount of $1,000, which was to be refunded by Saint in the first year, after which Saint was to pay $1,600 per annum as rent.

On the 9th of June, 1835, Thompson and wife conveyed to Isaac Phillips, his heirs and assigns, the Chestnut street property, subject to the payment of an annual ground-rent of $272 per annum; and subject also to the payment of a mortgage debt of $3,500.

On the 22d of June, 1835, Phillips, having purchased the ground-rent thus reserved upon his lot, received a deed for it from the then owner, paying $4,533.33.

On the 30th of January, 1837, the register issued a notice to John Moss, stating that, in consequence of his *caveat*, no letters of administration had been taken out upon the estate of Robert Phillips, whereby the collateral inheritance tax was unattended to, and the commonwealth was suffering.

On the 4th of February, 1837, letters of administration were granted to Isaac Phillips, who gave the required bond and security.

On the 13th of February, 1837, R. and I. Phillips wrote to Eustace, instructing him to draw on them at ninety days for $30,000 or $40,000, and to send sterling or French bills.

On the 4th of March, 1837, Eustace drew a bill of exchange, dated at Richmond, upon R. and I. Phillips, payable fifteen days after date to the order of Henry Thassall, for $9,085.92, which was accepted by the drawees.

*656] On the 20th of March, 1837, Joseph L. Moss conveyed to David *Samuel certain property therein mentioned, situated on Walnut street, for the sum of $7,000.

On the 22d of March, 1837, Isaac Phillips and Joseph L. Moss, composing the firm of R. and I. Phillips, made a conveyance to Joseph M. Moss and David Samuel, reciting that the parties of the first part had been compelled to suspend payment, and conveying to the parties of the second part "all and singular the joint and several property and estate of the said parties of the first part, and of each of them, real and personal, situate, lying and being, or due, owing or belonging to them or either of them, within the state of New York," upon trust to pay certain persons therein mentioned. This deed was verified and recorded in New York, on the 23d of March.

On the 24th of March, 1837, Joseph L. Moss executed a warrant of attorney, to confess judgment in favor of John Moss, for $48,000, conditioned for the payment of $24,600.

On the 25th of March, 1837, David Samuel re-conveyed to Joseph L. Moss the same property which Moss had conveyed to him on the 20th of March.

On the 27th of March, 1837, a judgment was entered up, in the District Court for the city and county of Philadelphia, in favor of John Moss, against Joseph L. Moss, for the sum of $48,000, in conformity with the warrant of attorney just referred to.

On the 10th of April, 1837, Isaac Phillips conveyed to John Moss the life-estate which he derived from being tenant by the curtesy, in the Mulberry street property, which has been

heretofore mentioned as having been conveyed to Sarah Moss Phillips, wife of the said Isaac, on the 29th of August, 1834. This property was subject to a ground-rent of $231 per annum, but is understood to be considered in Pennsylvania as a fee. The consideration received by Isaac Phillips is stated to have been $7,102.17.

On the 27th of May, 1837, Joseph L. Moss executed to John Moss, a bill of sale of sundry articles of furniture, valued at $3,950, to pay in part the judgment which had been entered, on the 27th of March, against the said Joseph L. Moss.

On the 3d of June, 1837, Isaac Phillips executed to Joseph M. Moss a bill of sale of certain furniture, in consideration of $5,707.

On the 22d of June, 1837, Isaac Phillips, and Sarah his wife, and Joseph L. Moss, and Julia his wife, executed a deed to Joseph M. Moss and David Samuel, assigning their property generally, and particularly *describing the two [*657 pieces of property which are the subjects of the present suit, upon certain trusts. After providing for preferred creditors, the deed directed the trustees to pay and satisfy in full, or ratably, all the other creditors who should, on or before the 21st day of August, 1837, at twelve o'clock, noon, and if resident in Europe, on or before the 20th of October, 1837, at twelve o'clock, noon, execute and deliver to the said R. and I. Phillips, a full, valid, and general release. The trust was accepted.

On the 8th of July, 1837, the property thus conveyed was valued by appraisers, appointed by the Court of Common Pleas, at $139,373.69. The Chestnut street property was valued at $15,000, and the Sixth street property at $20,000.

On the 2d of October, 1837, Phillips and Moss separately petitioned for the benefit of the insolvent law of Pennsylvania, but did not execute an assignment of their property to trustees. Two of the creditors opposed their discharge, but on the 19th of October their opposition was withdrawn, and Phillips and Moss were severally discharged.

On the 17th of November, 1837, Isaac Phillips, as the administrator of Robert Phillips, represented to the Orphans' Court that the said Robert, at the time of his death, was seised in fee of the Sixth street property; that he owed the petitioner the sum of $35,473.35, and prayed for an order to sell the property. Whereupon the court, on due consideration, granted the prayer of the petitioner, and awarded an order of sale accordingly.

In December, 1837, an action was brought by the Farmers' Bank of Virginia against Phillips and Moss, trading under

the firm of R. and I. Phillips, in the District Court of the city and county of Philadelphia, upon the bill of exchange drawn upon them by Eustace as before mentioned.

On the 19th of January, 1838, Isaac Phillips, as administrator of Robert, reported to the Orphans' Court, that he had, on the 26th of December, sold the Sixth street property to David Samuel and J. Mora Moss, assignees of R. and I. Phillips, for $22,500, which sale was duly confirmed.

On the 22d of January, 1838, a judgment was entered in the District Court against R. and I. Phillips, at the suit of the Farmers' Bank of Virginia for the sum of $9,541.58, subject to the defendants' discharge under the insolvent laws of Pennsylvania.

*658] *On the 30th of January, 1838, Isaac Phillips, as administrator of Robert, executed a deed for the Sixth street property, to David Samuel and Joseph Mora Moss, assignees of R. and I. Phillips, which was ratified and confirmed by the Orphans' Court.

On the 19th of March, 1838, a *fieri facias* was issued upon the judgment obtained in March, 1827, by John Moss against Joseph L. Moss, for $48,000, the proceedings upon which were set aside on the 5th of May for irregularity.

On the 11th of May, 1838, Eustace filed a bill in equity, in the Court of Common Pleas, against R. and I. Phillips and their assignees, claiming that the proceeds of certain notes and bills should be specifically applied to the payment of his, the said Eustace's, claim.

On the 12th of May, 1838, an *alias venditioni exponas* was issued upon the judgment in the case of John Moss against Joseph L. Moss, and on the 4th of June the sheriff sold to John Moss, for $150, the interest of Joseph L. Moss in the Walnut street property.

On the 8th of June, 1838, the judgment which the Farmers' Bank of Virginia had obtained against R. and I. Phillips was entered for the use of Eustace, upon which a *fieri facias* was issued on the 12th of September. The sheriff levied upon several pieces of property, amongst which were the two which are the subject of the present suit, viz., the Chestnut street and Sixth street properties.

On the 29th of September, 1838, the subject of the insolvency of Phillips and Moss was brought before the Court of Common Pleas, which passed an order permitting the petitioners to sign the assignments annexed to their petitions, and directed the date of said assignments to be filled up, as of that day; and that the time from which said assignments should take effect should thereafter be determined by the proper

authority: and the court refused to alter the appointment of assignees, made at the time the petitioners were sworn and discharged, to wit, in the term of December, 1837. The trustees gave bonds on the same day.

From September, 1838, to April 24th, 1839, there were five writs of *venditioni exponas* issued on the judgments which the Farmers' Bank of Virginia had against R. and I. Phillips, all of which writs and the proceedings under them were set aside for irregularity. On the 24th of April, a *pluries venditioni exponas* was issued. But before the sale was made, viz., on the 30th of April, 1839, the assignees of R. and I. Phillips sold at public sale, at the Philadelphia Exchange, *the [*659 Chestnut street and Sixth street properties to William R. Hanson, one of the defendants in the suit below, and one of the present plaintiffs in error, at the following prices, viz., the Chestnut street property for $16,000, and the Sixth street property for $20,500. Both properties were advertised as clear of all encumbrances, title indisputable. At the sale the following notice was read:

"Bidders will please take notice that the property on the north side of Chestnut street, 42 feet west of Schuylkill Seventh street, being 66 feet front, by 158 feet deep; and also that on the west side of Delaware Sixth street, between Market and Chestnut streets, formerly known as Rubicam hotel, have been levied upon as the property of the late firm of R. & I. Phillips, and are actually advertised by the sheriff; and that the right of the assignees of R. & I. Phillips to convey any title to either of said properties is disputed and denied.

C. FALLON."

On the 10th of May, 1839, the assignees executed deeds to Hanson for the Chestnut street and Sixth street properties.

On the 20th of May, 1839, the sheriff, under the last writ of *venditioni exponas*, issued in the case of the *Farmers' Bank of Virginia* against *R. & I. Phillips*, set up and exposed to public sale several pieces of property, amongst which were the Chestnut street and Sixth street properties, for which Christopher Fallon became the highest bidder and purchaser.

On the 22d of June, 1839, the sheriff executed a deed of the above to Fallon, who, on the 11th of September conveyed them to Eustace, the plaintiff in the suit below.

In October, 1839, Eustace brought an ejectment to recover possession.

The cause came on for trial in October, 1840. The facts stated above were established by proof, and evidence farther

offered to show that the property in Sixth street was recognized by the firm of R. & I. Phillips as partnership property; that an account was opened with it on the books, and the taxes paid by the firm. On the part of the defendant, evidence was offered to show that, at the time of the death of Robert Phillips, there was another brother living besides Isaac, who was called Samuel, and also that two children of a third brother, named Lawrence, were living; that the Walnut street property was not included in the assignment, because it
*660] was thought *that the encumbrances upon it were so heavy as to destroy its value as property.

In an early stage of the trial, the counsel for the plaintiff gave notice to the defendant to produce the books and papers belonging to the firm of R. & I. Phillips. After the testimony was closed, the court called on the plaintiff's counsel to proceed to address the jury, at which time a large number of books were brought into court, said to be the books of R. & I. Phillips, and the inspection of them was offered to the plaintiff's counsel; but the court said it was too late, and they would not permit time to be taken up in that stage of the case.

The court having delivered a charge to the jury, a verdict was found by the latter for the plaintiff; but the following exceptions were taken to the charge:

"Mr. Joseph L. Moss and Isaac Phillips, the defendants in the judgment, have been divested of all their interest, either by their voluntary assignment in June, 1837, and the proceedings under the insolvent act in October following, or the sheriff's sale in May, 1839. They can set up no title adverse to the plaintiff, and though the assignment in June may be perfectly valid, they have no right to retain possession, unless, perhaps, with the assent of the assignees, under their title, as distinct from theirs. Mr. Joseph M. Moss and David Samuel have no legal estate in the property; their deed to Mr. Hanson divested their interest in May, 1839; they have, therefore, in themselves, no right to retain possession; though, if they are in possession, they may defend under the assignment, and the title of Mr. Hanson, as a purchaser from them, unless such privity exists between them and the defendants in the judgment, as prevents them from setting up an outstanding title—a question, which is not very important in this case, and might rather tend to make it more complicated than is necessary, by discussion."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It is farther objected to the plaintiff's right, that having

accepted a judgment, subject to the discharge of the defendants under the insolvent law, he took it, subject to all its incidents and effects, whereby he can come upon the property of the debtors only as a *general creditor, on an equal [*661
footing with all others, through the intervention of the trustees, or in their name. This is, however, not the true construction of the agreement; it means that by confessing judgment, the defendant waived no rights or exemptions, which accrued to him by the discharge; it left him free to claim freedom from arrest on any process on the judgment, or any other right secured by the law; but it left the plaintiff at liberty to pursue any property which had belonged to the defendants, by a proceeding adversary to a purchaser under him, or any assenting creditor. If, notwithstanding any previous assignment, either voluntary or under the insolvent law, there was any property to which his judgment could attach, there was nothing in the assignment or its legal effects which prevents the plaintiff from pursuing it by legal process, till by its consummation by a sheriff's sale and deed acknowledged, he put himself in a position to assert his pretensions in a court of law, or which could, in any manner, compel him to come in under either assignment, or lose his debt.

"As a judgment creditor, he might contest with the assignees under the voluntary assignment, the validity of their title, or that of any person claiming under them, or the right of the trustees under the insolvent assignment; and if he could defeat the right thus claimed, the property was open to his claim, if he could establish it. In endeavoring to do so by this suit, we think he is not acting inconsistently with the terms on which the judgment was confessed; the defendants disclaim all interest in the property from the time of their first assignment, and are, therefore, not competent to question the plaintiff's right to try title with others. On a contrary construction, he would be compelled to acquiesce in the exclusion from the benefits under the assignment, by not having released in time; or if it was inoperative, to come in only as a general creditor for his ratable proportion of the available effects of the insolvents. We think this objection is not sustained."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It is next objected that the plaintiff is precluded from contesting the validity of the assignment of June, 1837, by having filed a bill in equity, admitting its effect, and claiming under it, on the same principle which binds a creditor who

takes his dividend under it. *That principle is undoubtedly a sound one, but we cannot perceive its application to this case.

"The bill states the fact of an assignment—its acceptance by the assignees—their action under it, with the consequences of such action on the equitable rights of the plaintiff; without affirming or denying the legal efficacy of the assignment, he alleges that the assignees have made, or are about to make a disposition of certain specified notes, in violation of an agreement between the plaintiff and the assignees, prejudicial to his interest and rights. He asks the court to interfere, for the purpose of protecting him from the effects of the assignment, to prevent the assignees from diverting the notes or their proceeds from the purposes agreed upon by the assignors before the assignment; he avers this agreement to be binding on the assignees, who are not authorized, on principles of equity to apply this fund to the purposes of the assignment. It is consequently a disaffirmance of the terms and conditions prescribed by the assignors—a claim to the whole of the notes and proceeds, for his own sole benefit, in opposition to the claims of every other creditor. The whole bill is founded on the equitable obligation and duty of the assignees to apply this portion of the assigned effects, contrary to the express terms of the assignment, on the ground that for the causes alleged, the law of equity controls its effect, and must regulate their distribution of the funds. On these principles the equitable claim of the plaintiff to this portion of the personal property assigned, is as adverse to the assignment as his legal claim to the real estate in controversy. The difference between the two claims is this: in the bill in equity the plaintiff avers the delivery of the notes to the assignees—that they were payable to, and endorsed by Robert and Isaac Phillips—that having then come to their hands, his remedy to recover possession of the unpaid notes, or the proceeds of those which are paid, is in equity. Whether his remedy is at law or in equity, is for the court, before whom the bill is pending, to decide; the object of a suit in either court would be the same; the question in both must be—in whom is the right to the notes or their proceeds—as it is in this case, in whom is the right of possession to the real estate? In the one case the validity of the assignment in passing the right to these notes to the creditors under the assignment, is as much contested by the plaintiff as it is in the other; the fact of an assignment is admitted in both, but the plaintiff takes different modes of avoiding its effects.

*663] *"Having accepted and acted in execution of the trust, the assignees cannot deny the validity of the

assignment; the law places their action under the supervision of a court, to whom the plaintiff applies for the application of a specific fund to his exclusive benefit, notwithstanding the contrary application by the assignees, under the requisitions of the assignment.

"Had the plaintiff resorted to a court of equity for a remedy as to the land in controversy, in virtue of his sheriff's deed, he must have stated his case, as he has done in his bill in equity in relation to the notes, praying for a reconveyance of what was not sold, an account for, and payment of what had been sold, on the ground that the property did not pass in equity by the assignment, and that in the hands of the assignees, it remained subject to his paramount right as a creditor attempted to be defrauded by it. Broader ground might be taken in the latter than in the former case; the plaintiff might rest his claim to the notes, on the principles of equity implanted in his case, without an allegation of fraud in fact, while he might put his claim to the land on every ground of fact, law, and equity, which his case covered; but when his object is to paralyze the assignment, either as to the notes or land, he cannot be held to affirm or claim under it.

"So long as he claims adversely to the terms and conditions upon which the assignees must act pursuant to the assignment, he may, according to the nature of his case, apply to a court of equity, to compel them to execute the trust, according to their legal and equitable obligations; or apply to a court of law, on the ground that the assignment passed no legal right to personal or real property. In resorting to a court of equity in one case, and a court of law in the other, the plaintiff is at liberty to choose his ground in affirming or disaffirming the legal effect of the assignment in creating a trust. The assignees are precluded from a choice; they have fastened on themselves a trust, either for the assenting or dissenting creditors, which the appropriate court will carry into execution, according to its settled principles. As the trust may be a legal or equitable one, its execution is enforced at law or in equity; as to one portion of the assigned property, the proper remedy may be at law, and as to the other, in equity; yet the pursuit of one can be no bar to the other, unless the grounds respectively assumed are wholly incompatible. A creditor who asks for such an execution of a trust as puts him in *the same situation as if a trust [*664
never existed, and defeats the objects intended to be effected by the creation of the trust, by directing the subject of the trust from those for whom it was designed to himself, cannot be said to claim a benefit from the trust, or to affirm what he

disaffirms. By pursuing this course, he gives up no right which he could assert at law, by invalidating the instrument creating the trust—his objects are the same; the results of a decree in equity, or a judgment at law, are the same, when his rights are established to the same extent as they existed before the assignment, or as if it had never been made. Should the plaintiff obtain a decree in his favor, as to the notes and their proceeds, he thus far annuls the assignment, that it no longer impairs his rights, and is used by a court of equity as the mere instrument for the purposes of justice, and a conduit to the equitable jurisdiction which it exercises over the trustee. Should he obtain a judgment at law, an execution gives him all the fruits of a decree in equity—the different modes of proceeding being but the varied means of effecting the same object. We are, therefore, of opinion, that the filing and pending of the plaintiff's bill in equity does not, in law, impair his rights to proceed by ejectment to recover the property now in dispute, any more than bringing and prosecuting the present action would prevent him from prosecuting his bill in equity. This objection must consequently fail."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"Another objection to our entering on an investigation of this case is founded on the decisions of the Supreme Court of this state, in the case of *Fassit* v. *Phillips*, which it is said established the validity of this assignment, and is obligatory on this court, on the principles which it has adopted and acted on uniformly. We cannot so view it. That was a bill in equity, praying for an injunction against any proceedings under the assignment, on account of its invalidity for the causes set forth in the bill, being acts of alleged fraud on the part of Joseph L. Moss, one of the assignors; an injunction was granted, but on the coming in of the answer, there appeared a positive denial of fraud, and of every fact on which the equity of the plaintiff depended. A motion to dissolve the injunction was made and heard on the bill and answer alone; the court dissolved the injunction, the only effect of which was, that assuming the answer to be true, as the *665] *court were bound to do in the then state of the case, all action upon it was suspended till evidence was taken, and the cause came to a final hearing, when it will be competent for the plaintiff to disprove the answer, and support the allegations of his bill. In the mean time, the merits of the cause remain as open as before; the injunction was granted on the *prima facie* case stated in the bill and exhibits, but as the

whole equity of the plaintiff was denied, the *prima facie* case was rebutted, whereby the parties now stand as if the court had not acted on the bill; an interlocutory order, in granting an injunction, or taking it off, has no effect on the rights of either party at the hearing. The facts set up or denied in the answer, can neither be considered as established or negatived; for the purposes of the motion to dissolve the injunction, the answer was taken as true; it has performed its office, leaving its future effect dependent, in the opinion of the court, on the effect of opposing evidence on the part of the plaintiff. Had the decisions of the court been made on a hearing of the cause on the pleadings, exhibits, and evidence, it would have been entitled to great weight in our mind, and yours, on the facts before them, and perhaps conclusive on matters of law; certainly so, if their decree had been founded on any state law, statute or common, which was local, and not in conflict with the laws of the Union."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It has also been contended, that whatever may be the effect of the assignment of June, 1837, on the rights of the parties, or if it is wholly void, the estate of the assignors passed to the trustees appointed by the court, on the discharge of Moss and Phillips, under the insolvent law of 1836, by the force of the law and the discharge, from the time of the filing the petitions for the benefit of the act, so that there was no interest in the defendant on which the judgment under which the plaintiff claims could attach. If this position is well taken, it takes away all right in either the plaintiff, the assignees, or Mr. Hanson to the property in controversy; for if it is still vested in the trustees for the benefit of all the creditors of the insolvent, without any assignment made by them, then as the trustees have made no conveyance, the plaintiff's judgment was no lien on their rights; and if the assignment of June, 1837, is void, Mr. Hanson has no right.

[*666 *"As this position is founded on the words of the thirty-fourth section of the insolvent act, it becomes necessary to examine its various provisions, in order to ascertain the intention of the legislature in this particular.

"By the first section, the courts of Common Pleas have power to grant relief to insolvent debtors, 'on application made in the manner hereinafter provided.' Purdon, 508.

"Sect. 2. 'The jurisdiction of the said court must be exercised as follows, and not otherwise,' viz.: 'by sect. 9, the petitioner must present a statement of his estate, effects, and

property, debts due by him, &c.;' by sect. 12, he must exhibit a true account of his debts, credits, and estates, and shall satisfy the court that he has neither concealed or conveyed, for his own use, or for any of his family or friends, or whereby to expect any future benefit to him or them, any part of his estate, effects, or credits.

"Sect. 13 directs, that if he shall be entitled to relief, he shall take an oath that he will deliver up, and transfer to his trustees, for the use of his creditors, all his property, debts, rights, and claims, &c.; that he has not given, sold, or intrusted any part of his property, rights, or claims, to any person, whereby to defraud his creditors, or any of them, or to receive or expect any profit, benefit, or advantage thereby.

"Sect. 14. 'The petitioner shall thereupon execute an assignment of all his estate, property, and effects whatever,' to such trustees as may be nominated by his creditors, or appointed by the court.

"Sect. 15. When such assignment shall have been executed, the court shall make an order of discharge; and then follows the thirty-fourth section, enacting that, 'The trustees appointed as aforesaid, shall be deemed to be invested with all the estate and property of the insolvent, at the time of filing his petition, subject to existing liens, and the trustees shall take possession of such property and estate, and may sue therefor in their own names, as well as for debts and things in action, to which there are these provisos: 1st. That no purchase or assignment of real estate in the county, made *bona fide* for a valuable consideration, before the assignment, to any person not having actual notice of the petition, shall be impeached thereby. 2. Nor if situated out of the county, if so sold or assigned before the recording of the assignment in the other county. 3. Nor a sale of personal property to any person, not having actual notice of the petition or assign-
*667] ment. 4. Nor if any person pays a debt, or delivers *property to the insolvent, without actual notice, shall he be liable to pay or deliver the same to the trustees.

"Sect. 36. 'If any insolvent shall, prior to such assignment, have conveyed any part of his property to his wife and children, or either, or to any one in trust for them, or have conveyed to any other person with intent to defraud creditors, the trustees shall have power to recover and dispose of the same, as fully as if the insolvent had been seised or possessed thereof at the time of the assignment.'

"From this summary view of the law, it is evident that the legislature intended that an assignment should be made before a discharge; the sections subsequent to the fourteenth are

predicated on the supposition that it had been made, and their most important provisions will become a dead letter, if none is made, especially the thirty-sixth. By referring to the preceding act of 1814, it appears that no assignment was requisite; but as the act of 1836 is an entirely new system, superseding the old, its requisitions cannot be overlooked.

"The fourteenth section is peremptory, that an assignment shall be executed; and the fifteenth, in terms, makes the discharge dependent on its having been done; the making the estate vest before the assignment, or without one, is restoring the law of 1814, by entirely annulling the provisions of the fourteenth and fifteenth sections of the new act, and making it impossible to carry the thirty-sixth section into effect by any other construction than substituting petition for assignment. We are aware of no rule or principle of law which justifies such construction by the force of the thirty-fourth section; it must be taken in connection with the other parts of the law, so as to make the system consistent in all its parts, unless its words exclude all construction and reference, which in our opinion they do not; on the contrary, they contain a reference which makes them in perfect harmony with what precedes and follows. Thus, in the fifteenth section, 'the trustees appointed as aforesaid,' necessarily refers to the fourteenth section, by which they became trustees in virtue of the assignment; they are the persons to whom the court direct it to be made; its execution is the prerequisite to a discharge by the very words of the fifteenth section, and is the only mode in which the petitioner can comply with the oath prescribed in the thirteenth section.

"Had the law used the term assignees instead of trustees, there could have been no doubt they are the persons to whom the debtor swore he would deliver and transfer all his property, debts, rights, and claims, in the thirteenth section, to whom he was bound to execute *an assignment by the [*668 fourteenth, on which alone the court could discharge by the fifteenth, or give such effect to their order made after the assignment, as declared in the sixteenth section. They are assignees to all intents and purposes; as such they became trustees; but however named, their character, powers, rights, and duties are the same, and were complete without the thirty-fourth section, to vest in them the estate of the petitioner at the time of the assignment; but the legislature thought proper to make provision for transfers and conveyances of the estate and effects of the insolvent, between the filing the petition and the execution of the assignment, which was the object of the

thirty-fourth section, and not to repeal any preceding provision, or to dispense with the assignment.

"Hence its true construction is, that the assignment, when made, shall relate to the filing of the petition, so as to cut out all intermediate dispositions by the debtor, except in the cases provided for in the thirty-fifth section, which are exceptions to the thirty-fourth, by way of a proviso, limiting its effect. Such construction gives effect to the thirty-sixth section, according to its words, which it cannot have, if there has been no assignment, while it is in harmony with every preceding provision, as well as in effectuating the intention of the legislature in requiring the execution of an assignment before discharge. We cannot think it the meaning of the law, that a debtor should be discharged who has made no assignment; that there should be trustees who were not assignees, or that the oath of the petitioner need not be complied with, as to the act specially enjoined to be done as the basis of all subsequent action by the court or trustees.

"There is another important view which must be taken of this law. In conferring power on the Court of Common Pleas to grant relief, the first section applies only to an application made in the 'manner thereafter directed;' the second section directs that the jurisdiction of the courts 'may be exercised as follows, and not otherwise;' this section is, consequently, a limitation on jurisdiction, so far as it applies. These words are broad enough to extend to all the provisions of the law; it is certainly no strained construction to hold, that they apply to those acts which are positively directed to be done, before any subsequent action can be had pursuant to the law; and if such should be its ultimate construction, that the requisites prescribed are matters on which jurisdiction depends, the consequences may be very serious and alarming. We do not
*669] mean to say that such is the true inference to be drawn from the words of the law, or desire *to be the first to give them a judicial exposition; our duty is to await the course of the courts of the state, and to follow it, unless the exigency of a case requires us to take the lead. We can decide all questions which have arisen under this law, without inquiring into the jurisdiction of the Court of Common Pleas, on the cases of the parties in this case; we can, with perfect consistency, hold that the estate of the insolvent does not pass to the trustees, without an assignment, so as to cut out the lien of a judgment rendered after the discharge, but before an assignment executed; and at the same time hold the judgment, or order of discharge, to be perfectly valid for all the purposes declared by the law. So we take this law as applicable to this

case; the omission to make the assignment before the discharge does not impair its effect in protecting the debtor, but it leaves the parties free to assert their respective rights—the plaintiff as a creditor by original right or by assignment, and Mr. Hanson as a purchaser, notwithstanding the provisions of the thirty-fourth section. Other considerations tend to the same conclusion. The words of the thirty-fourth section are, 'all the estate and property of the insolvent, at the time of filing his petition,' which cannot apply to the property in question, because the assignment made in June preceding divested the assignors of the whole estate and property, whether it was valid or void, as against creditors. If it was valid, all the right of the assignors passed to the assignees; if it was void as to the creditors, it was good between the parties, and all others, except the creditors who were intended to be defrauded, or whom it might tend to defraud. As to them and them alone, the assignors are held to be vested in trust, without any other right, or for any other purpose, than making the property subject to debts. So that in any event there was no interest or right which the assignor could pass to the trustees for all the creditors, either by operation of law under the thirty-fourth section, or by an assignment under the fourteenth.

"The thirty-fourth section provides only for the case of an insolvent having property at the time of his petition, which he had not before conveyed; it is wholly silent as to the case of his having conveyed or assigned to his wife, children, or in trust for them, or to any other person, with intent to defraud creditors; such case is provided for by the thirty-sixth section, when the insolvent has made an assignment to trustees previous to his discharge. By making this distinct, substantive provision, the law clearly excludes such conveyance and transfer from the operation of the thirty-fourth section; thereby making a clear distinction *between the property which [*670 had never been transferred before the discharge, and property which had been so transferred contrary to law. Whether, then, we look to the provisions of the insolvent law in connection, or the words of the 34th section alone, we are fully satisfied that an assignment by the insolvent at some time previous to the discharge, is necessary to vest his estate in the trustees, so as to prevent a subsequent judgment from becoming a lien. This section, then, does not affect the plaintiff's case, as contended by the defendants; the judgment may attach, notwithstanding the discharge, if we assume, as we do at present, that no assignment was made before the 29th September, 1838, after the plaintiff had made a levy; an assignment was then made, and this brings up the construction of the 36th section, which

provides that when a conveyance is made prior to such assign ment to defraud creditors, the trustees shall have power to recover the estate so conveyed. It follows, that if they do recover it, it must be distributed among all the creditors in the same manner as if the insolvent had been seised or possessed of it, at the time of such assignment. So construed, this section would take the property in controversy from Mr. Hanson, as a purchaser under the assignment of June, 1837, however fair his purchase may have been; it is very analogous to the enacting clause of the 13th Eliz., without the aid of the 6th section of that statute; there is no proviso to except a purchaser for valuable consideration without notice of the fraud between the assignors and assignees. There is, indeed, no declaration in terms, that the fraudulent conveyance shall be void, but it is done in effect by declaring that the trustees may recover and dispose of what has been so conveyed, 'as fully and effectually' as if the insolvent had actually been seised at the time of the assignment, which to all intents and purposes annuls the fraudulent conveyance, and takes the estate from the purchaser under it, as would the 13th Eliz., but for the exception in the 6th section.

"Literally construed, it would also destroy the lien of plaintiff's judgment, and any right founded on it, other than this ratable proportion of the general effects of the insolvent; giving it this effect, the 36th section would supersede the 13th Eliz., the common law on which it is founded, and deprive the creditor, who was attempted to be defrauded, of rights which have been unquestioned for two hundred and seventy years. It has never been doubted, that a creditor who takes measures for avoiding a fraudulent conveyance of real or personal property, by levying on and buying it under his judgment, or *a stranger who is such purchaser, shall hold and enjoy the property for his own use; and we cannot believe it was intended by the act of 1836 to uproot the whole system of jurisprudence which has grown out of the 13th Eliz., or that it is the fair construction of the provisions of the 36th section. In our opinion, they apply to a case where no creditor having previously acquired a lien or right to property fraudulently conveyed, the trustees proceed to invalidate the conveyance; and that it does not apply where the property is in the hands of a *bona fide* purchaser for valuable consideration, without notice of the fraud before the assignment made by the insolvent. We will not be the first to so construe a state law, which will produce the most mischievous effects on a long settled system of jurisprudence.

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"We have been asked to consider the assignment as having

been made before the discharge, but the insolvent record shows the contrary—it shows the form drawn up, unsigned, and without date, the actual execution by the order of the court on the 29th of September, 1838, as of that date, together with the refusal of the court to give it a retrospective effect to the time of the discharge or petition. This was the proper course to pursue, leaving it to be thereafter decided what was the legal effect of the proceeding, when it should be brought in question.

"There are cases where a court may order that an act be done presently, and to take effect as if done before, but the cases are few; the power is a delicate one, which ought to be used with extreme caution, so as to do no injustice to third persons, or in any way prejudice their rights; when it is intended to be exercised, it should be done in clear terms, and an entry thereof made of record—it is even then viewed with much jealousy, and is never favored—*vide* 2 Pet., 521, &c. In this case it may well be doubted whether the Court of Common Pleas could give to an assignment actually made in September, 1838, the effect of taking away the lien of a judgment rendered in January preceding, and which the judgment creditor had followed up by a levy, while the assignment remained unexecuted; that court very properly refused to make such order, and this court will not consider that as having been done, which was not intended, and ought not to have been done. 2 Pet., 522, 523."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

*"Having disposed of these objections, we now proceed to another, which was much pressed during the trial [*672 —that the plaintiff had not shown a legal title to the property in controversy, so as to enable him to recover in this action. As this objection presents questions of fact, as well as of law, we must refer to the evidence of title, which has been exhibited by the plaintiff, as direct proof of its being in him in virtue of the sheriff's sale, together with the principles of law by which the evidence must be applied.

"A legal title is the right to real estate, derived from the original owner of the soil, and passed to the party claiming it by deed, will, descent, or legal process operating as a deed by force of a law.

"An equitable title is one acquired without a regular deed or formal conveyance of any description, which a court of law considers as a transfer of the estate of one to another; but a title so acquired, as in equity, justice, and good conscience to

vest the beneficial interest—the real and substantial ownership of the property—in the person claiming it. In such a case, a court of equity, whose appropriate and peculiar jurisdiction is to act upon the conscience of the person who holds the formal or legal title to the property, compels him to convey it to the person to whom he is bound in good conscience to make a complete title, thus uniting form to substance.

"As when B sells to A, for a price which is paid by A, who takes possession and makes valuable improvements, but B holds the title, and refuses or neglects to make a deed, A is the real owner in equity, but B is the owner in law, and the contract of purchase is by the most solemn articles of agreement under seal, with covenants to make a deed on payment of the purchase-money. B may turn A out of possession by ejectment in a court of law, because such courts cannot recognize merely equitable titles. But a court of equity would prevent B from following up his legal right, and order him to convey it; such is the course and settled rule of this court, though in the courts of this state, A might successfully defend himself in an ejectment. State courts act in the same case, and at the same time, as a court both of law and equity, which we cannot do, as the courts of the United States are, by the Constitution and laws, organized on common law principles: and though we have full common law and equity jurisdiction, we must exercise it in distinct capacities, as judges or chancellors, as the nature of the case may require.

"There are, however, cases where a court of law will not inquire whether the title of a plaintiff is legal or equitable; *673] a tenant will not *be allowed to dispute the title of his landlord while he holds under him; a defendant in a judgment cannot contest the title of one who holds a sheriff's deed under a sale on the judgment, nor any person who holds possession under them, by privity arising after the judgment; in all such cases the plaintiff will recover possession, so that this objection cannot be made by Mr. Joseph L. Moss or Isaac Phillips.

"So where both parties claim under the same title, neither is bound to trace theirs beyond the common source, or to show any other right than what appears there; the court will not inquire whether such title is legal or equitable. The right of possession depends on the question—in which party the title is invested. Thus, in the present case, both parties claim the right of possession to the Chestnut street lot, under George Thompson's deed to Isaac Phillips. It is, therefore, not necessary for the plaintiff to show the nature of the title of Thompson, or to trace it through the title-deeds to the first owner;

the only contest between the parties being—to whom the right conveyed to Phillips has passed—and neither can call on the other for the exhibition of any other title than that under which both assert the right of possession. As to the house in Sixth street, the case may be different, if the assignees have any claim to it, by any other than the title of J. L. Moss and Isaac Phillips, or Mr. Hanson is clothed with the character he assumes, or claims by a title adverse or independent. He has assumed the position of a *bona fide* purchaser, for a valuable consideration, without such notice as the law requires; if this position is well taken, Mr. Joseph M. Moss and David Samuel can have no interest in either piece of property, or be actors in the suit in opposition to the plaintiff in any other than a derivative right, as before stated.

"Claiming under the assignment of June, 1837, under the Orphans' Court sale, or under Mr. Hanson as a purchaser from them, their possession, if they had any, on the service of the writ, must be rightful or wrongful, as the case may be in evidence; it is, however, clear, that in their own right, by the assignment, they cannot controvert the title of Isaac Phillips and Joseph L. Moss, or call on the plaintiff to produce any other. Whether they do claim under the Orphans' Court sale, how or what they do or can claim by it, will be considered hereafter; any claim they can have under Mr. Hanson depends on the nature of his title, and how he has a right to claim, and does claim the property.

[*674 *"If he is clothed with the character he assumes, that of a purchaser of the title of Robert Phillips, in virtue of the Orphans' Court proceedings, the deed of Isaac Phillips to the assignees, and theirs to him, by a right adverse to the title of the assignees, as conveyed by the assignment, Mr. Hanson may rely on it in opposition to the equitable right of the assignors, as a distinct, independent right, passing to him in virtue of the judicial proceedings, and not in virtue of the assignment. But if he does not stand as the purchaser of an adverse title, but claims under the assignment, through the deed of the assignees founded upon it, he cannot contest the title of the assignors, even if he assumes another position as a purchaser, which is this: a purchaser from the assignees, *bona fide*, for a valuable consideration, without any notice of any fraud in the assignment. Conceding for the present, that in this position he might hold the property, though the assignment was fraudulent, he neither need, or could, contest the title under which he claimed; for such as it was, his purchase would protect him from all the consequences of fraud between

the assignors and assignees, unless it was affected by the plaintiff's judgment and proceedings upon it.

"The only position, therefore, in which Mr. Hanson can set up a title adverse to that of J. L. Moss and Isaac Phillips, or call on the plaintiff for any other, is as a purchaser under the Orphans' Court sale; considering him at present as so standing, the present question for consideration is, whether the legal title of the Sixth street lot was in the heirs of Robert Phillips, or in Joseph L. Moss and Isaac Phillips, as the firm of R. and I. Phillips, at the time of the judgment in January, 1838.

"The plaintiff may show a legal title, without producing a deed from Robert Phillips to R. and I. Phillips; being a purchaser at sheriff's sale, he is not supposed to have the title-papers, or bound to produce, or to account for them; it is sufficient if he can prove that a deed once existed, or if he can prove such facts as will authorize a jury to presume that one had been made, if notice was given to those in whose possession it is presumed to have been, to produce it at the trial."

And thereupon the defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"In an ordinary case, the jury must decide from the evi-
*675] dence before them, what facts have been proved; but in this case there is *one feature which is rather unusual, and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent points. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. and I. Phillips; no objection was made to the competency of the notice—they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court had called on the plaintiff's counsel to address the jury. No reason was assigned for their non-production, save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced before the evidence on both sides was closed, can scarcely be doubted, when so many were produced afterwards. Their production, then, was no compliance with the notice; the plaintiff could not, without leave of the court, have referred to them; he was not bound to ask it, and had a right to proceed, as if they had not been produced.

"Mr. Hanson had a right to call for the books; claiming by an adverse title, he might have moved the court for an order

to produce them, but he made no effort to procure them; we say so, because there was no evidence that he did in any way endeavor to have them produced, although the court, in their opinion on the motion for a nonsuit, plainly intimated the effect of their non-production.

"There has, therefore, been no satisfactory or reasonable ground assigned for their having been kept back, and the plaintiff has a fair case for calling on you to presume, whatever the law will authorize you to presume as to the contents of the books. On this subject the fifteenth section of the Judiciary act has made this provision: 'That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases, and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on *motion as aforesaid, to give judgment [*676 against him or her by default.' This enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity, which are these, in our opinion, as long since expressed in *Askew* v. *Odenheimer*, 1 Baldw., 388, 389."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"It must not, then, be supposed that the only effect of the suppression or keeping back books and papers, is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them; a jury may presume as largely as a chancellor may do, when he acts on his conscience, as a jury does, and ought to do, and on the same principles.

"Mr. Bridges states that he believes there is an entry on the books, of the transfer from Herring to Robert and Isaac Phillips, but don't know how the transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring; one of the persons who erected

the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of $1,000, and the tax collectors prove the payment of taxes by the firm. In opposition to this evidence, the defendants offer nothing; the books of the firm are suppressed, when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips, is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume, that if the books had been produced, they would have shown that the payment of the whole purchase money, and the whole expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may, also, and ought to presume, that the production of the books would have been favorable to the plaintiffs, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable
*677] *title in the firm, that Robert Phillips, or his heirs, were bound, on every principle of justice, conscience, and equity, to make a conveyance, so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title, we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity and good conscience to make.

"Legal presumptions do not depend on any defined state of things; time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any weight in the only circumstance set up to rebut it, which is the proceedings in the Orphans' Court. You will give them what consequence you may think they may deserve, when you look to the time and the circum-

stances under which they were commenced, carried on, and completed by a sale for $22,500, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips, or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that any thing accruing afterwards was entitled to no weight in rebutting such presumption: and were we in the jury box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the Orphans' Court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for *your consideration, we leave it [*678 to your decision, with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made if the party who was in possession of the legal title, was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterrupted and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips, or his heirs, competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips—that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge to the jury, to wit:

"Should you think otherwise, you will find accordingly; but even then your finding would not affect the merits of the case, because Mr. Hanson, or those under him, cannot make the objection of the want of a legal title, unless he stands firm in the position he assumes—that of a *bona fide* purchaser for

valuable consideration, without notice, such as the law requires.

"There are two classes of purchasers of this description.

"First. Those who are thus referred to, and [have] the requisites to clothe themselves with such character prescribed by the Supreme Court of the United States, in *Boom* v. *Chiles*, in 10 Pet., 210 to 212. 'It is a general principle in courts of equity, that when both parties claim by an equitable title, the one who is prior in time is deemed the better in right; 7 Cranch, 18; 18 T. R., 532; 7 Wheat., 46; and that where the equities are equal in point of merit, the law prevails.' This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Sugd. Vend., 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser *who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it; and when in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief, 9 Ves., 30–34, which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, encumbrance or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabula in naufragio*, if acquired before a decree.

*679]

"But this will not be done on mere averment or allegation; the protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance without notice, and a clear conscience.

"Second. Those who claim the character of purchasers under the 6th section of the 13th Eliz., the requisites of which are thus defined by the law: 'That this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assumed, or hereafter to be had, made, conveyed, or assumed, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assumed to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice

or knowledge of such covin, fraud, or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding.'

"Our first inquiry must be, whether Mr. Hanson comes within the first class of such purchasers, by any evidence he has adduced.

"He claims the Chestnut street lot under the title of Isaac Phillips, by the deed of the assignees, as the estate of Isaac Phillips, without any claim by any outstanding legal title. As to this property, then, he does not come within the first class; he relies exclusively on the deed of Thompson to Isaac Phillips, the assignment, and the deed of the assignees. He claims the Sixth street lot under Robert Phillips, and not Isaac Phillips, and adduces, as evidence thereof, the following chain of title:

"The deed from Herring; The Orphans' Court proceedings; the sale under them; the deed from Isaac Phillips, the administrator, to *Joseph M. Moss and David Samuel, on the 30th January, 1838, and the deed of 10th May, 1839, (made by them pursuant to the public sale to Mr. Hanson, on the 30th April, preceding,) recorded on the 23d May, 1839, and there rests his case as to the adverse title of the Sixth street lot, as one distinct from the Chestnut street property. On inspecting the deed for the Sixth Street lot, there is found no reference to the title of Robert Phillips, or the Orphans' Court sale; the whole recital of the title is the assignment of June, 1837, and there is no other covenant in the deed than against the acts of the grantors, who execute the deed as assignees; and not as purchasers from Isaac Phillips, of the title of R. Phillips, in virtue of the Orphans' Court proceedings. [*680

"No evidence is offered of any agreement, or even intention to sell, or purchase, any other than the title which passed by the assignment; so that there is no obligation, legal, equitable, or moral, on the assignees, to make any conveyance of the right of Robert Phillips, unless Mr. Hanson can affect them with some fraud, or show some accident or mistake under which he accepted the conveyance. The form of this deed is in substance the same as the deed for the Chestnut street lot; the recital of the assignment the same, and both made in the capacity of assignees. There seems no one feature of difference between the two purchases, which can make one refer to the title of Robert, and the other to Isaac Phillips; and if you believe the evidence of Mr. Blackstone, there is one fact in evidence which goes strongly to prove that he neither purchased, or intended to purchase any other title than

what his deed purported to convey. Mr. B. says, that after the ejectment was served on him, he had a conversation with Mr. Hanson, and expressed some doubt about paying the rent; to which Mr. Hanson replied that the property was his, he had purchased it at auction, under the best legal advice. If this was so, and he had purchased the title of Robert, and not Isaac Phillips, or that of the firm, it is scarcely credible that he would not have been advised to at least take a deed with a reference to, and recital of that title, and that he would not have done so; on the contrary, he took a deed in the form it appears, and claimed exclusively under it. By reference to the auction sale, it appears that there was no notice of the title of Robert Phillips, but the title under the assignment was stated to be good, and the sale made under it. In the absence of all explanatory evidence, the legal construction of the deed is, that it conveyed, and purported to convey no other than the *title of the assignors, and that no legal presumption can be made that any other right passed, especially when it does not appear that Mr. Hanson had, at any time before this trial, claimed under the Orphan's Court sale, or the title of Robert Phillips. On this ground alone, Mr. Hanson has failed to bring himself within the principles established by the Supreme Court, as necessary to constitute a purchaser of the first class: and there are other circumstances in the case equally conclusive to exclude him. *Vide* 10 Pet., 211, 212.

*681]

"We are next to consider his character as a purchaser at the assignees' auction sale of the title which is claimed to have passed by the assignment.

"The evidence of his filling this character is his bid at the auction, his acceptance as a purchaser, and the deed from the assignees, its record, his possession of the property, and claim of title by the purchaser; but no evidence is offered of the actual payment of any money, independently of the recital of the deed and the receipt at the foot of it, which is for the whole consideration, while the counsel of Mr. Hanson distinctly admit before you, that only one-third has been paid. There is, therefore, no pretence set up that any more was actually paid, or that the recital of the deed, or the admission in the receipt is correct; but we do not think proper to put this part of the case on the admission of counsel, as they might fairly contend that the admission should be received as made, whereby the payment of one-third would be taken as part of the admission, or the whole be disregarded. It is better and safer to take the case as the law considers it, independently of any admission, and according to well-established principles,

as applicable to a purchase set up under the circumstances in evidence, of an estate in lands, conveyed 'upon good consideration, *bona fide* lawfully conveyed, to a person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud, or collusion' as is recited in the law. You will observe, that by the preamble and enacting clause of the English statute, all conveyances, bonds, judgments, &c., made with intent to hinder, delay, or defraud creditors, are declared actually void, although the person who accepts of them is no participator in the fraud; it is a sweeping, general denunciation of such acts as unlawful, having no effect as against the person designed to be defrauded, but good between the parties and all others; the consequence whereof is, as we have heretofore held, that the fraudulent grantor remains the legal owner of the property, not because his deed *is not binding on him, or his heirs, but the law [*682 has put it out of his power to divest himself of property, by a deed designed to defraud creditors; he therefore holds the legal title in trust for his creditors, and for the purpose of applying it to the payment of his debts, is as fully the legal owner after the conveyance as before, though as to all others the estate is in the fraudulent grantee. 1 Baldw., 356.

"Such is the effect of the enacting part of the statute, which would not protect the fairest of purchasers for the want of any words limiting or qualifying its imperative terms, and precludes any construction or exception; but the sixth section operates as an exception in the case provided for, which is a conveyance, &c., designed by the grantor to defraud creditors, but in which the grantee has in no way participated, or had any notice or knowledge of any fraud before the conveyance—*Magniac* v. *Thompson*, 7 Pet., 389, &c. Mr. Hanson claims to be a purchaser of this description from the assignors under the assignment, and in virtue of the proviso in the law, claims to be protected; although the assignment was fraudulent between the parties, the question now to be considered is, whether, if the assignment be void, he can be in a better situation than the assignors; in deciding which, it must be assumed that the assignment is void as to creditors, unless Mr. Hanson can hold what the assignors cannot. The true inquiry then is, not what was the character of the assignment, but his character as a purchaser from the fraudulent grantee; for if the assignment is valid, then the plaintiff's judgment was no lien, and he can have no right. We must, therefore, see whether Mr. Hanson fills the character of a purchaser under the sixth section of the 13th Eliz., assuming the assignment to be fraudulent for the purpose of this inquiry, and this only.

"The first question is, what he is bound to prove; the general answer is at hand, that claiming under an exception to the law, he must bring himself within it, or he comes under the enacting clause; and he must prove it by other evidence than what is repudiated in the law by clear, comprehensive words, as not sufficient to take a conveyance out of it; they are, 'any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.'

"No words can better or more clearly apply to the consideration, or uses expressed in a conveyance, or other recital, averments, or declarations, which are set forth as the reasons
*683] of making it; hence it is incumbent on the party to do more than to produce the deed *containing them; for if the mere statement of the parties imposes on a creditor the necessity of proving their falsity, he might not be enabled to do it, as the matters so recited are not within his knowledge. But if they exist, they must be known to the parties to the deed, and can be easily proved; if the law was otherwise, it would be easy, as the Supreme Court of the United States say, 4 Wheat., 507, for the grantor to make out such a case by his own recital, that 'there would no longer exist any difficulty in evading the rights of creditors.' The Supreme Court of this state have also established it as a rule, that whoever sets up a plea of purchase for valuable consideration, must support it by other evidence than the conveyance, or the receipt at the foot of it, which is only the acknowledgment of the grantor. We cannot better state the law on this subject, than in the words of that court, in *Rogers* v. *Hall*, 4 Watts (Pa.), 362. 'Though in the absence of proof to the contrary, the presumption is in favor of the fairness of a transaction, yet flight and an absolute general assignment are in themselves circumstances demonstrative of fraud; and though not conclusive, they undoubtedly impose on the assignee the necessity of elucidation. He is the most cognizant of the transaction, and best able to explain it; and why should the business of explanation be laid on the creditors placed by him in the dark, though entitled to light? The question is on the existence of a valuable consideration; and it would be against a fundamental rule of evidence to burden them with the necessity of producing negative proof. The policy of handling these transactions with little attention to tenderness, is obvious and uncompromising. They are ulcers of frequent occurrence in practice, which require to be thoroughly probed, and, if necessary, laid open to the bone, and on him be the consequences who withholds the means of doing so.

"'But the defendant claims to hold discharged of the fraud, if such there were, by having, as he alleges, purchased without notice of it. A decision of the question of notice is uncalled for by the circumstances, and we give none. There was neither proof of valuable consideration, nor the semblance of it; and nothing is clearer than that a plea of purchase for value must be sustained by other evidence than the conveyance. Even the receipt of the debtor is not proof against his creditor claiming paramount to the debtor's grantee, inasmuch as his fraudulent conveyance is no conveyance at all against the interest intended to be defrauded. His receipt or other acknowledgment of payment, therefore, is the act of a grantor, done subsequently *to a title derived from him, [*684 which, consequently, may not be prejudiced by it. Now, the defendant produced nothing but the conveyance, with whatever collateral evidences of payment may have been imbodied in it, or appended to it; and they fell far short of proof of actual payment; for, giving a security for the purchase-money, which in practice is often the consideration for a receipt at the foot of the conveyance, is not enough to entitle him to the character of a purchaser for valuable consideration, and the court properly rejected the prayer for protection on that ground.' 4 Watts (Pa.), 362.

"A deed is evidence of a conveyance in fact, and when the payment of the consideration is proved, it is *prima facie* evidence of a purchase presumed to be fair till the contrary appears, unless there is something on the face of it to excite suspicion.

"This rule is founded on the same sound reasons as the rule that an asserted purchaser must prove the payment of the consideration recited; for a party who alleges fraud, ought to be prepared to prove it, and it is as difficult for a party claiming under a deed, to prove affirmatively his *bona fides*, or want of notice, as for a party claiming against it, to prove the non-payment of the money. Hence the law has been long and well settled, that on the production of a deed of conveyance, it shall be presumed to be as to fraud, &c., what it purports on its face to be, until some evidence is brought forward to impeach it in some particular which the law makes a requisite to its validity. How far the evidence goes to prove the fact, which will invalidate the deed, is for a jury to decide, if the court shall be of opinion that it conduces to prove it. Whatever would satisfy a jury that the fact existed, if the law would authorize them to presume it from the evidence, or if the court on a demurrer to the evidence would render judgment for the party offering it then the burden of proof is

shifted on to the party offering the deed, and he must bring himself within the exception or proviso of the statute, in order to make out a case under it. The creditor need not offer evidence to disprove every requisite to make out a valid purchase; it suffices to throw the proof of every requisite on the alleged purchaser, if the creditor can satisfactorily establish the want of one; in such case the general principle applies, that a party who claims under a proviso or exception to a law, must make out a case which brings himself within it, or he comes within the enacting clause, standing in no better position than the fraudulent grantor against the rights of the creditors attempted to be defrauded. In cases of this description an important *inquiry is—had the purchaser such notice as affects his purchase unfavorably? Purchasing under the assignment, the law presumes he had notice of it—its contents, whatever it referred to, and 'of such other facts as those already known necessarily put him on inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge. But of other facts, extrinsic of the title, and collateral to it, no constructive notice will be presumed, but it must be proved.' 2 Mason, 536. Besides, if there is any thing on the face of the deed of assignment, to which the law imputes fraud, or from which a jury can infer it, the purchaser has, by legal intendment, constructive notice of it, so as to impair his purchase; so as to any matter in the deed from assignees to him, the same consequences follow.

*685]

"If a purchaser has notice of a fact, he is presumed to have notice of the consequences. 1 Gall., 42. It is in full proof that the following notice was publicly read from the rostrum, at the sale by the assignees on the 30th of April, when Mr. Hanson became the purchaser, by a note in writing signed at the time.

"'Bidders will take notice, that the property on the north side of Chestnut street, 42 feet west of Schuylkill Seventh street, being 66 feet front by 158 feet deep, and also that on the west side of Delaware Sixth street, between Market and Chestnut streets, formerly known as Rubicam Hotel, have been levied upon as the property of the late firm of R. and I. Phillips, and are actually advertised for sale by the sheriff, and that the right of the assignees of R. and I. Phillips to convey any title to either of said properties, is disputed and denied.

April 29, 1839. CHRISTOPHER FALLON.

"The Chestnut street lot was advertised and sold as 'clear of all encumbrance,' 'title indisputable'—the house and lot

on Sixth street as 'clear of all encumbrance;' yet, if you believe the witnesses, here was actual notice that the title of the assignees was disputed—that there was an order for the sale of the property under a levy, and that it was then advertised for sale by the sheriff. It was, therefore, notice of an encumbrance by some act of record which would authorize the sale—it referred to the advertisement which pointed to the nature of the encumbrance, and was in law sufficient to put Mr. Hanson on inquiry at least. And if he had pursued it with due diligence and prudence, he must have found the judgment and other proceedings of record as they appear on the transcript read, which, connected with the notice, would show an adverse claim, and by a creditor of the assignors prosecuted with great diligence by the plaintiffs, *contested by the assignors and assignees, and then [*686 approaching a consummation by effective process.

"It is said, that this notice was not such as the law requires, to taint Mr. Hanson's purchase, because it did not specify the particular grounds on which the right of the assignors to convey was contested, by stating, that the assignment was void by reason of fraud; and therefore, the law holds that he is deemed to have had 'no manner of notice or knowledge of the fraud, covin, or collusion,' between the parties to the assignment, this notice not being sufficient to put him on inquiry. Yet if the law were so, it seems that this or some other notice did put him on inquiry, if he consulted counsel and purchased under their advice.

"This objection has assumed a strange aspect by the remarks of counsel, that if the written notice had contained an allegation of fraud in the parties to the assignment, a suit or prosecution for a libel would have been the consequence; while it is contended, that the want of such charge makes the notice inoperative, as if the law compelled a creditor to commit a civil injury, or a public offence, in order to put a person on inquiry about the title he was about to purchase. On the other hand, if Mr. Hanson had not examined the subject fully, and satisfied himself that there was no fraud, how did it happen that when the terms of the sale were to convey a 'title clear of all encumbrance,' on any of the property, and an 'indisputable title' to the Chestnut street lot, with actual notice of an encumbrance and dispute of the title—that he accepted of a deed with only a covenant against encumbrances by the grantors, or suffered by them, taking no security against a judgment against the assignors. If he consulted counsel on the kind of title he should take, the form of the deed, and the covenants to be inserted, and was

advised to accept a deed without any covenant against the very encumbrance referred to in the notice, and to pay his money, to the amount of $36,000, on the transfer of the right of the assignees without better warranty, the client must have stated a strange case to his counsel, if he was advised that he filled the character of a *bona fide* purchaser for a 'valuable consideration, without any manner of notice or knowledge, &c.' Mr. Hanson was not bound to accept a conveyance without covenants of warranty to the extent of the terms of sale; he might repudiate the purchase on any other terms than those stated in the notice of sale by the auctioneer; and if, when he accepted such a deed as he now produces, *he shall be considered by you as filling the character he assumes, we think you must presume very largely and liberally in his favor, if you think he has acted with reasonable diligence and due prudence. Under all the circumstances of the case, our view of the evidence is very different; you will, however, decide on the facts for yourselves, bearing in mind, however, that the notice was sufficient, in law, to put him on inquiry into the fraud set up, to set aside the assignment. 3 Pa., 66, 67.

*687]

"There are other circumstances in this case which may affect the nature of Mr. Hanson's purchase, and his character as a purchaser, after the acceptance of the deed of the 10th of May, which are worthy of your consideration. The sheriff's sale took place on the 20th of May, at which Mr. Fallon attended on behalf of the plaintiff, and Mr. Ingraham for the assignees. Mr. Fallon states, that Mr. Ingraham gave verbal notice that the property about being sold belonged to the assignees, and had been assigned to them before the judgment. Mr. Ingraham states, that, on behalf of the assignees, he gave notice, that the property did not belong to the defendants in the judgment at the time it was rendered, and referred to the assignment; but neither state, that any notice was given, that the property selling had been conveyed by the assignees to Mr. Hanson; that he was present, or any one for him; it also appears, that the deed to him was not put on record till the 23d of May, 1839. Under such circumstances, Mr. Hanson rests his case as a purchaser on his paper title, without producing a witness to prove the payment of any money, or the delivery of the deed in fact; he does not produce any evidence that it was recorded by him, or offer any reason for the omission, but asks you to presume from his paper title, that he has made out all the requisites of a purchaser, such as is protected by the law from the effects of any fraud which may attach to the assignment. If he has paid one-third of the pur-

chase-money, it cannot well be doubted that he can prove it affirmatively, and so of the delivery of the deed, and its being put on record by him. But he adheres to his perilous position, and asks you to presume that he has done that, of which he has offered no other proof than the acknowledgment of the assignees in the deed, and their receipt at the foot; that the grantors delivered the deed, without calling the witnesses to its execution, and that it was recorded by him as a purchaser.

"We will not say that you cannot presume these things, and overlook *those circumstances which would [*688 authorize you to make a contrary presumption in the three particulars; but we feel bound to say, that in your places we would not so presume.

"Should your opinion coincide with ours on the evidence and facts of the case, Mr. Hanson would not be considered to be the purchaser who is protected by the law, as to any of the requisites mentioned; but the consequences are the same, if he fails in any one. To be so, he must be, in your opinion, not only a purchaser without any manner of notice or knowledge of any fraud in the assignment, such as the law requires to be given to him; he must also be a purchaser for a valuable consideration, actually paid, and the property must have been *bona fide* conveyed to him, pursuant to the purchase, so that the purchase must be in all respects an absolute one, such as it purports to be. If you are not satisfied that this is the character of his purchase, and his as a purchaser, then he is in no better situation than the assignees; if you think otherwise, you may find a verdict for the defendants; if so, we must request you to find it subject to the opinion of the court on the point reserved, which is, whether if he is in fact a purchaser such as the sixth section of the law defines, he can hold the property against the plaintiff, if the assignment is fraudulent on its face. On that subject we do not think it proper now to express any opinion: it is a pure question of law, which we have not had time to examine fully during the trial, and it will better the exigency of the case to reserve it."

And thereupon the said defendants further excepted to the following matters or propositions of law contained in the said charge, to wit:

"We now come to the inquiry, whether the assignment is valid or void.

"It is alleged to be fraudulent in fact, and in law. Fraud, in fact, consists in the intention to prevent creditors from recovering their just debts, by any act which withdraws the property of a debtor from their reach; both parties must con

cur in the illegal intention. 1 Baldw., 356, 357; S. C. 7 Pet., 398, &c. But the least degree of concert or collusion between the parties to an illegal transaction, makes the act of one the act of all. 4 Watts, (Pa.), 361. Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors, if they vest the property of
*689] the debtor in his grantee, they are void for legal fraud, which is deemed tantamount *to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. 1 Baldw., 356, 553. The alleged acts of fraud are numerous, covering a large space of time, but all are offered in evidence as bearing on the assignment; they are competent evidence to impeach it, if the plaintiff has satisfied you that they tend to show the intention of the parties at the time of making it. With this object, you may take into consideration whatever preceded or followed it, if the circumstances show a connected chain of facts leading to, or following the assignment, and they can be in any way brought in to explain its nature and character. But proof of fraud in any transaction wholly unconnected with this, or not tending in any way to affect its fairness in fact or law, ought not to be regarded.

"Fraud must be brought home to this transaction, but as to acts which led to it, which were preparatory, and with reference to it, as well as those which followed or grew out of it, in order to effectuate the intention of the parties, they are as proper to be considered as those which took place at the time. The character of a deed, or other act which affects creditors or purchasers, may be judged of by the subsequent conduct of the parties, which throws back light on their conduct. 5 Pet., 280, &c. You will, therefore, carry these principles into your consideration of the various acts of alleged fraud, which the plaintiff has set up to invalidate this assignment. The evidence of fraud consists, 1st, in not assigning the Walnut street house and lot, and furniture. The house and lot was conveyed to Joseph L. Moss, in 1834, for the consideration of $3000 paid, and a mortgage of $8000, which remained a lien on it; on the 20th March, 1837, he conveyed it to David Samuel, one of the assignees, for $15,000, by deed recorded on the 21st; Samuel re-conveyed to Moss on the 25th March, for the same consideration, by deed recorded on the 27th; on the 24th March, 1837, Joseph L. Moss gave a warrant of attorney to confess a judgment to John Moss for $24,600, reciting a bond for that amount which was not produced at the trial, on which judgment was entered on the 27th March. On the 27th May, 1837, Joseph L. Moss made a bill of sale of his household

furniture to John Moss for $3900, in consideration of the money due on the judgment of $24,600; but no credit was given for the amount of the furniture on the execution which issued upon that judgment. Notice was given to produce the bond, and prove the consideration *for which [*690 it was given, but neither was done; Joseph L. Moss continued in possession of the house and furniture, and John Moss paid one or more of the creditors of Joseph L. Moss and Isaac Phillips, who opposed their discharge under the insolvent act, but withdrew their opposition in consequence.

"In deciding on this transaction throughout, we must be understood as not intending, in any way, to intimate any opinion as to its effects on any controversy existing, or which may arise between Mr. John Moss and the plaintiff, or on any other creditor of R. and I. Phillips, or either; we look upon it solely with a reference to withholding the house, lot, and furniture from the assignment, as a badge, evidence, or ground of inferring fraud in the assignment, in the first place. Next, to ascertain whether Joseph L. Moss has offered any evidence to rebut the proof or presumption of fraud attending the transaction; for it is one thing, whether a debt is really owing to John Moss to the amount of the judgment, and a very different thing, whether Joseph L. Moss has given such evidence as he was bound to do, in order to repel the imputation of fraud in keeping this property back.

"He sets up the encumbrance upon it as a reason for not assigning it, and if there is in the evidence any thing proving or conducing to prove fraud in so doing, any thing from which a jury may presume fraud, he must rebut it, or the imputation may be fastened upon his conduct.

"As to the furniture, there is evidence and a strong badge of fraud in retaining possession, even if the sale was made to a purchaser, and the money proved to have been actually paid; the want of possession by the purchaser must be accounted for—it is not enough to set up family considerations; they will not suffice, unless a sheriff's sale has intervened, or some other reasons given why possession did not accompany the bill of sale. This has not only not been done, but no proof has been offered that any consideration has been paid, except that the bill of sale recites the judgment as the consideration which is set up by Joseph L. Moss as evidence that he owed the amount for which it was rendered. We will not say whether, as between John Moss and other persons, this judgment is evidence of the debt or not, without other proof, but as between Joseph L. Moss, and one of his creditors, who alleges it to be fraudulent, it is only his acknowledgment

that he owed the amount, which is no evidence *between him and the plaintiff under the circumstances in this case. He has been called on to prove the consideration of this judgment, which he may be presumed to have been able to do, and has not done it, but relies solely on the record of the judgment, and proceedings upon it; as between the parties to this suit, this is not sufficient to rebut the fraud of this transaction, if there was any, or if he sets up Mr. John Moss as a purchaser of the furniture in part payment of the judgment, he must show it by something more than appears.

"As to the house, there is much unaccounted for in the change of apparent ownership in so short a space of time, especially when Mr. Samuel is an actor; he is an assignee in the assignments of March and June, in 1837; fraud is imputed to him, as well as the assignors; he and Joseph L. Moss can explain these transfers, but do not do it; they too rest exclusively on the papers which are in evidence, without calling a witness to explain what you will probably agree in opinion with us requires explanation. Their deeds purport to be for the consideration of $15,000 each, with receipts at the foot for the payment in full, which must be taken as true, or false; if true, why then was this passing of property and money from one to another in five days, we are not informed; if false, the deeds are entitled to no credit till explained.

"As to the Arch street house and lots, it appears that the lots were conveyed to Mrs. Phillips in August, 1834, for the consideration of $1,200, and an annual ground-rent of $693, recorded on the 23d of March, 1837, the day after the execution of the New York assignment. In September, 1834, Isaac Phillips made a contract for building a house on the Arch street lots, which was finished in the summer of 1835, at an expense exceeding $22,000, exclusive of furniture. In November, 1821, a house and lot in Locust street was conveyed to Sarah Moss, afterwards Mrs. Phillips, who with her husband conveyed the same, on the 1st October, 1834, to Peter McCall, for $10,000. In April, 1837, Isaac Phillips conveyed his life-estate in the Arch street house and lots to John Moss, for $7,102.12, being the value of his life-estate therein, as estimated at the annuity office, which sum was recited and receipted for in the deed as paid. In June following, Isaac Phillips made a bill of sale of the furniture remaining in the Arch street house, in consideration of $5,507 paid, and possession stated at the foot of the bill of sale to have been deliv-
*692] ered, to which was attached a schedule of certain *articles, valued at $860. This sale was to Joseph M. Moss one of the assignees.

"The assignment of June, 1837, did not embrace the house and lots in Arch street, the furniture, or any claim by Isaac Phillips on the property as the separate estate of his wife, or for any debt due by her on account of the money expended in building the house. Though the furniture was not assigned, it was appraised as part of the assigned effects, and entered on the inventory thereof.

"In reference to these transactions, the same remarks are applicable as to the Walnut street property; reliance is had solely on the papers produced, without any effort at explanation of what requires it; no proof is offered of the payment of any money on the bill of sale of the furniture, or of any delivery of possession to the purchaser, other than the statement at the foot. Nor is this any evidence that any money was paid on the sale of the life-estate of Isaac Phillips in the house and lots, except his own acknowledgment in the deed; or any proof of what money was paid on the sale of the Locust street lot, other than the recital and receipts of Phillips and wife; and there was no attempt to show the application of any part of it, to building, or in furnishing the house.

"These circumstances, and the withholding from record the deeds to Mrs. Phillips till after the declared insolvency of the firm, and their assignment of the New York effects, leave the expenditure of so large a sum on the house, open to much ground for your consideration. It has been contended by defendants' counsel, that though these transactions may be open to suspicion, yet that they can affect only the property in question, and that the assignment is valid notwithstanding. This argument is good, so far as it respects the non-delivery of possession of the furniture; that may be considered as rather evidence or a badge of legal, than of actual fraud, not affecting the validity of the assignment, as a substantive cause for holding it void. But if you are of opinion that these transactions indicate an intention in the parties, assignors and assignees, to make such a disposition of the property of the assignors, as to place it beyond the reach of creditors, by any other means than fair and *bona fide* sales, transfers, and dispositions of it, or by encumbrances for debts justly due, and you can trace such intention in the conduct of the parties from March till June, and that the last assignment was the carrying such intention into effect, then it is void throughout. We do not *say that keeping back property from an [*693 assignment is alone evidence of fraud—our opinion is founded on all the circumstances of the case which are in evidence, of which one of great weight in our minds is the entire want of any attempt at explanation of matters which throw the burden

of proof on the defendants. It is a bold requisition on a jury to make presumptions of facts merely from papers which contain only the declarations and recitals of the party who makes them, where direct proofs of the facts can be made if the parties desired to make it. The law makes no such presumptions in favor of the party who produces deeds, or papers, if it does not appear that he offers the best evidence of the facts which it is in his power to produce; especially if he keep back better evidence which is presumed or appears to be at his command; and a jury ought to be very cautious in making such presumptions, which may tend more to encourage than check the suppression of truth.

"The plaintiff has referred to the records of the Court of Common Pleas and the discharge of the assignees under the insolvent act, as evidence of fraud, which is reflected back on the assignment; you will judge how far it is proved by extraneous evidence, taking what appears on the record and papers attached to it as fully proved and operating according to its legal effect. But whatever may be your opinion of the matters so proved, or apparent on the record, you will refer them to the assignment; and though you may think there was fraud in the insolvent proceedings, you will not attach it to the assignment, unless you have reason to believe that it shows a fraudulent intention in some way connected with it, growing out of it, or tending to effectuate its object more completely.

"The composition with the opposing creditors was an improper act, and taints the conduct of the parties who made it with suspicion, which may be thrown back on the assignment, if you think it was connected with, or formed a part of the original design.

"Much has been said about the proceedings in the Orphans' Court, and were it necessary for the purposes of this case to decide all the questions which have been raised in relation to them, we should have much difficulty in doing it; for there are terms and provisions introduced into the act of 1832, under which these proceedings were conducted, that are not to be found in preceding laws, and are of rather an unusual character as respects the jurisdiction of that court, being simi-
*694] lar to the provisions in the insolvent law of *1826, which we have before noticed. If it was an act of Congress we should have less difficulty, but being a law of a state, affecting many titles, we would give an opinion on its construction, only in case of its being necessary to decide the merits of this case, which we think it is not, as in our opinion it cannot avail the defendants in this case, admitting the power of the court

to be undoubted, to do what it has done in relation to the Sixth street property.

"On inspecting the record of the Orphans' Court proceedings, it appears there, that in November, 1837, about a month after the discharge of Joseph L. Moss and Isaac Phillips, under the insolvent act, Isaac Phillips, as administrator of the estate of Robert Phillips, applied to the Orphans' Court for authority to sell the Sixth street lot and house, for the purpose of paying a debt due to himself, amounting to more than $35,000, which, he stated in his petition, was the only debt due by Robert Phillips at his death. A sale was made in December, 1837, by the administrator, reported to and confirmed by the court; whereupon a deed was executed to Joseph M. Moss and David Samuel, the purchasers, for the consideration therein expressed and receipted for as paid, of $22,500, dated 30th January, 1838; on the back of which was a conveyance by them to Mr. Hanson, dated 10th May, 1839, for $20,300, for which a receipt was given at the foot.

"The record contains no evidence of the debt due by Robert to Isaac Phillips, except the statement of the latter in his petition, verified by his own affidavit thereto annexed; yet Mr. Bridges and Mr. Welch, two of the clerks of the firm of R. and I. Phillips, state, that in the books of the firm there was an account open with each partner. The petition states the exact sum due on its date to be $35,000. A schedule attached to the insolvent petition of Isaac Phillips, states in detail the personal expenses of the members of the firm for nineteen years, in exact sums, which could not well be done without a reference to books or accounts; yet they are all suppressed, and the whole proceedings of the Orphans' Court are based on the mere statement and affidavit of Isaac Phillips, of the existence of so large a debt, when there can be little, if any doubt, that if such a debt was due, there was better evidence in the party's power.

"In looking at the deed, we find it to express the payment of $22,500 to I. Phillips, as the purchase-money; yet there is nowhere found any assignment of this alleged debt by Isaac Phillips, nor any *notice of it in his schedule in [*695
the insolvent proceedings; it must be observed, too, that Robert Phillips left three surviving brothers, so that Isaac Phillips was entitled only to one-third the purchase-money beyond the debt justly due to himself. It appears, too, that Joseph M. Moss, one of the assignees, and Joseph L. Moss, were securities in the administration bond, and John Moss and E. L. Moss were securities approved by the court, for the appropriation of the proceeds of the sale according to law. It also appears,

that, though Robert Phillips died in December, 1833, no administration was taken out on his estate till, in January, 1837, after a citation from the register's office, in conformity with the law respecting collateral inheritances. Now, if we take this transaction as it purports to be on the face of the Orphans' Court proceedings, it is this, and nothing else.

"In June, 1837, Isaac Phillips and Joseph L. Moss assign to J. M. Moss and David Samuel the Sixth street house and lot, on certain trusts as their estate, owned by them and the firm of R. and I. Phillips; in December, 1837, the assignees purchase this property from Isaac Phillips, as the estate of Robert Phillips, for $22,500, take this amount from the residue of the assigned fund, pay it to Isaac Phillips in January, 1838, and in May, 1839, convey it to Mr. Hanson for $20,300, making a dead loss to the fund assigned $2,200, besides interest.

"This is the transaction as it appears on the record and deeds; if it was so in fact, how would it look when it appeared in the accounts of the assignees as trustees, when they were called on for a settlement? Would auditors, or the court, approve of such conduct?

"In our opinion, a grosser fraud could not well be imagined, and in order to avoid its imputation, the parties who set up the Orphans' Court proceedings, as giving a title to the assignees by the deed of Isaac Phillips, most distinctly admit its falsity, that no money was paid, and that the whole proceeding was got up for the purpose of extinguishing the mere legal right, which was supposed to be in Robert Phillips, and not to affect any rights against the assignment.

"This saves us the necessity of further inquiry, whether these proceedings are available to the defendants as a title distinct from, and adverse to that of the firm of R. and I. Phillips; but these proceedings furnish a salutary lesson to courts and juries, not to give much credence to deeds and papers, when the parties to them keep back evidence of their true character, whereby light is excluded which would otherwise explain their nature and object.

*696] *"If these proceedings were concocted by Isaac Phillips and the assignees, for the purpose of injuriously affecting the creditors of R. and I. Phillips, who did not assent to the assignment, they are so far void as the evidence of participation in the fraud by the assignees is sufficient on the authority of the Supreme Court of this state, in 4 Watts, 361, to make the act of one the act of all. On their own admission, it was not a real sale and purchase—no consideration was paid or stipulated to be paid; it was not intended to pass any title adverse to that of R. and I. Phillips, but merely

to unite what was supposed to be an outstanding legal title, to the equitable right existing in the members of the firm. That such was the object, and no other, appears not only by the admission of all the parties now, but is manifest from the conduct of the assignees, in conveying to Mr. Hanson; for they neither recited any title derived under the Orphans Court sale, nor professed to convey any; as between the parties, therefore, it was not a binding sale, and if the object was merely what has been declared, it must operate according to the intention with which it was made, and the legal effect of what was done. Of consequence, it cannot impair the right of the members of the firm; if the assignment is valid, the sale inures to the use of the assignees, as an extinction of any right in Robert Phillips, unless his heirs contest it; and if the assignment is void as to the plaintiff, the Orphans' Court sale does not affect his right, but inures to his use, as standing in the place of the defendants in the judgment under which he purchased.

"Having thus disposed of the matters set up by the plaintiff, in support of the allegation of actual fraud in the assignment, which is exclusively a question for your consideration, we proceed to notice the objections to its validity on the ground of legal fraud, which presents questions of law for the decision of the court.

"Of these objections, a very prominent one is, that the requiring a release from the creditors of the firm, as a condition precedent to their coming in for any portion of the property assigned, is illegal, and invalidates the assignment. If this were a new question, or was now open to examination in this court, we should be strongly inclined to hold the assignment void, as contrary to the policy of the law; but the Supreme Court of the United States have decided otherwise. In *Brashear* v. *West*, they hold, that when a debtor assigned all his property for the benefit of his creditors, a stipulation for a release had been settled by the courts of this state to be valid, and that this settled *construction of the [*697 law must be followed in the courts of the United States. 7 Pet., 615, 616. This decision is binding on you and us, as the established law of the case; you will consequently disregard any opinion of ours to the contrary, and consider the law to be settled in favor of the assignment on this point. Had the case in the Supreme Court of this state, in which the question was supposed to have been decided, been as closely examined, and that cause been argued as this has been, the result might have been different; it is, however, now too late to re-examine the question here; elsewhere I may feel at liberty to think

otherwise; yet it may tend to shake too many titles held under such assignments, to interfere with them in any other way than by prospective legislation.

"But though you will take the law to be thus settled, when the assignment is of the whole of the debtor's property and effects, it is otherwise if any portion is fraudulently kept back from the assignment; should such be your opinion in this case, then the assignment would be void by the exaction of a release from the creditors, according to the opinion of the Supreme Court of this state, in 5 Rawle, (Pa.) 221, as well as the soundest principles of law. We, however, are not desirous of giving you any imperative instructions on any of the grounds of legal fraud on which this assignment is assailed, nor do we think it necessary to state them in detail; they arise on the face of the assignment,—they form a part of the plaintiff's case, which cannot be excluded from it, and must be decided by the court as questions of law, should your verdict on the evidence make it necessary.

"This case is an interesting and important one, not only to the parties concerned, as to the value of the property in dispute and what may be consequently involved, but, on public considerations, arising from the nature of the transactions in evidence, their character and tendency. We think it better that the case should be decided on the questions of fact involved, reserving for future consideration any matters of law not yet stated to you, which your verdict may leave for our decision, should it be for the defendants. But though every question of fact is for your consideration solely, we are not desirous of throwing on you the whole responsibility, without expressing our opinion on the result of the evidence, not as a direction to bind, but as opinion merely, which will have such
*698] weight, and such only, as you may think proper to give it. It is a painful *task to view the transactions which are in evidence, in order to ascertain whether they are fraudulent; but it is a duty not to falter, and it will have a better effect, if there is a concurrence of opinion between the jury and the court on that question, than to have it in doubt as to either. A careful consideration of all the testimony in the case has led our minds to the conclusion, that there are such circumstances as will fully justify your finding the assignment to be invalid on the ground of its being fraudulent as to creditors in point of fact."

And inasmuch as said charges and instructions, so excepted to, do not appear upon the record, the counsel for the defendants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges

to be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judges, at the request of the counsel for the defendants, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided.

HENRY BALDWIN, [L. S.]
JOS. HOPKINSON, [L. S.]

Hubbell and *Sergeant*, for the plaintiffs in error.
Guillou and *Fallon*, for the defendant in error.

Thirty-seven points were stated by the counsel for the plaintiffs in error, in which, it was alleged, the court below erred. The argument upon both sides branched out into numerous points of law which the record suggested. The reporter would take pleasure in stating all these arguments, but for the excessive length of the bills of exceptions and the circumstance that the decision of the court rests upon a single point in the charge of the court below, viz., the effect of the refusal to furnish books and papers, in conformity with a notice. He only mentions, therefore, such portions of the argument as bear upon that part of the charge.

Four of the points of the plaintiff in error were thus stated by his counsel.

11th. The court below erred in charging the jury that they might presume, that Robert Phillips, or his heirs, had made a conveyance, vesting the legal title in the firm of R. and I. Phillips, and that it so remained at the time of the assignment, and that it was by such a conveyance as would enable them to enjoy the property against Robert Phillips and his heirs.

*12th. The court below erred in charging the jury [*699
that this presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions.

13th. The court below erred in charging the jury that the defendant below, Hanson, was under any obligation to produce the books of Joseph L. Moss and Isaac Phillips, or of the firm of R. and I. Phillips, and that any presumption whatever could be made to his disadvantage by the non-production of them. And also, as against the defendant below, Hanson, in admitting evidence of their contents.

14th. The court below erred in charging the jury that they had the right to presume that the production of the books would have been favorable to the plaintiff below, and unfa-

vorable to the defendants below, in every respect, as bearing upon the ownership of the property.

Hubbell, said:

Another defence set up by the defendants below is, that the legal title of part of the subject of this ejectment, viz., the Sixth street house, was never vested in the assignors, R. and I. Phillips, and that therefore the plaintiff below, claiming under them, cannot sustain an action of ejectment for that property.

His honor, the judge, charged the jury, that a conveyance of the outstanding legal title to the assignors may be presumed by the jury.

There is no warrant in law for the jury to presume a conveyance of the legal title.

There are three ingredients commonly concurring with such presumption.

1. Time.
2. Duty.
3. Acts inconsistent with the outstanding of the legal title.

There are four classes of cases in which such presumption has been made.

1. Where, in the deduction of title, the deeds before and after the step sought to be presumed are produced, and possession has gone according to the limitations in the latter. After thirty or forty years, the chasm will be filled up by presumption.

2. Deeds proper to have effected a change or alteration in a family estate, when the family have treated it as so altered, will be presumed after the lapse of many years. Matthews on Presumptive Evidence, 219.

*700] * 3. Where the legal title is vested in trustees for a *specific purpose and to convey at a specified time, and the property is delivered into the hands of the *cestui que trust* at the specified time, a conveyance will be presumed after the lapse of many years. Matthews, 220.

4. Even where there is no express trust to convey, a conveyance has been presumed in two cases where the purpose of vesting the title in the trustees was temporary; the presumption was made in one case after a hundred years, and in the other after the lapse of seventy years. But these cases are considered of questionable authority. Matthews, 225.

Where lands are conveyed to trustees without any expressed or manifest object, requiring the separation of the legal and equitable estates and the beneficial enjoyment continues from the first in the same persons or their privies, and there is

nothing in this enjoyment inconsistent with the outstanding of the legal estate, no lapse of time will establish the presumption of a conveyance by the trustee of the legal estate to the *cestui que trust*. Matthews, 228.

If there had been, in the present case, a duty to convey, of which there was no evidence, still the ingredient of time was wholly wanting. The conveyance to Robert Phillips was in 1832, and the sale under the judgment in 1839—an interval of but seven years: a period far short of the statute of limitations, which seems to furnish, except under extraordinary circumstances, the minimum of time necessary to such presumption. 13 Johns. (N. Y.), 513; 7 Wheat., 59, 108; 6 Id., 581; 2 Wend. (N. Y.), 1; 5 Taunt., 170.

The court further charged the jury, that the admission of secondary evidence to prove the contents of the books was not the only effect of their suppression, but that they ought to presume that the production of the books would have been favorable to the plaintiffs and unfavorable to the defendants in any other aspect as bearing on the ownership of the property; that the court would, as a court of equity, hold on such evidence that there was such a clear equitable title in the firm, that Robert Phillips or his heirs were bound, on every principle of justice, conscience, and equity, to make a conveyance so as to make that title a legal one; and that the jury might presume as largely as a chancellor might do.

Our objections to this charge may be subdivided into

1st. The error in charging that the plaintiff below had any right to call for the production of these books, or that the effect of the notice *and non-compliance with it, [*701 was any thing more than to admit him to produce secondary evidence of their contents.

2d. The error in charging the jury that Hanson was in anywise to be affected by the non-production, or that he was under any obligation to resort to the act of Congress to compel their production, or that he or the plaintiff below could compel their production under the act of Congress.

The act of Congress only compels a party to produce books or papers which contain evidence pertinent to the issue, in cases and under circumstances where he might be compelled to produce the same by the ordinary rules of proceedings in chancery.

To the rules of chancery we must resort to know under what circumstances chancery compels the production of books and papers. Sergeant's Constitutional Law, 158, 159.

The party requiring the production of books and papers

must show right, property, or interest in them. 2 Cox Ch., 242; 1 Id., 277, 365; 4 Johns. (N. Y.) Ch., 382.

The party requiring the production of books and papers must obtain a rule on the opposite party to produce them, which must be supported by affidavit, showing that they are in the possession of the party required to produce them; that they contain evidence pertinent to the issue, and that all the circumstances exist which would induce a Court of Chancery to direct their production. And the party required to produce them may deny all this by counter-evidence on the trial. 4 Wash. C. C., 126; 3 Id., 582; *United States* v. *Twenty packages of goods*, 1 Gilp., 306.

The party required to produce, is, upon every principle of chancery practice, entitled to deny upon his own oath, the whole of the allegations upon which their production is sought, to explain any entries found in the books, &c. 2 Pa., 139; Hare on Discovery, ch. 2, sect. 6, pp. 228, 238; 2 Chitty's Eq. Dig., 1129, where the whole is reviewed.

The court must rely on the oath of the party required to produce, as to the relevancy of the books; also, as to what parts are material. Hare on Discovery, 230. He may seal up such parts as he declares to be immaterial. Id., 230; 1 Swans., 539.

But we particularly complain of this error as affecting Mr. Hanson, who had not the custody of the books, against whom they would not have been evidence if produced. He could *702] not have made the affidavit required to enforce their production, and he could not have *enforced the penalty given by the act of Congress for their non-production, viz. judgment against the recusant party.

Guillou, for the defendant in error.

In vindication of the charge of the court, that the jury might presume a deed from R. Phillips to R. and I. Phillips, cited 11 East, 56; 4 T. R., 682; 1 Cai. (N. Y.), 457; 3 Watts (Pa.), 167; 10 Serg. & R. (Pa.), 389, 391; 7 Wheat., 110; 2 Wend. (N. Y.), 13, 15; 12 Ves., 24, 251, note; 6 Bing., 180; 5 Barn. & Ald., 233; 19 Johns. (N. Y.), 345; 8 East, 263. And further to sustain the court in leaving it optional with the jury, 9 Wheat., 486; 4 Dall., 132; 1 Yeates (Pa.), 32.

Fallon, on the same side, after directing his attention to other points of the case, said:

We wanted the books to show, amongst other things, that the Sixth street house was purchased with the partnership funds, in which case it became partnership property. 1 Sumn., 182; 2 Wash. C. C., 441; 7 Serg. & R. (Pa.), 438.

Sergeant, in reply and conclusion.

Hanson never had the books, and yet is made responsible for their not being produced. The notice was to produce the books of a firm, carrying on a very extensive business, running through six years, and tax receipts for eight years. In the courts of the United States a party can choose one of three modes.

1. A common law notice.
2. A proceeding in equity for papers.
3. An affidavit and rule under the Judiciary act.

This was a common law notice exclusively. As such, it only gave the party a right to use secondary evidence by proving the contents of papers. The law presumes that a party knows what he wants, and allows him to call for it, but does not give him the power, under a drag net notice like this, to bring up the books and papers of six years accumulation. Can it be, that a party, without affidavit, without an order of court, without specification, shall be entitled to have a cart load of papers brought into court, many of them of a private character, and open to the inspection of everybody? If this was the rule, the act of Congress must have been passed to restrain it; otherwise it would both be insufficient and intolerable.

The charge says, where papers are suppressed by a party, it is a ground of suspicion. This is true in a chancery proceeding. But *there is no spoliation of papers in [*703 this case, nor is the notice to be brought under the chancery head; neither is it under the act of Congress. There is no affidavit, no order of court, no hearing of the party.

It has been already argued, that before a presumption can be raised, circumstances and time must justify it. It is in favor of possession and time. Supposing, here, that Robert Phillips bought the property with the partnership funds, and thereby became a trustee for the firm, where is there any ground to presume an end of the trust? The presumption would be to the contrary, that he was to hold it as long as both parties agreed.

Mr. Justice WAYNE delivered the opinion of the court.

The defendants in this case having failed to produce on the trial of it certain books of original entry, day books, &c., of the late firm of R. and I. Phillips, which had been called for by a regular notice, the court permitted the plaintiff to give secondary evidence of their contents. The object of the plaintiff in introducing the secondary evidence was to prove that the legal title to the Sixth street property was in R. and I. Phillips, the defendants having previously introduced a

deed to that property from R. J. Herring and wife, dated the 9th June, 1832, to Robert Phillips.

The partners of the firm of R. and I. Phillips were Robert Phillips and Isaac Phillips. That firm, however, was dissolved by the death of Robert Phillips in 1833. The survivor then took into partnership Joseph L. Moss, and the new firm traded under the style of the original firm of R. and I. Phillips.

The court, in reference to the refusal of the defendants to produce the books, and to the secondary evidence which had been given of their contents in respect to the Sixth street property, charged the jury, that, "In an ordinary case, the jury must decide, from the evidence before them, what facts have been proved; but in this case there is one feature which is rather unusual, and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent parts. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. and I. Phillips; no objection was made to the competency of the notice; they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court
*704] had called on the plaintiff's counsel to address the jury. No reason was assigned for their non-production, *save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced before the evidence on both sides was closed, can scarcely be doubted, when so many were produced afterwards. Their production, then, was no compliance with the notice; the plaintiff could not, without leave of the court, have referred to them; he was not bound to ask it, and had a right to proceed, as if they had not been produced.

"Mr. Hanson had a right to call for the books; claiming by an adverse title, he might have moved the court for an order to produce them, but he made no effort to procure them; we say so, because there was no evidence that he did in any way endeavor to have them produced, although the court, in their opinion on the motion for a nonsuit, plainly intimated the effect of their non-production.

"There has, therefore, been no satisfactory or reasonable ground assigned for their having been kept back, and the plaintiff has a fair case for calling on you to presume whatever the law will authorize you to presume as to the contents of the books. On this subject the fifteenth section of the Judiciary act has made this provision: 'That all the said

courts of the United States shall have power, in the trial of actions at law, and on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases, and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default.' This enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity, which are these, in our opinion, as long since expressed in *Askew* v. *Odenheimer*, 1 Baldw., 388, 389.

"It must not, then, be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them; a *jury may presume [*705 as largely as a chancellor may do, when he acts on his conscience, as a jury does, and ought to do, and on the same principles.

"Mr. Bridges states that he believes there is an entry on the books, of the transfer from Herring to Robert and Isaac Phillips, but don't know how the transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring; one of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of $1000, and the tax-collectors prove the payment of taxes by the firm. In opposition to this evidence, the defendants offer nothing; the books of the firm are suppressed, when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume, that if the books had been produced, they would have shown that the payment of the whole purchase-money, and the whole

expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may, also, and ought to presume, that the production of the books would have been favorable to the plaintiffs, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips, or his heirs, were bound, on every principle of justice, conscience, and equity, to make a conveyance so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title—we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity, and good conscience to make.

*706] "Legal presumptions do not depend on any defined state of things; *time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any weight in the only circumstance set up to rebut it, which is the proceedings in the Orphans' Court. You will give them what consequence you may think they may deserve, when you look to the time and the circumstances under which they were commenced, carried on, and completed by a sale for $22,500, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that any thing accruing afterwards was entitled to no weight in rebutting such presumption: and were we in the jury box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-

assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the Orphans' Court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for your consideration, we leave it to your decision, with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact, than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterrupted and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed [*707 from Robert Phillips *or his heirs, competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

It appears, then, that the court made the refusal of the defendants to produce the books, the secondary evidence of their contents, and other evidence in the cause, the basis upon which it gave the foregoing instructions to the jury. The defendants excepted to them.

The inquiries therefore arising, are—had a case been made, which authorized the court, as a matter of law, to give an opinion to the jury, that the facts proved would justify the presumption of a deed; and, if not, were the instructions given in terms which left the jury to make the inference from the evidence alone, unaffected by considerations which it is not the province of a jury to indulge, that the legal title to the Sixth street property was in the late firm of R. and I. Phillips?

This property may be the partnership-estate of the original firm of R. and I. Phillips, without the legal title being in the copartnership or in either of the partners. A deed was in evidence, that the legal title had been made to Robert Phillips. The plaintiff wished to show, that Robert Phillips had conveyed it, before he died, to the firm, or that there were circumstances in the case which raised the presumption that he had done so. No evidence was given to show that Robert

Phillips had made such a conveyance. On the contrary, as the case stood, the proof was, that R. J. Herring and wife had conveyed the Sixth street property to Robert Phillips, by deed dated the 9th June, 1832. The deed was in evidence. The plaintiff then proceeded to give secondary evidence of the contents of the books, which the defendants had refused to produce. That secondary evidence, as it is stated in the instruction, is, that "Mr. Bridges states that he believes there is an entry on the books of the transfer from Herring to Robert and Isaac Phillips, but don't know how that transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration-money to Herring. One of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of $1,000; and the tax-collectors prove the payment of the taxes by the firm." Such is the proof, and *the only proof in the cause to show that the legal title to the Sixth street property was in the late firm of R. and I. Phillips. It may justify the inferences in the court's instructions, that Robert Phillips never was the sole and real owner of this property on the first purchase; that, if the books had been produced, it would have been shown that the consideration money for the lot was paid by the firm; that all the improvements were paid for by the money of the firm; that it formed a part of their joint estate; that they so considered it, and that Robert Phillips was bound in equity and good conscience to make a title to the firm; but the evidence is certainly deficient in those particulars which, according to the established law, will permit the presumption of a deed by a jury, as a matter of direction from the court. Before a court can instruct a jury to presume a grant or deed for land, time or length of possession must be shown, which, of itself, in certain cases, and in other cases, in connection with circumstances, will induce the presumption of a grant as a matter of law, or as a legal effect from evidence, which the jury is instructed to make, if in its consideration of the evidence the jury believe it to be true. Or when the presumption in fact as to a legal title is founded upon the principle of *omnia rite esse acta*. Supposing, then, that the court did not intend to instruct the jury, that the legal effect of the evidence was to raise the presumption of a deed—we will now inquire, what effect the refusal to produce books and papers under a notice has upon the point which a party supposes they would prove.

*708]

The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that if produced they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, &c., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence. *Life and Fire Insurance Co. N. Y.* v. *Mech. Fire Insurance Co.*, 7 Wend. (N. Y.), 33, 34.

All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression. There the *rule is that *omnia* [*709 *præsumuntur contra spoliatorem.* In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which any thing can be inferred as to the point which is sought to be proved by the books or papers. Nor can any views of policy growing out of the refusal be associated with the secondary evidence to enlarge the province of the jury, to infer or presume the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such considerations, and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law.

Apply these principles to the instruction, and we find that the court, under a notice at common law to produce books and papers, and the refusal to produce them, without any other foundation having been laid to permit secondary evidence to be given of the existence of a deed which had not been specifically called for, and the destruction or loss of which had not been alleged, permitted the plaintiff to give secondary evidence that a deed had been made, and upon his failure to do so, instructed the jury that it "must not be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them. A jury may

presume as largely as a chancellor may do, when he acts on his conscience, as a jury does and ought to do, and on the same principles." And further, after reciting the evidence which the court thought led to its conclusion, the court says, "upon such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips or his heirs were bound on every principle of justice, conscience, and equity, to make a conveyance, so as to make the title a legal one." To which the court adds, "when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance and sold the property under the assignment, that the purchaser from them had accepted a deed reciting theirs and no other title, we cannot hesitate as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips or his heirs has been made, as they were bound in equity and good conscience to make." "Legal presumptions *do not depend on any defined state of things; time is always an important, and sometimes a necessary ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance." And the instruction finally concludes with this direction: "As, however, this is a matter entirely for your consideration, we leave it to your decision with this principle of law for your guide, that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true, and equitable owner. This legal presumption is not founded on the belief, alone, that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips or his heirs, competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips, that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

*710]

Supposing, then, the term "legal presumption" to have been used in its known professional sense, it is obvious that the court did not mean it to be one that was absolute and conclusive, but one of law and fact. If the latter, we have already said such a presumption did not arise under the evidence, and the conclusion must be that the construction did not leave the jury to presume, from the evidence alone, that a conveyance had been made of the Sixth street property by Robert Phillips, which vested the legal title to it in the late firm of R. and I. Phillips. We think the exception taken to these instructions must be sustained, and direct the judgment to be reversed.

In the consideration of this case, the court has not forgotten that there were many other points in the cause which were argued with great learning and ability. The court, [*711 however, abstains from *noticing them and directs that its opinion should be exclusively confined to the instructions which have been considered.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; 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*.

The Bank of the United States, Plaintiff in error, *v.* The United States.

By a treaty between the United States and France, the latter agreed to pay to the former a certain sum of money, the first instalment of which became due on the second of February, 1833. The Secretary of the treasury, under a power conferred by Congress, drew a bill of exchange upon the French government, which was purchased by the Bank of the United States. Not being paid, upon presentation, it was protested and immediately taken up by bankers in Paris, for the honor of the bank. *Held* that the bill is not liable to objection as being drawn upon a particular fund.[1]

The United States, as drawers, are responsible to the bank for fifteen per cent. damages under a statute of Maryland, which allows that amount to the holder of a foreign protested bill.

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[1] Cited. *United States* v. *State Bank*, 6 Otto, 36.

When the bankers in Paris took it up and charged the amount of the bill to the bank, in their account with it, the bank became thereby remitted to its original character as holder and payee.

Under the law-merchant, the drawer of a foreign bill of exchange is liable, in case of protest, for costs and other incidental charges, and also for re-exchange, whether direct or circuitous. The statute of Maryland, allowing fifteen per cent., fixes this in lieu of re-exchange, to obviate the difficulty of proving the price of re-exchange.

When the bank came into possession of the bill, upon its return, the endorsements were in effect stricken out, and the bank became, in a commercial and legal sense, the holder of the bill.[2]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Pennsylvania.

*712] *The facts in the case were these:

By the second article of the Convention of 4th of July, 1831, between the United States and France, which was ratified on 2d of February, 1832, 25,000,000 of francs, with interest at the rate of four per cent. per annum, were payable, at Paris, in six annual instalments, into the hands of such person or persons as should be authorized by the government of the United States to receive it, the first instalment to be paid at the expiration of one year next following the exchange of the ratifications. It was further agreed, however, by the treaty, that the sum of 1,500,000 francs should be reserved by France for purposes therein stated.

On the 13th of July, 1832, Congress passed an act by which it was made the duty of the Secretary of the treasury to cause the several instalments, with the interest thereon, payable to the United States in virtue of the said convention, to be received from the French government and transferred to the United States in such manner as he might deem best, and the net proceeds thereof to be paid into the treasury.

In October and November, 1832, and January, 1833, a correspondence took place between Louis McLane, Secretary of the treasury, and Nicholas Biddle, president of the Bank of the United States, upon the best means of transferring to the United States the first instalment, which would become due on the 2d of February, 1833. Mr. Biddle offered to purchase the bill at the rate of five francs thirty-two and a half centimes to the dollar, which would have yielded to the government $912,050.77, but this offer was declined by the Secretary. Subsequently, on the 30th of January, 1833, a negotiation was concluded at the rate of exchange of five francs thirty-seven and a half centimes to the dollar, and the following bill was drawn:

[2] See a further decision in this case, *United States* v. *Bank of the United States*, 5 How., 382.

[L. S.] *Treasury Department of the United States, Washington, February 7th*, 1833.

Sir:—I have the honor to request, that at the sight of this, my first bill of exchange, (the second and third of the same tenor and date, unpaid,) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of 4,856,666 francs and 66 centimes; which includes the sum of $3,916,666.66, being the amount of the first instalment to be paid *to the United States [*713 under the convention concluded between the United States and France, on the 4th of July, 1831, (after deducting the amount of the first instalment to be reserved to France, under the said convention,) and the additional sum of 940,000 francs, being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratifications to the 2d of February, 1833.

I have the honor to be, with great respect,

Your obedient servant,

Signed LOUIS MCLANE.

Mr. Humann,

Minister and Secretary of State for the Department of Finance, Paris.

E. 2682—Mem.

Total amount of indemnity payable to the United States, ...	25,000,000 00
Less amount of indemnity to be reserved to France, ...	1,500,000 00
	23,500,000 00
1 year's interest from 2d Feb. 1832, to 2d Feb. 1833, at four per cent.	940,000 00
First instalment payable to the United States,	3,916,666 66
Amount of the bill, ...	4,856,666 66

This bill was purchased by the Bank of the United States on the 11th of February, 1833, at the above-mentioned rate of exchange of five francs and thirty-seven and a half centimes to the dollar, and the amount of $903,365.89 carried to the credit of the Treasurer of the United States, which sum was increased on the 9th of March, by adding $200 for a short credit given, thus making altogether the sum of $903,565.89.

The bill was accompanied by a power from the President of the United States, authorizing Samuel Jaudon to receive the

amount of the bill, and to give full receipt and acquittance to the government of France.

The bill was endorsed:

Pay to the order of Messrs. Baring, Brothers and Co., of London.

(Signed,) S. JAUDON,
Cashier of the Bank of the United States.

*714] *Pay to the order of N. M. Rothschild, Esq., value received. (Signed,) BARING, BROTHERS and Co.
London, 19th March, 1833.

Pay to Messrs. De Rothschild, Brothers, or to their order, value in account. (Signed,) N. M. ROTHSCHILD.
London, 19th March, 1833.

It was presented for payment on the 22d of March, 1833, at the office of Mr. Humann, the laws of France not allowing any days of grace. The answer of the cashier of the central money-chest of the public treasury was, "that having had the orders of the minister, secretary of state for the department of finance, he was instructed to say that diplomatic treaties, which impose engagements on the French treasury to be discharged, do not become obligatory upon it until the Chambers have sanctioned the financial dispositions which are therein embraced. Therefore, the treaty concluded with the United States, not being yet sanctioned by the legislature, the minister of finance cannot at present make any payment to avail upon the obligations contracted by the said treaty."

The notary further states, that immediately after the protest Messrs. Hottinguer and Co., bankers, intervened for the account of Mr. Samuel Jaudon, cashier of the Bank of the United States, and agreed to pay the amount of the bill and costs.

On the 30th of March, 1833, Hottinguer and Co. made up the following account against the bank:

Statement of the payment and charges made by Hottinguer and Co., of Paris, on a bill of 4,856,666.66, drawn by the Secretary of the treasury of the United States upon M. Humann, minister of finance, protested for non-payment, and which they paid for the honor of the signature and for account of S. Jaudon, cashier of the Bank of the United States of America.

F. 4,856,666 66 amount of the bill.
24,283 33 commission half per cent.

F. 4,880,949 99
3,399 90 stamp.
27 65 protest and translation.
14 45 second and third of protest and legalization.
35 00 paid to American consul at Havre, expenses for the document to be copied upon his books.

F. 4,884,427 99

*Say four million eight hundred and eighty-four thousand four hundred and twenty-seven francs and ninety-nine centimes, which we place to the debit of the Bank of the United States, due 22d March, 1833. [*715

Errors excepted. HOTTINGUER.

Paris, 30th March, 1833.

On the 26th of April, 1833, the bank received information of the fate of the bill, and on the same day informed the Secretary of the treasury that they would hold him responsible for principal, interest, costs, damages, and exchange.

On the 13th of May, 1833, the bank forwarded to the Secretary the following account:

Bank of the United States, May 13, 1833.

Account of return, with protest for non-payment, of a bill of exchange drawn by Louis McLane, Secretary of the treasury, dated Treasury Department of the United States, Washington, February 7th, 1833, at sight, to the order of Samuel Jaudon, cashier of the Bank of the United States, on M. Humann, minister and secretary of state for the Department of Finance, Paris:

Principal due, March 22, 1833, . .	fr. 4,856,666 66
Costs of protest, as per Messrs. Hottinguer and Co.'s account of charges herewith, exclusive of their commission, which is covered by the damages charged below,	3,478 00
	4,860,144 66
Interest from March 22d (the date of protest) to May 13th, fifty-two days, .	42,121 25
Damages on fr. 4,856,666.66 at 15 per cent.,	728,500 00
	5,630,765 91

Which, at 5 30, the current rate of exchange for a bill, at sight, on Paris, is $1,062,408.66, due in cash this day, with interest until paid.

On the 16th of May, 1833, the Secretary replied that the proceeds of the bill had not been brought into the treasury by warrant, and therefore he had it in his power to return the amount immediately to the bank; which was accordingly done, and on the 18th of May the bank debited the United States upon its books with the sum of $903,565.89, being the exact sum for which the bill had been bought.

*716] *On the 24th of May, 1833, the attorney-general of the United States addressed the following letter to the Secretary of the treasury:

Attorney-General's Office, May 24, 1833.

Sir—I have carefully examined the claims presented by the Bank of the United States, on account of the protest of the bill of exchange drawn by you on the French government for the first instalment and interest due the United States, under the convention with France of July 4, 1831.

The account stated by the bank, if supported by proper vouchers, appears to be correct, with the exception of the claim of fifteen per cent. damages on the amount of the bill. This item, in my opinion, has no foundation in law or in equity, and ought not to be paid by the government. The bank is entitled to indemnity, and to nothing more.

I will take another occasion to state to you the reasons on which my opinion is formed, and

Am very respectfully, your obedient servant,

(Signed,) R. B. TANEY.

To the Secretary of the Treasury.

On the 7th of July, 1834, the bank declared a dividend of three and a half per cent. on its capital stock, which, upon 66,692 shares held by the United States, amounted to $233,422.

On the 10th of April, 1835, the Secretary of the treasury drew upon the bank for the difference between this sum and the amount which the bank claimed to hold for the purpose of paying itself the damages on the protested bill, being as follows:

Amount of dividend, ...	$233,422 00
Claimed by the bank on that day, . .	170,041 18
Amt. drawn for by Secretary of the treasury,	$63,380 82

On the 29th of July, 1837, the first auditor of the treasury stated an account with the bank, in which he sanctioned the principle of all the claims of the bank, except that for fifteen per cent. damages, saying that the costs and charges for stamp, protest, &c., together with the charge of Hottinguer for commission, were disallowed "for want of vouchers merely," but, if properly vouched, would be admissible.

The United States brought a suit against the bank on the second of March, 1838, for the withheld portion of the dividend, being $170,041.18, with interest. The bank claimed a set-off as follows:

[*717

*Amount claimed in letter of 13th May, 1833, ...	$1,062,408 66
Refunded by the United States, . .	903,565 89
Amount of set-off, ...	$158,842 77

with interest from 13th of May, 1833.

The bill having been drawn in that part of the district of Columbia where the laws of Maryland, anterior to the cession, were in force, the following statute of that state, a knowledge of which is necessary to understand the points raised in the bill of exceptions, is transcribed:

"November, 1785.—Chap. 38.

An act ascertaining what shall be recovered on protested bills of exchange, and to repeal an act of Assembly therein mentioned.

"Be it enacted by the General Assembly of Maryland, That upon all bills of exchange hereafter drawn in this state on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner, or holder of such bill, or the person or persons, company, society, or corporation, entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of protest, until the principal and damages are paid and satisfied: and if any endorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such endorser shall have a

right to receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society, or corporation, liable to such endorser upon such bill of exchange."

The court, after instructing the jury that the case was to be governed, in respect to the set-off or credit claimed by defendants, by the enactments of the said statute in Maryland; and that if they had been the holders of the said bill at the time of its protest, they would, under the said statute, have been entitled to the set-off or credit claimed,—the damages being, in such case, made by the provisions of the said statute a part *718] of the debt as much as the principal, to which they were admitted to be entitled,—proceeded further *to instruct the jury, that by the endorsements and protest given in evidence, defendants did not appear to have been such holders of said bill at the time of its protest; that their position was that of endorsers, who had taken it up or paid it; and that whether they had so paid it in the place where it was payable or elsewhere, they could not sustain their claim to the damages in question, unless by proof that they had themselves paid such damages to the holder of the bill; and that the verdict on this point ought to be in favor of the plaintiff.

Whereupon the counsel for the defendants excepted to the opinion of the court.

The jury found for the plaintiffs, and assessed the damages at $251,243.54.

The case came up to this court upon the exception just recited, and was argued by *Cadwallader* and *Sergeant*, for the plaintiffs in error, and *Nelson* (attorney-general), for the defendant in error.

Cadwallader, for the plaintiffs in error.

Since the bill was drawn, and even since the suit was brought, this court has settled many of the questions intended originally to be raised on the trial.

The last of these decisions was that in 15 Pet., 391, which took place in the interval between the institution of the suit and the trial, where the court decided that "where the United States become a party to drafts, they were under all the liabilities of private individuals."

The only two questions in the case are, therefore,

1. Whether, under the statute of Maryland, a private drawer would be answerable, on the bill in question; and

2. Whether, if so, there is anything in the relation existing between the parties to divest this responsibility.

1. We contend that the defendants below were within the description of "owner or holder of the bill or party entitled to it," mentioned in the first clause of the statute, and not within that of endorser, in the latter clause. To entitle a party to the benefit of the first clause, it is not necessary that he should have been holder at the time of protest; but, nevertheless, the defendants below were, in fact, holders of the bill at the time of protest, through the intervention of their agent, who, at that time, interposed, for their account, and took up the bill at the place where it was payable.

*The fifteen per cent. is not well named, when it is called "damages." It is not a penalty, but as much a part of the transaction as re-exchange, certainly not unliquidated because it can be easily calculated. It was described, in the court below, as a penalty to punish delinquency or insure punctuality; but is really intended to mitigate the rigor of law against a drawer. Re-exchange would often be ruinous, and particularly with the colonies. The explanation of re-exchange is given in Story on Bills, 401. The holder has a right to draw for the amount of the bill, and must do it in the same way that the bill came. It is often circuitous. The general course of exchange is often so between two countries, and sometimes the circuity is casual. All the colonial statutes were to limit the amount for which a drawer should be held responsible, and did not intend to inflict a penalty. [*719

The rate of these damages varies; it is not the same between England and the West Indies that it is between England and the East Indies. Chitty, 668; Story, sect. 408; Beawes on Bills, 610.

Damages were fixed in lieu of re-exchange. 6 Cranch, 221; 6 Mass., 157, 161.

The history of Maryland legislation shows that it was intended for the benefit of the drawer, by limiting the responsibility which he would have been otherwise under. Acts of 1676 and 1678 say "the party shall not be allowed more than," &c. So the acts of 1692, 1699, 1704, 1708, and 1715. The act of 1715 is found in Bacon's Laws, the others were read from MS. copies.

The French Code of Commerce, 183, art. 445, edition of 1814, says, that damages are a compensation for the circuitous transmission of a bill. Great injury is sustained by taking funds provided for other purposes, and being obliged to take up a protested bill. 3 Marshall, 184; *John H. Piatt's case*, in 19 State Papers, 734.

In the latter case, an act of Congress of 1820 referred it to the second comptroller. In 1823, it came before Congress

again, and a committee reported upon it. Pp. 894, 904. The report says equitable principles require damages to follow protested bills. Piatt had not paid damages, "but this is a question never asked; the fact of protest is sufficient."

Damages cannot be sued for separately. 4 Har. & J. (Md.), 240.

In Ambler, 672, Lord Camden says, "the twenty per cent. is a part of the original contract." See also, 2 Campb., 445; 12 East, 420; *8 Watts (Pa.), 546; Story, sect. 398, note; 1 Lutw., 885; 7 T. R., 570, 577; 4 Barn. & C., 445.

*720]

The argument on the other side is, that the endorser who pays is not a holder under the statute; but this is contrary to the general law; and the object of the statute was to give indemnity to any sufferer.

If an endorser, or his agent for his honor, takes it up *supra protest*, he becomes the holder. Thus full effect is given to the whole act. The argument on the other side requires an interpolation of the words "time of protest." By providing for the case of an endorser who has paid damages, the statute intends an action on the bill; but it does not restrain an endorser who has become holder without paying damages, because the whole statute is enlarging. In this case, the ownership was resumed at the time of protest.

An endorser who paid the bill could not, without the statute, recover any thing except the amount of the bill and the damages; but the statute gives him interest also. It is, therefore, an enabling statute. At the time of the act it was doubtful what an endorser could recover; 2 T. R., 100. Two years after the Maryland act says there had been doubt. See also 1 H. Bl., 640; 4 T. R., 714; 3 East, 82, 177; 6 Barn. & C., 439.

According to the construction which the other side put upon the statute, the case of an endorser who pays the bill without damages is not provided for, unless by implication. And even the implication cannot stand unless by insertion of the words "time of protest."

But the bank had made provision abroad. If a former holder of the bill here, from alarm that it might not be paid, sends his money abroad, he is as much out of funds as a foreign holder would be.

A payment *supra protest*, for the honor of a name upon the bill, is an exception to the general law of agent or substitution, which is that one person cannot become agent for another without his consent. And this is not only a case of payment *supra protest*, but with funds. See 5 Whart., 189; Pothier, 171; Chitty on Bills, 543; French Code of Com-

merce, 158; 10 Merlin Repertoire Universelle de Jurisprudence, 74 b, tit. Lettre et billet de change; 1 Esp., 113, criticised and explained in Story on Bills, sect. 124, note; Beawes, 54, 570; 1 Lutw., 896, 899.

A party, therefore, paying a bill, with or without funds, becomes a holder under the Maryland law.

The law of Maryland must govern this case. 6 Cranch, 224, *Story on Bills, sect. 153; Story on Conflict of Laws, 307–317; 12 Pet., 524. [*721

The United States must rest on the same obligations as a private drawer when a bill is drawn by an authorized agent. Congress call this a bill. When they settle with the bank it is called a bill of exchange. 4 Story's Laws, 2556, act of 3d March, 1837.

It is so on its face, and in its nature; subject to the same rules, because it was drawn to save freight, insurance, &c. The Secretary had a discretion under the act of Congress how to transfer the money. The bank was bound by its charter to transfer the money of the government without exchange, within the United States; of course, on a foreign transaction, exchange would be charged. The Secretary sold the bill, and preferred that mode to having it collected. 5 Wheat., 288.

The bank gave the government credit on its books, which is equivalent to payment. 1 How., 239; 3 Bro. Ch., 433.

Nelson, attorney-general, for the defendant in error.

The objection to the form of action, which was raised in the court below, is understood to be waived. It is unnecessary, therefore, to argue it.

The damages upon this bill were claimed by the bank by the way of set-off, when sued by the government for the dividend due upon its stock; and were claimed, not upon general principles, but under the statute of Maryland. The only question is the construction of that act.

There are four objections to allowing the bank these damages.

1. That the bank, through its agent, having paid no damages, can receive none, and such was the opinion of the court below.

2. That the instrument is not a bill of exchange within the meaning of the act of 1785.

3. Supposing the bank to have been the holder, and the instrument to be a bill, still the United States, as a sovereign power, are not bound by the penalties of the act.

4. That the relations existing between the parties, and understood by them, were such as to exclude the idea of damages.

1. By the general law-merchant, the holder of a protested bill is entitled to reimbursement or indemnity, the standard of which is interest, expenses, and re-exchange.

In many places, by statute or usage, damages are allowed, *722] differing in amount; and given, in some cases, in lieu of re-exchange, *costs, and interest. The effect is, to dispense with proof of all these things and facilitate adjustment. Sometimes a penalty is superadded.

The statute says the holder shall receive as much money as will purchase a new bill. This is just the definition of re-exchange. Story on Bills, sect. 400. The Maryland bar was celebrated at the time when this statute was passed; and no doubt it was carefully prepared. The definition of re-exchange is "the purchase of a bill on the country where the drawer of the protested bill lives." The statute adopts this in effect, because, although it directs the new bill to be purchased in the country where the drawer of the old bill lives, instead of the country upon which the old bill was drawn, yet the same amount of money would have to be paid in both cases. The statute then provides for re-exchange, for costs, and for interest. But these together constitute indemnity. What is the fifteen per cent. which is then added? It must be a penalty.

The old statutes of Maryland which have been read show this. For example, the act of 1704 says there shall not be allowed more than twenty per cent. more than the principal sum and costs. The act of 1708 says ten per cent. more than the sum and costs. Under these statutes, the amount of damages was required to be proved, because it was left uncertain. The act of 1785 adopts a new principle, by providing indemnity and fifteen per cent. damages. The amount of damages and the rules being thus fixed, a party who claims the one must bring himself within the other.

Rothschild was the holder of the bill. It was in his possession by regular endorsement. Suppose he had omitted to cause it to be protested. He could have recovered damages from nobody, because he would not have brought himself within the terms of the act. And the endorser must bring himself within its operation also. How? By paying the damages to the holder or some subsequent endorser, to whom he was responsible. The statute provides damages for this class of endorsers only. But the bank, having paid no damages, does not belong to this class, and is therefore not within the statute at all. At the time of protest, it is clear that the bank was not the "owner or holder" of the bill; nor was it at any time afterwards within the protected class of endorsers. The reason of the distinction is manifest. An

endorser who had parted with the bill and received value for it was put to no inconvenience by the protest, and therefore had no claim upon the drawer for damages. [*723 *His claim only began, in reason, when he was himself called upon to pay damages.

It is said by the other side, that the "owner or holder" means also an endorser. But the act does not say "those who may become entitled to the bill," but uses language indicating existing ownership; existing at the time of protest. The second clause of the act says, "and if any endorser of such bill shall pay to the holder," &c., making a clear distinction between the two classes of persons. How then can they be confounded, and an endorser be allowed to claim as a holder? To sustain the construction of the other side, the word "endorser" must be interpolated in the first clause. That the ownership must exist at the time of protest is clear, from the language of the statute: "That upon all bills of exchange hereafter drawn in this state on any person, corporation, company, or society, in any foreign country and regularly protested, the owner or holder of such bill," &c. *Such* bill; what bill? One that is regularly protested. The ownership is placed in juxtaposition with the description. He must have been the owner or holder of the bill when it underwent this ceremony.

As to endorsers, the statute introduces no new principle. By the general law-merchant, no endorser can receive damages from the drawer unless he has himself paid them. 3 Kent's Commentaries, 115; 3 Wash. (Va), 310.

It has been said that the object of the second clause was to provide a new remedy for an endorser. But was it? What were his rights before? If Jaudon had been sued in London on this bill, he would have been liable by the English law, for the bank was as much liable for damages as the drawer. If the bank had paid all this, the drawer would have been liable, independently of the statute, because the drawer would have to replace the bill and expenses.

The statute, therefore, gives the endorser no new remedy.

The bank was an endorser at the time of protest, and must remain so; it cannot shift its position and become a holder. The bill was paid for the honor of an endorser after protest; the only effect of which is to make the payer an endorsee of the bill, and protect the endorser, for whose credit it is taken up, from damages. 1 Esp., 113.

2. This is not a bill within the meaning of the act, [*724 because it *was drawn upon a particular fund. Story on Bills, sects. 55, 56. A general bill must be drawn upon the

general credit of the party. 2 Lord Raym., 1681; 2 Str., 1211; 5 Esp., 247; 2 Kent's Com., 74, 75, 76; 2 Whart. (Pa.), 233. The act of 1785 only applies to general bills. Here it was drawn upon a particular fund and payable at the pleasure of the French government, because no appropriation had been made by that government for it. It was payable, too, out of the fund provided by the treaty.

3. The United States, as a sovereign power, are not bound by the penalties of an act.

It is settled in England that the government is not bound by a statute unless named. If the state of Maryland was not, then the United States are not. 5 Co., 14 b; 11 Co., 74.

Is it possible that Maryland could have intended to provide against her drawing bills as a sovereign, which would not be paid? Her courts have uniformly construed her laws according to the position just laid down. 3 Har. and M. (Md.), 171.

The question in the above case was this: Under the act of 1785, chap. 80, sect. 7, no creditor was entitled to priority in the division of an intestate estate. But the state claimed a preference; and the court said she was entitled to *jura regalia*. Not being named, she was not embraced within the act. 1 Har. and J. (Md.), 417; 6 Gill and J. (Md.), 226.

4. The correspondence shows that the bank knew that the government was acting merely as an agent for the claimants under the French treaty; that it was but a trustee. The money to be received was not intended to belong to the treasury of the United States, but to be distributed amongst its owners. The only object of all parties was to transfer the money from France to the United States.

Sergeant, in reply.

The bill, being drawn in Maryland, is to be governed by the law of Maryland, so far as concerns the drawer. The endorser might be subject to a different rule, having endorsed the bill in Pennsylvania, where the damages are twenty per cent. How the matter would have stood, if the bank had been compelled to pay the twenty per cent., it is not material to inquire.

What is the law of Maryland? There are six acts of Assembly prior to the act of 1785, on the subject of damages. They all have *one title, and they are all restrictive in their terms, that is to say, they restrain or limit the amount of damages by negative words. The first act, made between 1676 and 1678, was nearly, if not exactly the form of expression which is followed in the five subsequent acts.

*725]

The act of 1785 is of the same character. They are *in pari materia*. Besides, the act of 1785 has the same title, and being made to repeal and supply the prior acts, it must have the same purpose.

These acts assume, and conclusively show, that there was a right to damages before, which they restrain, and fix at a certain per centage. This per centage is not damages given; they existed before. The acts only furnish a rule for computing them. But they are still damages.

He then argued

1. That damages were payable by the law-merchant, in all cases of dishonored foreign bills of exchange.

2. That these damages were payable by contract, as a part of the contract, and were capable of being ascertained, but only in each particular case.

3. That they have been fixed in some places and trades by usage, and in others by law, but they are still due by contract, and in no respect different from the damages payable by the general law-merchant, except that a rule is established for computing or "ascertaining" them.

1. He referred generally to the books and cases already cited, but especially to Judge Story's work on bills of exchange—466, 467, where the subject is fully explained. The damages are ascertained by the rate of re-exchange. What that is, and how it may operate, we well know. *De Tastet* v. *Baring*, 11 East, 265; *Mellish* v. *Simeon*, 2 H. Bl., 378, where the damages were fifty per cent.; *Pollard* v. *Herries*, 3 Bos. & P., 335, where they were upwards of two hundred per cent.

It is necessary to understand what "re-exchange" means. It is the right to redraw, at the place where the bill is payable, upon the place where the bill is drawn, for such a sum as will pay the amount on the face of the bill, with costs and expenses, at the place where payable. The law is clearly laid down by Judge Story, in 3 Kent's Com., 115, and in Chitty. It is the right to redraw, and is exemplified in the two cases just cited.

We must distinguish between "exchange" and "re-exchange." *The act of 1785—framed with remarkable [*726
accuracy and fullness of knowledge—itself makes the distinction, for it gives the exchange, and then adds the fifteen per cent. The object is, to pay the bill at the time and place where payable, according to the terms of the contract. Messrs. Hottinguer, for example, would have had a right, by the law-merchant, to draw upon the United States, or upon the Bank of the United States, for as much money as would pay them in Paris the amount of the bill. The payment in Paris,

therefore, at the time, included the damages. And so, the payment by the Bank of the United States to Messrs. Hottinguer included the damages.

2. They were payable by contract and capable of being ascertained. They were in no sense a penalty. They were a recompense, an equitable equivalent, or more exactly, a fulfilment of the contract, given by the law-merchant, which does not deal in penalties, but looks to equity and substantial justice. This law of damages is founded in the plain equity of the contract, and has nothing in it that is vindictive or penal.

Still less, could they be said to be unliquidated. Where there was an established rate of re-exchange, the price of the day furnished the rule. The law does not require that there should be an actual redrawing. There is an immediate right to redraw, and whether the holder redraw or not, he is entitled to the amount. *De Tastet* v. *Baring.* Where there is no such rate established, or it is interrupted or disturbed, no matter how, resort may be had to circuitous drawing, and the actual cost settles it, at the expense of the party liable on the bill. *Bangor Bank* v. *Hook*, 5 Greenl. (Me.), 174; Chitty, 670. These damages are part and parcel of the bill, though contingent, as is also the liability of the drawer and endorser. They are recovered in an action on the bill, as the principal is.

The payment, at the time and place where the bill is payable, therefore, includes the damages. Put the case of a party on the bill, thus paying after protest—he actually pays the damages. They are included in what he pays. In other words, he pays exactly the same as if he had been redrawn upon.

3. In lieu of the right to redraw, usage has in some places fixed a rate of re-exchange or damages, and law in others. Where not so fixed, they remain as they were before. But neither the law nor the usage professes to give the damages.

*727] They were payable by the contract, according to the law-merchant. Neither does the law *or usage, in any case, intend to take them away. They have in view to avoid the fluctuations of exchange, (Story on Bills, 480;) to mitigate the occasional rigor of the law-merchant. Chitty, 665. The acts of the Maryland legislature had chiefly in view this latter object. It would seem that the rule of the law-merchant had proved very burdensome, which will easily be understood when we consider that there never has been, and is not now, any regular re-exchange between England or the continent of Europe and the United States, and, therefore, recourse was necessary to costly expedients. They have all one title, "an

act ascertaining what damages shall be allowed on protested bills of exchange." The usage, in some instances, has passed into law. Neither the usage nor the law altered the nature of the contract, that is, made it less a contract, as to its force or its comprehension. They had one single object only, and that for the benefit of the party liable. The damages are still due by contract; more precisely than before, because the rate is fixed and known, and therefore can be stipulated. But they rest upon the same equitable contract. Before, it was an undefined, now a fixed liability—that is, the amount is fixed, where there was already a liability—the redrawing is fifteen per cent., neither more nor less, since 1785. By the prior acts, it was twenty per cent.

No such act can be presumed to mean any more. The remedy is applied to a given mischief, and the acts all indicate plainly what that mischief was. It was the same that has led elsewhere to usages and laws, that is, to substitute a fixed rate of damages for an uncertain one, but by no means to take away the right where it previously existed.

Proceeding, then, more particularly to examine the act of 1785, under the view thus taken of it, he maintained,

1. That the Bank of the United States was the "owner or holder of such bill," and "entitled to the same," within the terms and meaning of the first part of the first section of the act of 1785.

2. That the Bank of the United States had actually paid the damages, and was within the words of the second part of the section.

1. There is a radical error, as already intimated, in supposing the act gives the damages—that there would be none without it. This leads to error in the whole construction, by taking a wrong departure. The act leaves the right as found, but limits and fixes the amount. It professes to do nothing more. To this intent, it is to be liberally, *at [*728 least fairly, construed. It must be reconciled, if necessary, with the law-merchant. It must not be brought into conflict with that law, by interpretation out of its own words and declared intention. His position was simply this—whoever by the law of the contract was entitled to damages, is entitled still; and the damages are fifteen per cent. Such is the exact effect of a usage. *Grimshaw* v. *Bender*, 5 Mass., 157, 161, 162. The right to damages attaches upon the protest of the bill. It is no more than this, to compel the drawer to pay the bill, at the time and place stipulated. In favor of whom does it attach? Why of the holder. Of what holder? Of any holder. For there always must be a holder, and there can be

but one at a time, though there may be several persons united to make that one. The drawer is not to be put to the risk of paying twice. Therefore, the claim must be made by one who has the possession, with right, so as to be able to give up the bill, with a full and final discharge. The Bank of the United States was the holder, to this full intent. It held the bill, with right, ready to hand it over and give an effectual release. What more could be requisite to make it a holder?

Now let us look at the act of Assembly. It uses the words in the most general sense. It does not restrict them to the holder at the time of the protest, nor to any particular time. It could not so mean. The holder has a transferable right; not negotiable in the broadest meaning of that word, because, being overdue, which is notice, the assignee takes the bill, subject to the equities between the parties. In other respects it is negotiable. The holder may transfer it, as fully as he holds it, and his transferree becomes the holder, with all his rights, including the right to damages. If this be not so, the damages would be lost by the transfer, and the first holder would be the loser, as he would not be paid for the damages, if they could not be transferred, which would be unreasonable and unjust; or else, we should be obliged to consider this as a case not provided for by the act, and turn over the derivative holder to the law-merchant for his rate of damages. But it is clear that the act meant to provide for every case. It applies, therefore, to every holder, and surely the Bank of the United States was a holder.

The right of the bank, however, as holder, is even stronger than has yet been stated, and in point of law sufficient to satisfy any construction of the words, as a moment's attention to the facts will show.

*729] *The bank was the original holder of the bill, by purchase from the United States. It endorsed the bill to Barings, and they endorsed it to Rothschild. The bill was dishonored, and protested for non-payment. Hottinguer and Co., of Paris, strangers to the bill, paid it *supra protest*, for the honor of the Bank of the United States, the endorser. By this payment, Hottinguer and Co. became the holders, were substituted for the holders, with all their rights against the drawer and the first endorser. This is fully settled in France, in England, and in the United States, as may be seen by reference to Pothier, Pardessus, Beawes, Chitty, Story, and every book that treats upon the subject. The only restriction was, that as they paid for the honor of the first endorser, they could make no claim upon the subsequent parties on the bill. They became the holders, at the time of the protest, with full rights

against the United States, and the Bank of the United States. These rights were, to redraw, that is, to claim damages, and to transfer their rights as holder. In this state of things, Hottinguers paid themselves, in Paris, the full amount, out of money of the Bank of the United States then in their hands. The bank ratified the payment—that is, the bank paid it to the holders, and the holders (Hottinguers) handed the bill, with all their rights, to the bank. The bank thus became the holder, and was remitted to its former character and rights. Lutw., 896, 899; 7 T. R., 570. They were the holders when the bill returned. They were holders, by relation, to the time of the protest. They became the holders, in law, at the time of the protest. They had therefore a right to redraw—that is, a right to damages.

The material fact here is, that the bank paid the full amount in Paris of what was due there. They actually, really, and legally paid the damages, for to pay the bill at the place where payable, after protest, is to pay the damages. It gives the right to recover damages. Suppose the case of circuitous redrawing. Each holder in succession becomes entitled. *Mellish* v. *Simeon*. The cases are to every intent the same; if there be a usage, that fixes the amount: and so, if there be a law. To redraw from Paris on Maryland is fifteen per cent. This, the Bank of the United States have therefore, paid.

2. The Bank of the United States had actually paid the damages, and so was within the words of the second part of the first section of the act of 1785.

It is proper here to notice the objection made on the part of the *United States, that the Bank of the United States was an endorser, and, therefore could not recover damages, "unless it had paid them or was liable to pay them." This is urged, upon the authority of Chancellor Kent. 3 Kent's Com., 115. That learned author refers, for his support, only to the case of *Kingston* v. *Wilson*, 4 Wash. C. C., 310. He has been misled by the note at the beginning of the report, where from an error of the press, or some other cause, the point is stated as he has quoted it. But no such question arose in that case, and none such was decided. One of the claims there made was by the drawer of a bill of exchange upon the drawee, for not accepting his bill, and the learned judge who then presided in that court (Judge Washington) said, that in an action by the drawer against the drawee, he could not recover damages, unless he had paid them or was liable to pay them. See 4 Wash. C. C., 316. What the law would be in such a case it is not now material to inquire. [*730

But waiving that question, and supposing (if it be possible)

the bank not to have been a holder, how will the matter stand? The bank, it must be premised, no one doubts, is able to give a full discharge.

If being on the bill, and holding the bill, the bank had paid the damages, it would be entitled to recover them from any prior party, with interest. This is not disputed, and cannot be disputed. Had the bank not paid the damages? "The law does not insist upon an actual redrawing," &c. 3 Kent, 115. Nor is the claim for re-exchange or damages confined to bills of exchange. 3 Bos. & P., 335; *Pollard* v. *Herries*, Chit., 668. It is the substance which is regarded. And so it is in the Maryland act of 1785. The words of the act apply exactly. It does not require that the damages shall be paid *eo nomine*, but the "value" of the same paid to the party "entitled" to the same, as Hottinguer and Co. undoubtedly were here. What was the "value" of the same? Precisely the amount on the face of the bill, in Paris, at the time. That is exactly what they had a right to redraw for. There is nothing artificial or technical in the law-merchant. Chitty, 667. Its principles and its methods are those of common sense and justice applied to the transactions of men. The confusion in this case has arisen from not distinguishing, as the law-merchant does, between paying here and paying abroad. Paying abroad includes the damages, which the act of Assembly fixes at fifteen per cent.

*731] *In every point of view, then, the bank has a clear right to the damages. If the United States were authorized to draw, and the government of France bound to accept, the United States will have their recourse over against France for the damages, after paying the bank.

Some minor objections have been made, not properly open upon this record, which may be disposed of in a few words; and a question has been suggested, entitled to attention.

1. It is said this is not a bill within the act, nor in a legal and commercial sense, being drawn on a particular fund.

This subject, of what is not a negotiable bill, is treated fully, and with reference to the authorities, by Mr. Chitty, pages 157, 158, and by Judge Story in section 40, page 54. The exceptions are, when there is a condition or contingency; here, there was neither condition nor contingency.

It has been settled too by the legislative authority. The act of Congress of 3 March, 1837, 4 Story's Laws, 2556, styles it "the bill of exchange."

Again, it calls itself a "bill of exchange;" has always been termed a "bill of exchange;" went forth to the world, and was negotiated as such; has been so treated in all the corre-

spondence; was protested as a bill of exchange, and claimed as such in the suit. It is too late in the day to question its character.

The use it was employed for, to remit or transfer funds, does not make it the less a bill of exchange. 5 Wheat., 288. This is, and always has been the appropriate purpose of bills of exchange, whether they were originally invented by the Jews of Lombardy, or, as Ranké supposes, in his History of the Popes of the 16th century, to collect the revenue in the Papal States.

2. The United States is a sovereign, not affected by penalties in an act of the legislature.

If confined to penalties, the position is of no consequence here, the question not being of penalties. If it be extended to damages, it is authoritatively answered by the *United States* v. *Bank of Metropolis*, 15 Pet., 377, 392. See also, 3 Marsh., 184.

Upon what principle can it be contended that a contract of the United States is different from that of an individual? A bill of exchange is a contract well understood, importing definite legal responsibilities. To what extent is it that the difference is to apply? *Will the United States be [*732 barred from claiming, as well as exempted from paying damages? They have always insisted upon, and received them, where they were the holders of protested bills. Such a one-sided doctrine would be intolerable. And what would become of the credit of the United States? and the facilities they require in the receipt and disbursement of their revenue, if their bills were thus, as it were, outlawed? Such a doctrine has no countenance in any decision of this court, and it is quite safe to predict it never will have.

3. The relation between the parties—What is it? That of seller and buyer. The United States came into the market with a bill to sell. The Bank of the United States bought it. Nothing could be more simple. There is no mystification in this. See Record, 16, 17, 18, 19. The money being paid into the bank makes no difference. That was agreed (Record, p. 19); and without agreement was a thing of course, for the bank was the treasury, and when the money was so placed, it was immediately at the disposition of the government as its own.

But further, the United States have admitted their liability for principal, interest, protest, and expenses, according to the bill of exchange. If not a bill of exchange, why pay for protest? Why a protest or expenses, if not a bill of exchange?

They only refuse to pay the damages, which is entirely arbitrary.

If it had not been a bill of exchange, it would still be a contract to pay a certain sum of money in Paris, on a given day. If broken, what would be the measure of damages? Not less, certainly, than upon a bill of exchange. Chitty, 668; *Pollard* v. *Herries*, 3 Bos. & P., 335.

The objections of the United States are thus disposed of. It is, in truth, a very plain case, now that it has been deliberately examined. The record and the history of the cause show that the principal point was suddenly started in the Circuit Court, and scarcely at all discussed.

The question suggested, and all that remains to be considered is, what would be the effect of the payment being prohibited by the law of France?

The fact is, that the payment was not prohibited by law; but there was no appropriation by law for the payment. See Protest, Record, 22, 26. The treaty was a binding con-
*733] tract between the high *contracting parties from the exchange of ratifications; and by that treaty, the money was due and ought to have been paid. It was impossible to prohibit the payment by a law of France, without assuming the grave responsibility of a wilful violation of the treaty, which is not to be presumed. A mere failure to supply the means, at the time appointed, was not of so serious a character. It might admit of explanation. But still it was a failure.

But neither the one nor the other, nor a prohibition in every respect lawful, as being clearly within the rightful authority of the legislature, could vary the rights of the parties to this bill. This was directly and deliberately decided in *Mellish* v. *Simeon*, 2 H. Bl., 378, 379, and in effect decided, also, in *Pollard* v. *Herries*, 3 Bos. & P., 335. The reasons are there fully set forth.

Mr. Justice McLEAN delivered the opinion of the court.

A writ of error brings this case before the court, from the Circuit Court for the eastern district of Pennsylvania.

On the 7th of February, 1833, the Secretary of the treasury of the United States drew the following bill on the minister and Secretary of state for the department of finance of the French government:

"Sir:—I have the honor to request that at the sight of this my first bill of exchange (the second and third of the same tenor and date unpaid) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States,

the sum of 4,856,666 francs and 66 centimes; which includes the sum of $3,916,666.66, being the amount of the first instalment to be paid to the United States under the convention concluded between the United States and France, on the 4th of July, 1831 (after deducting the amount of the first instalment to be reserved to France under the said convention), and the additional sum of 940,000 francs, being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was purchased by the bank, and endorsed by it to Messrs. Baring, Brothers & Co., of London, and by them for value was endorsed, pay the order of N. M. Rothschild, Esq.; and by him it was directed to be paid to Messieurs De Rothschild, Brothers, or order, of Paris, for value in account.

*This bill on presentation not being paid, was protested, and was afterwards taken up on account of the first endorser by Hottinguer & Co., who also paid the costs, &c., and charged the whole sum to the Bank of the United States. Notice of the non-payment of this bill was given, in due time, to the drawer; and also that the bank claimed of the government interest, costs, and fifteen per cent. damages on the bill. The government accounted to and paid the bank the principal of the bill and the costs, but refused to pay the damages. [*734

Sometime after the protest, a dividend on the stock held by the United States having been declared by the bank, it retained a part of the dividend to cover the above damages. A suit being brought against the bank, by the government, to recover the dividend thus withheld, the bank set up as an offset the fifteen per cent. damages claimed on the above bill.

On the trial, the court held, and so instructed the jury, that the action was maintainable. That the set-off or credit claimed by the defendants was governed by the statute of Maryland. That if the bank had been the holder of the bill, at the time of the protest, it would, under the statute, be entitled to the damages claimed; but that it must be viewed as endorser, and consequently could not recover such damages, unless upon proof that they had been actually paid by the bank. To this charge the defendant's counsel excepted, and this brings before the court the questions for consideration.

Before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel; though not having been excepted to by the government, it is not a matter for decision.

It is supposed not to be a bill of exchange, as it was drawn payable out of a particular fund. This seems not to be the character of the bill. It was drawn for a certain sum, and the drawer then states on what account such sum was due from the French government. But there was no restriction as to what moneys or appropriation out of which the bill should be paid. This could in no sense restrain the negotiability of the instrument. It has the frame, character, and effect, of a bill of exchange. It was so called and treated by the Secretary of the treasury who drew it; by his successor who had some correspondence in regard to it; by the attorney-general to whom it was submitted for his opinion, by Congress; and by the *eminent bankers in Europe through whom it was negotiated and paid.

*735]

That the United States can sustain an action against the bank, to recover a dividend declared in their favor, is undoubted. This seems to have been doubted by the counsel for the bank in the Circuit Court, but the objection has been abandoned in this court. Nor can there be any question of the right of the bank to set up, in this case, by way of offset, the damages in controversy, if the claim for damages be sustainable. This right is not contested by the attorney-general.

The main point in the case depends upon the construction of the Maryland statute, which applies to this district. It is singular that this statute, which was enacted in 1795, in regard to the question now before us, has never been construed by the local courts. And the same may be said of other and prior statutes of Maryland, containing similar provisions.

The first section of the act provides, "that upon all bills of exchange hereafter drawn in this state, on any person, corporation, company, or society, in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation, entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of protest, until the principal and damages are paid and satisfied: and if any endorser of such bill shall pay to the holder, or the person or persons, company, society, or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such endorser shall have a right to receive and recover the sum paid, with legal interest upon the same,

from the drawer, or any other person or persons, company, society, or corporation, liable to such endorser upon such bill of exchange."

That the holder of a foreign bill, or other person entitled to it, may recover, under this statute, from the drawer, in case of protest, a sum that will purchase a similar bill of the same amount, together with fifteen per cent. damages on the principal sum, is admitted. *But it is insisted that the [*736 bank paid the bill as endorser, and that as there is no proof that it paid the fifteen per cent. damages, they are not recoverable under the statute. The first part of the section gives to the holder of a protested bill its value at the place drawn, the fifteen per cent. damages, and interest upon the value of the principal sum. The latter part of the section gives to the endorser, who has paid to the holder the value of the principal, the damages and interest on the entire sum paid, with legal interest. So that while the holder of the bill recovers only interest upon the principal sum, the endorser is entitled to interest on the whole sum paid by him. And to give interest on this sum seems to have been the object of the latter clause of this section.

Had the bank retained the bill until its presentation and protest, there could be no question of its right, as holder, to the damages claimed. It endorsed the bill to Baring, Brothers and Co., and they to Rothschild, who endorsed it to De Rothschild and Brothers. These last were the holders, and had not the bill been paid, *supra protest*, on account of the bank, as first endorser, they would have been entitled to the damages. Hottinguer and Co., having paid the bill for the honor of the bank, became the holders, and could recover the damages from it or the drawer. But they being the depositories of the bank, charged it with the amount they paid, by which the bank was remitted to its original character as payee and holder of the bill. In this light the bank was viewed and treated by the government, for it paid not only the principal sum and interest to the bank, but also the costs of protest and other expenses chargeable under the laws of France. But the damages allowed by the statute were refused.

It has been intimated that these damages must be considered as a penalty, and not as a part of the bill. This is a mistaken view of the subject.

Had there been no statute, the bank, as the holder of the bill, would have been equally entitled to damages. They would have been claimed on a different principle, and might have been of a greater or less amount according to circumstances. The origin and character of a bill of exchange are

found in the law-merchant: that law which pervades the commercial world, and which, though founded on usage, has become as fixed and definite as any other branch of the law. *737] Under this law the drawer of a bill in this country payable in *a foreign country is liable, should such bill be protested, not only for the costs of protest and other incidental charges, but also to re-exchange on the bill. The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn, and where it is made payable. Between this country and France, the exchange is often, if not generally, by the way of London.

The bill under consideration having been protested at Paris for non-payment, the holder under the general commercial law was entitled to a bill drawn at that place, payable in this city, for such sum as would pay the original bill at Paris, including costs of protest and other legal charges. This is re-exchange, and it varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the state of Maryland, and almost all the other states of the Union, have fixed, by legislation, a certain amount of damages on protested foreign bills, in lieu of re-exchange. Experience has shown that this is a judicious regulation. It relieves the parties to the bill from great uncertainty, and promotes punctuality by showing the drawer what damages he must pay on the dishonor of his bill. Fifteen per cent. on the principal sum, which the statute adopts, may be greater than the actual re-exchange in the present case. But, whether this be so or not is not open for inquiry. It is believed that if this per cent. excluded the re-exchange, at the time this bill was protested, there are many other cases in which it would fall short of that charge. The statute has, probably, fixed an amount which would be an average charge for re-exchange. This being the basis of the act, the damages cannot be considered as a penalty. The damages given by the statute are as much a part of the contract as the interest. On this point there is believed to be no difference of opinion among enlightened courts or commercial men.

The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, in France. The payee gives a premium for it under the expectation of receiving the amount at the time and place

where the bill is made payable. It is *protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country, which should sell at Paris for the sum claimed. The statute of Maryland then is founded on equitable considerations, although the rule of damages may be considered arbitrary, as it does not yield to circumstances.

In this case the bank purchased the bill from the government and paid for it. It was sold and transferred by the bank. But the bill not being paid to the holder, the bank paid the amount of it, including the costs of protest and other charges, to Hottinguer and Co., at Paris, who had taken it up *supra protest*, for the honor of the first endorser. The bank, in this manner, came again into possession of the bill, the endorsements, in effect, being stricken out. In a commercial and legal sense, then, the bank is the holder of the bill, and has the same claim for damages as if it had never been endorsed. Had the government been suable by the bank, it must have declared and recovered as payee and holder, and not as endorser of the bill.

No objection is taken, in the bill of exceptions, as to the liability of the government to damages, on a protested bill of exchange drawn by it, the same as an individual. No such question, therefore, arises in this case. As the holder of a protested bill, the government exacts damages; it would seem to be equitable, therefore, that as drawer under like circumstances, it should pay them.

Upon the whole, we think, that in view of the circumstances of this case, the bank is entitled to the fifteen per cent. damages, under the Maryland statute, and that, consequently, the instructions of the Circuit Court were erroneous. The judgment of that court is, therefore, reversed, and the cause is remanded to that court, and a *venire de novo* is awarded, &c.

Mr. Justice CATRON.

By the instructions given by the Circuit Court, the controversy is made to turn on the construction of the statute of Maryland; nor does *the record raise any question on the transaction growing out of the fact, that it was one [*739

between governments, to obtain a sum of money due from the one to the other; in which the corporation acted as an instrument and agent, in a form suggested by itself, to obtain the money. For instance: if it be true, that the United States, in fact, received no money from the bank for the bill, it not having been charged to the bank; this being found, with the additional fact, that the parties intended to await the event of payment, or refusal, on the part of France, and let the bank hold and use the money awaiting the event; then the question on the equity of the case may arise. But the jury did not pass on any such facts, the instruction given rendering the inquiry unnecessary; and so it cut off every other question the plaintiff might have raised in opposition to the offset claimed.

The foregoing is given merely as an instance, to show that no question arises on the record, but on the construction of the act of 1785.

The statute provides for two classes of cases: 1st, "the owner or holder of the protested bill, or the person or persons, company, society, or corporation entitled to the same;" and 2dly, "any endorser of the bill who should pay to the holder, or the person or persons, company, society, or corporation entitled to the same, the value of the principal and the damages and interest."

In the first class, the "owner or holder," &c., shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill, from the time of protest, until the principal and damages are paid and satisfied.

In the second class, the endorser who has paid the principal, damages, and interest, shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer or any other person or persons, company, society, or corporation, liable to such endorser upon such bill of exchange.

It is not necessary to inquire whether this statute includes all possible cases, and if it does not, by what law the cases so
*740] unprovided for would be governed, because the bank is seeking, in this instance, *to bring itself within the statute; unless it does so, the precise claim of fifteen per cent. cannot be sustained. The charge of the court below was twofold.

1. That the case was governed by the law of Maryland, and
2. Construing that law.

The bill of exceptions includes both points; but this court has proceeded to examine and decide the cause on the second only, passing over the first.

The bank must then bring itself within one of the two classes above described; let us examine them in order.

Was the bank at the time when its present rights accrued, the "owner or holder of the bill." I say at the time its present rights accrued, because this general proposition includes the rights acquired at the time of protest, or acquired subsequently—each of which branches must be separately examined.

The bill was endorsed to Messrs. Baring, Brothers and Co., of London, on some day which the record does not state: that it was sold to the Barings, and not sent over for collection, is not controverted, nor open to question.

It was then passed by endorsement to N. M. Rothschild, and from him to the Messrs. Rothschild in Paris, in whose possession it is found on the day that it became due. It was at their request that a demand was made, by the notary, for payment, and upon refusal, that the bill was protested. So far, they appear to have been, and no doubt were, both the "owners and holders of the bill," and the only "persons entitled to the same at the time of the protest."

Hottinguer and Co. intervened immediately after protest, and paid the bill for the honor of the bank. What rights were then acquired?

It will not be necessary to examine and decide whether they acquired a right to fifteen per cent. damages or not; or to comment upon the want of harmony in the law, if it were to allow to a volunteer, who had no right to complain of anybody, the same damages which it gives to a disappointed and suffering party expressly because he has been put to great inconvenience and to hazard of discredit, by the omission of the drawer to provide the necessary funds to meet the bill. The books and cases all recognise the right of such a volunteer to principal, interests, and costs. If Hottinguer and Co. were the parties to this suit, it would become necessary to examine *the question of their claim to damages; but we [*741
are now investigating the rights of the bank.

Granting that the Messrs. Rothschild, immediately upon protest, became vested with the right, under the statute, to "receive and recover" from the drawer fifteen per cent. damages in addition to the other sum pointed out in the law; and granting also, for the sake of the argument, that all these

rights passed to M. Hottinguer, with the delivery of the bill, it is clear that he was vested with a right that he could exercise or not at his pleasure. If he forbore to claim the damages, he mutilated the rights attached to the bill, supposing all the rights of the parties to be transferred with the bill from one to another. His right to relinquish the damages cannot well be disputed. It was property, and could be given away. It is not our province to inquire into his reasons; we can deal only with facts. It appears from the record, that instead of charging fifteen per cent. damages, he contented himself with charging a commission of one-half per cent., amounting to 24,283 francs and 33 centimes; less than 5,000 dollars. This commission may have been paid to him by the bank, and it appears from a report from the first auditor's office, dated July 29, 1837, that this commission would be paid by the United States to the bank upon presentation of a proper voucher.

There is nothing in the record to show that Hottinguer and Co., even up to this time, sanction this claim of fifteen per cent., or that the bank intends to pay it over to Hottinguer and Co., if it shall succeed in compelling the United States to pay it. On the contrary, the claim of the bank appears to be prosecuted for its own benefit; and the result will be that the bank, if it succeeds in this suit, will pay to Hottinguer and Co. less than $5,000, and keep $165,000 for itself.

At the time of the protest, and immediately afterwards, comprehending the payment *supra protest*, and protest itself, either Rothschild or Hottinguer and Co. were the "owners or holders" of the bill, as described in the first class of the statute, and of course no rights whatever accrued to the bank. Did it subsequently acquire any?

In what particular manner the bill was transferred by Hottinguer and Co. to the bank after protest and payment—whether by general or special endorsement, or by a receipt upon the bill—the record does not show. It only says *742] that "the bill of exchange and protest *were transmitted to the bank, which thereby, and by reason of the premises, became and were again holders and owners of the same." But the claim for fifteen per cent. damages had been voluntarily waived, as we have seen, by Hottinguer and Co., and it is not easy to see how any person claiming under them could have any more rights than those which the assignors chose to insist upon. The mere possession of the bill is not sufficient, because that possession was accompanied by a cotemporaneous declaration that Hottinguer and Co. intended to claim nothing more than one-half per cent. commission.

It is not perceived, then, how the bank can bring itself within the class of cases provided for in the first branch of the statute. Is it within the second?

This depends entirely upon the answer to the question, has it, as endorser, paid the damages to the owner or holder of the bill, or to any one? If it has, the record does not show it. On the contrary, all that it has paid was the commission of a half per cent. to Hottinguer and Co., if indeed it has paid that, for there is no evidence of it. The propriety of the statute is not the subject of examination; but it may be remarked that it appears to be founded on reason and justice. Every successive endorser, as he transfers a bill of exchange, receives from the endorsee its full value; and being thus reimbursed for his outlay in the purchase of the bill, the inconvenience which falls upon somebody when the bill is protested does not touch him. His account is already balanced. The reason therefore for allowing damages utterly ceases as to him. He has no fresh bill to purchase, either by re-exchange or in any other manner. But when he is made responsible, as he may be, to the holder, for the amount of the bill and damages, it is fair and reasonable that the same liability should travel upward until it is ultimately fastened upon the drawer; each endorser being obliged to refund to the one below him exactly what that one has been compelled to pay. But the bank has not paid these damages, and consequently is not within the second class of cases.

Being not within the statute at all, the claim for damages cannot be sustained.

The argument that the fifteen per cent. is not damages, but exchange, is entirely unsound, as I conceive, in this case. The statute gives exchange from the place of drawing interest, costs of protest, *and fifteen per cent. damages, in addition. The first is indemnity; the second a penalty. By commercial men the first is construed liberally, as within the general rule governing bills of exchange, with the difference of estimating the exchange from the place of drawing, instead of re-exchange; the right to the penalty is strictly construed, according to the words of the statute. Its plain meaning must govern the merchant and business man; for him it was made. He is told that the owner of a bill, at the time of its protest, shall be entitled to fifteen per cent. damages from the drawer, or endorser, in every case; and that the endorser shall be entitled to the same, (from the drawer, or a prior endorser,) provided the owner makes him pay the fifteen per cent.; not otherwise. And this I understand to have been the uniform mode of proceeding under the statute by the merchants of [*743

Maryland, under the 1st and 3d sections of the act; nor does it appear by the books of reports of that state, that this interpretation by business men has ever been questioned in the courts of justice there. For the reasons stated, I think the instruction given to the jury in the Circuit Court was proper, and that the judgment ought to be affirmed.

Mr. Justice WAYNE.

I concur in the opinion that the judgment of the court below ought to be reversed, but not for the reasons given in the opinion of the court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of 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, to award a *venire facias de novo*.

Note by the Reporter.—The Chief Justice did not sit in this case, and his opinion is therefore placed in an appendix.

APPENDIX.

SIR,—I will thank you to publish the accompanying opinion in the case of the *Bank of the United States* v. *The United States*, in the appendix to your second volume. The opinion itself will show why I have deemed it proper to publish it in the manner proposed.

I am, very respectfully, your obedient servant,

R. B. TANEY.

Benjamin C. Howard, Esq.,
Reporter to the Supreme Court of the United States.

The Bank of the United States } Supreme Court,
v. } January Term, 1844.
The United States. }

The question in this case is, whether the Bank of the United States is entitled to fifteen per cent. damages on the bill drawn by the Secretary of the treasury of the United States, upon the French minister and Secretary of state for the department of finance, for the first instalment due from France to the United States, under the convention of July 4, 1831. This bill was protested for non-payment; and the bank thereupon gave notice of the protest, and claimed these damages in addition to the re-exchange and to all costs and damages actually sustained, except only the commissions charged by Hottinguer and Co., which according to its statement were considered as included in the fifteen per cent. The claim for these damages was resisted by the executive department of the government, which offered to pay the re-exchange and all costs and charges actually incurred, and to give the bank a full indemnity. This was refused; and as the sum in controversy was a very large one, amounting I believe to about $150,000, it attracted a good deal of attention at the time, and has been the subject of much public discussion.

When this dispute arose I was the attorney-general of the United States, and my opinion was called for by the Secretary of the treasury; and was against the claim set up by the bank. Having thus been *consulted as the counsel [*746
of the United States, and given the advice upon which the

government acted, it seemed proper for me to withdraw from the bench, when the subject was judicially disposed of; and I should not therefore have taken any part in the decision, even if the state of my health had permitted me to be in Washington when the question came before the court.

The opinion I originally gave was a very brief one, without stating any of the reasons upon which it was founded. Some time afterwards at the request of the gentleman who succeeded me in the office of Secretary of the treasury, I stated some of the grounds upon which I had formed my opinion, but without intending to go into a full discussion of the subject; and indeed without having all the papers within my reach at the time. I have not seen that opinion since it was written. And as the subject is now brought up for decision in the Supreme Court, and as upon a more full consideration of the case I still entertain the opinion I originally expressed, it is due to myself, and to the official station I now hold, that the reasons should be fully understood upon which, in my judgment, the claim of the bank had no foundation in law or equity. No place appears to be so proper for such a publication, as the volume of Reports which contains the case. But as I did not sit in the cause I cannot with propriety insert my opinion in the body of the report, and therefore place it in the appendix.

I must here remark that a letter from Mr. Biddle to Mr. Duane, then Secretary of the treasury, dated August 24, 1833, is inserted in the record, in which it is said that *I had declined communicating to the Secretary* my reasons for the opinion I had given. The statement as there made is calculated to create an impression which is not correct. The letter, as printed in the record, is, by some mistake, represented as an answer to one from Mr. Duane of June 27, which is also given. But that letter certainly does not authorize the statement; and Mr. Biddle's was I presume an answer to one from Mr. Duane of the 17th of August. And in a letter addressed by me to the Secretary on the 16th of that month, in answer to one from him informing me of Mr. Biddle's wish to know the reasons for my opinion, I said—"It is no doubt due to the public, and to the executive branch of the government, which has acted on my opinion, and also to myself, that I should in due time place on file in your department the reasons which in my judg-
*747] ment justify the government in its refusal to pay this demand;" and after telling the secretary that I must *exercise my own discretion as to the time, I concluded by saying —"I cannot therefore imagine that it is the duty of the counsel for the United States to argue this question for the satisfaction of the president and directors of the bank whenever they may think proper to call on him to do so." My refusal,

therefore, was to answer the call of the bank, which I then thought, and still think, it had no right to make.

I give these extracts from my letter, because Mr. Biddle's would seem to have been introduced in the record for the purpose of proving that I had refused to give *the Secretary of the treasury* any reasons for the opinion I had expressed. If the circumstance of my giving or refusing to give reasons was deemed to be a matter sufficiently material and important to be offered in evidence at the trial, and spread upon the record, I can see no just reason why Mr. Biddle's statement should have been selected as the testimony to be offered, and my own letters upon the subject withheld. They are upon file in the treasury department as well as Mr. Biddle's, and copies of them could have been as easily furnished.

In examining the questions of law which arise in this case, it is necessary in the first place that all the material facts should be well and clearly understood. I proceed to state them. In doing this, however, I shall have occasion to refer to some papers which, although material to the controversy, are not in the record. But they are on the public files of the departments in Washington; and as I shall give their dates, there will be no difficulty in verifying the correctness of the references.

By the treaty between the United States and France, of July 4, 1831, article 2d, it was stipulated that twenty-five millions of francs, which the latter agreed to pay to the United States in discharge of the claims of sundry American citizens upon the French government, should "be paid at Paris in six annual instalments of four millions one hundred and sixty-six thousand six hundred and sixty-six francs and sixty-six centimes each, into the hands of such person or persons as should be authorized by the government of the United States to receive it;" and by the same article, the first of these instalments was to be paid at the expiration of one year, from the exchange of the ratification of the treaty; and the others annually thereafter until the whole should be paid. The exchange of the ratification took place on the 2d of February, 1832; and the first instalment therefore became due on the 2d of February, 1833.

*By an act of Congress passed July 13, 1832, it was [*748 made the duty of the Secretary of the treasury to cause the several instalments with interest thereon to be received from the French government, and transferred to the United States in such manner as he might deem best. The difficulty between the bank and the government has arisen out of this act of Congress, and the manner in which it was carried into execution.

On the 31st of October, 1832, Mr. McLane, then Secretary

of the treasury, addressed a letter to the president of the bank, referring him to the act of Congress, and expressing his desire to transfer the money to the United States, in a manner, "most beneficial to the interest of the claimants," and suggesting that a bill drawn on the French government might be an advisable mode. He concludes his letter with the following request: "I shall be happy to receive your views on the whole subject; and if, as I presume, an arrangement for the transfer may be best made with the bank, I will thank you to state the terms."

On the 5th of November following the president of the bank replied to this letter, and after stating his willingness to offer such suggestions as occurred to him "in regard to the transfer of the first instalment payable by the French government," proceeded to recommend a bill upon the French government, which he advised the Secretary not to offer in the market, as it would depress the price; and proposed that he should give to the Bank of the United States a bill for the whole amount, at a certain rate mentioned in his letter. He states that he advises this, because it is believed to be "the best operation for the government;" that the bank is purchasing from individuals on better terms; and that the offer is made from "an anxiety to make the transfer on such terms as would merely prevent a loss to the bank; and concludes by saying that in making the offer the bank was "influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury."

No further correspondence appears to have taken place between the parties until the 26th of January, 1833, when the Secretary again wrote to the president of the bank, stating that the department was then ready to draw on the French government for the first instalment; that he presumed the bank was still disposed to purchase on the terms it had before offered; and that as the instalment would be due before the bill could possibly arrive in France, it would be made payable on demand, and it was desirable that credit should be given to the treasurer by the bank on receiving the bill.

*749] *This letter was answered by the president of the bank on the 30th of the same month, and he stated in his reply that exchange had fallen since the former offer, and proposes new terms, which he represents as made by the bank "without looking to any profit in the operation, but merely in the expectation of incurring no loss upon it;" and that if this offer is accepted, the bank would, upon the receipt of the bill, pass the amount to the credit of the treasurer.

On the 6th of February, the Secretary informed the bank that the last-mentioned proposition was accepted, and that the bill would be forwarded the next day. It was accordingly so

transmitted, and the letter of Mr. McLane, which accompanied the bill, stated that he sent with it a communication from the Secretary of state to the French government, advising of the drawing of the bill, in order that the said communication might accompany the bill; and on the 9th of the same month he again wrote to Mr. Biddle, sending him "duplicates and triplicates of the act of the President, and a letter of advice to the American Chargè d'Affaires at Paris, intended to accompany the bills drawn by the department on the French government." The bill forwarded was in the following words:

"*Treasury Department of the United States,*
Washington, February 7, 1833.

"Sir:—I have the honor to request that at the sight of this my first bill of exchange (the second and third of the same tenor and date unpaid) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four millions, eight hundred and fifty-six thousand, six hundred and sixty-six francs and sixty-six centimes; which includes the sum of $3,916,666.66, being the amount of the first instalment to be paid to the United States under the convention concluded between the United States and France, on the 4th of July, 1831, (after deducting the amount of the first instalment to be reserved to France under the said convention,) and the additional sum of nine hundred and forty thousand francs, being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was signed by Mr. McLane as Secretary of the treasury, and directed to "Mr. Humann, minister and Secretary of state for the department of finance, Paris." Upon the back was endorsed a particular account, certified by the register of the treasury, showing *that the amount [*750
claimed to be due to the United States under the treaty was the same with that for which the bill was drawn.

The paper which accompanied the bill, and which is described in Mr. McLane's letter of the 7th as "a communication from the Secretary of state to the French government," and in his letter of the 9th as "the act of the President," was an instrument under the seal of the United States, signed by the President and countersigned by the Secretary of state, bearing the same date with the bill, and which after reciting the article of the convention, hereinbefore-mentioned, and that the first instalment became due on the 2d of that month—and reciting also the act of Congress by which the Secretary of the treasury was directed to cause it to be trans-

ferred to the United States, and that in virtue of the power vested in him, he had drawn the bill above-mentioned for the first instalment under the convention, proceeded to declare that the President of the United States ratified and confirmed the drawing of the said bill, and authorized "the said Samuel Jaudon or his assignee of the said bill to receive the amount thereof, and on the receipt of the sum therein mentioned to give full receipt and acquittance to the government of France for the said first instalment, and the interest due on all the instalments, payable on the said second day of February by virtue of the said convention."

The letter of advice to the American Chargè d'Affaires at Paris, transmitted with the bill, was one from Mr. Livingston to Mr. Niles, then chargè at Paris, informing him of what had been done in this business, and directing him to "take an early opportunity therefore to apprize the French government of this arrangement."

On the 11th of February, Mr. Biddle acknowledged the receipt of the bill, and informed the Secretary that he had passed the amount of it to the credit of the treasury. And after explaining the reasons for receding from the first offer made by the bank, he says, "the purchase of the bill is not in the least desirable to the bank, nor would the rate now allowed have been given to any other drawer than the government."

This bill, it appears, was afterwards endorsed to the Barings by the bank, and by them to Rothschild, and was presented to the French minister of finance for payment. But no appropriation having been made by the French Chambers, Mr. Humann was unable to pay it. It was therefore protested, and was paid by Hottinguer and Co., for the honor of the bank—and the bank gave notice of the protest to the Secretary of the treasury, and demanded not only the costs and
*751] expenses *sustained, and re-exchange, but also 15 per cent. damages on the principal amount of the bill.

Upon the receipt of this notice, the money which had been transferred to the government on the books of the bank in payment of the bill, was immediately re-transferred to the bank—it not having been used by the government, nor even brought into the treasury. And the government offered to indemnify the bank for all costs, expenses and damages it had actually sustained, by the non-payment of the bill; but refused to pay the 15 per cent. damages, upon the ground that the bank was not entitled to them.

These damages are claimed under an act of assembly of Maryland passed in 1785, which provides "That upon all bills of exchange hereafter drawn in this state on any person, corporation, company, or society, in any foreign country, and reg

ularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also 15 per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of the protest until the principal and damages are paid and satisfied:" and then comes a provision that if any endorser shall pay the holder the principal, damages, and interest above mentioned, he shall be entitled to recover the sum paid by him, with interest, from the drawer.

This act of assembly was in force at the time Congress assumed jurisdiction over the District of Columbia, and was of course embraced by the act of Congress, which declared the laws of Maryland in force in that part of the district which had been ceded to the United States by Maryland.

The 15 per cent. damages is the only point in controversy, and if the bank succeeds in establishing its demand, it will make a clear profit of about $150,000, without having run any risk or suffered any inconvenience, and without having rendered any service to the public; and the treasury of the United States will be subjected to this heavy loss without any fault on the part of its officers, unless it be regarded as a fault to have consulted the bank and relied upon its counsel.

[*752 *It is indeed impossible to read the statement of the case without being strongly impressed with the utter want of any thing like equity or justice on the part of the bank in making this demand. The Secretary of the treasury, it appears, being charged by law with transferring this money to the United States, and regarding the bank as the great fiscal agent of the government, which, from its extensive monetary transactions was best able to judge in what mode the transfer could most advantageously be made, very naturally consulted with its officers before he took any step in the business; and it is evident by his letter, that he addressed himself to the president of the bank not merely as to a person with whom he proposed to bargain for the sale of a bill of exchange, but as one who stood in such a relation to the public that the Secretary supposed he had a right to ask his counsel upon this subject, and might safely act upon it when given.

The answer of the president of the bank represented the officers of that institution as receiving the application of the Secretary in a corresponding spirit; and as advising and acting in the business altogether from public and patriotic motives, without any view whatever to their own profit. The

Secretary is advised that the simplest form would be the sale of a bill on Paris; but reasons are stated (no doubt good ones) why this operation should not be attempted, and why it would be advisable to deliver a bill to the bank at a rate which he mentions; and the Secretary is assured, that in making its proposal the bank is not governed by the market price for which bills on Paris are then selling, and that in its offer it is not governed by any selfish considerations, but "is influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury." It was upon the faith of these statements that the offer of the bank was accepted, and it obtained possession of the bill for the whole amount of the instalment upon its own terms, without any competition in the market with others. It needs no commentary upon the letter to show how little the present demand corresponds with the assurances contained in it, or with the motives upon which the bank professed to be acting.

But this letter proves still more. It shows that the parties were not dealing with one another for the sale and purchase of a bill of exchange, in the commercial and legal sense of those terms, where the rights and responsibilities of the drawer and drawee, and of all the parties to the instrument, depend upon the bill itself, and are determined *by the law-merchant and the usages of trade; but that the proposition made by the bank and accepted by the Secretary was an offer to act as the agent of the United States in transferring this fund, upon the terms and for the considerations therein mentioned—and that the bill, together with the other instruments executed at the same time, were delivered to the bank in order to enable it to perform this service. If such was the contract between the parties, there is no color for the claim now made; and that such was its real character, and that it was so regarded at the time, is evident when we take into consideration in connection with this correspondence the object which both parties intended to accomplish, and the other instruments executed and delivered with the bill, and making therefore a part of the contract.

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It must be borne in mind, that both parties had the same knowledge of the situation of this fund and of the circumstances connected with it, and both had the same object in view—that is, to transfer it to the United States, upon terms most advantageous to the treasury. And it is evident from the papers executed and delivered at the time, that neither party supposed that a bill of exchange would enable the bank to accomplish the object contemplated. The form of a bill was indeed given to one of the instruments, and it is spoken of in the correspondence referred to as the sale of a bill of exchange, and very naturally so spoken of from the shape

given to the contract, and the manner in which the compensation to the bank was arranged. But the question is, was the contract upon which this instrument was delivered in substance and in truth a sale and purchase of a bill of exchange, according to the usages of trade, and the legal meaning of the terms? or was it given to the bank merely to enable it, more conveniently, to execute an agency it had undertaken?

Now it is manifest that this bill would not give the endorsee or holder the right to demand this money of the drawee; and so the parties to it understood the matter; and the bank therefore took the power of attorney to Mr. Jaudon, without which it would have been unable to transfer this fund, even if the money had been in the hands of the French minister of finance, ready to be paid.

Undoubtedly so far as our government was concerned a bill of exchange would of itself have been all-sufficient. The act of Congress authorized the Secretary to adopt any mode he thought proper, to transfer this money to the United States; and the President and other officers of the government were bound to co-operate with the Secretary, *and to [*754 assist him as far as their assistance might be necessary to carry into effect any mode he might adopt.

But the act of Congress could create no obligation on the French government, nor impose upon it the duty of making the payment in any other mode but the one prescribed by the convention, and sanctioned by the usages of nations in their intercourse with one another. France had not agreed to pay a bill of exchange drawn by the Secretary of the treasury upon the French minister of finance; nor was she bound to take upon herself the risk of deciding whether the signature to a bill presented by a private individual as endorsee was the proper handwriting of the Secretary of the treasury; nor whether the endorsements upon it were genuine or not. By the convention she engaged to pay this money "into the hands of such person or persons as should be authorized by the government of the United States to receive it." And the only authority which she was bound to recognize, was one from the executive department of the government, which in its foreign intercourse is regarded as representing the nation. France did not stipulate, that in carrying this convention into execution the established usages of nations should be put aside, and her department of finance treated as a mercantile house, and subjected to the usages of trade and the custom of merchants, instead of the laws and usages of nations. She bound herself to pay this money to any one who produced an authority from that department of the government of the United States with which she had negotiated, with which she had made her contract, and which, in its foreign intercourse, is always under-

stood to represent the nation, provided the authority thus given was made known and authenticated, according to the established usages of diplomatic intercourse to that department of the French government which is charged with its foreign relations. This is the real and substantial meaning of this convention. She did not agree to accept a bill of exchange.

Whatever duties, therefore, the act of Congress imposed upon the officers of this government, and whatever authority it conferred upon the Secretary of the treasury, it did not and could not alter the obligations of France. So far as she was concerned, the bill of the Secretary of the treasury in favor of the cashier of the Bank of the United States, gave him no authority to demand the money, and created no obligation on France to pay it. Standing by itself, it would have been useless and ineffectual; and in this light it was evidently regarded by all the parties to the contract—by the President of the *United States, by the Secretary of state, by the Secretary of the treasury, and by the officers of the bank. The other instruments executed and delivered at the same time show that such were the impressions under which they were acting. The power of attorney in favor of Mr. Jaudon, certified under the seal of the United States, was the real authority relied on by all of the parties to enable the bank to receive the money; and the only effect of the bill was to make this power negotiable and transferable, and therefore I presume more convenient to the bank. It was convenient also to the United States, because it enabled the Secretary to ascertain at once the sum that the treasury would realize from this instalment. And even this power of attorney, carefully as it is drawn and attested, was not deemed sufficient under the treaty, without adding to it an original letter from the department of state to the American chargè, which was to accompany both the bill and the power of attorney, in order that he might by an official communication to the proper department of the French government assure them of the authenticity of the power and the bill.

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Now it seems to me to be confounding things which are essentially unlike, to apply to such a transaction between nations the commercial usages in relation to bills of exchange, merely because one of the instruments executed between the parties is in that form and called by that name.

The instrument of writing acknowledged in commerce as a bill of exchange, and to which the law-merchant applies, is one which, of itself, without any other aid, gives the payee or his endorsee the right to demand and receive the amount specified in it; and the payee and endorsee is presumed to buy it upon the faith that the drawee, upon the authority of the

bill itself, will pay the money. But if the bank in this case supposed that it was entering into such a contract with the government, and purchasing such a bill, why did it take the power of attorney to Mr. Jaudon, bearing the same date with the bill? Why take the letter from the Secretary of state to the American chargè? It had no occasion whatever for these papers, if it meant merely to buy a bill. It had nothing to do with them, and no business with them; and the acceptance of these instruments, delivered with the bill, to bear it company in all its transfers, and to be presented with it to the French government, is utterly inconsistent with the pretension now set up of being nothing more than the purchaser of a bill. But they are in perfect accord with the letter of *Mr. [*756 Biddle, in which he proffers the agency of the bank to transfer the fund.

The subsequent proceedings in this business conform in every respect to the view I have taken, and prove that it was regarded in the same light not only by the parties originally concerned, but by those also who afterwards became interested in it. For before the bill was presented for payment to Mr. Humann, the letter of the Secretary of state to the American chargè, herein before mentioned, was delivered by the assignee and holder of the bill to Mr. Niles, the chargè of the United States at Paris, who, pursuant to the instructions therein contained, on the 21st of March, 1833, addressed a letter to the Duc de Broglie, the French minister of foreign affairs, apprizing him of the contents of the despatch from the state department, and informing him that the bill would probably be presented in a day or two at the department of finance, and assuring him that the assignee had full power from the President of the United States to give the necessary receipt and acquittance to the French government, according to the treaty.

Now if this had been the purchase of the mercantile instrument recognized as a bill of exchange, and to be treated as such by the holder, he would have believed, and would have had a right to believe, that the bill itself authorized him to receive the money and give an acquittance. And if as a matter of courtesy (the bill being payable at sight) he chose to give notice of the time when it would be presented for payment, that notice would naturally and properly have been given to the drawee. But here the notice was not given by the holder to the person from whom he was to ask payment, nor to any officer of the French government, but he delivers the letter from the department of state to the American chargè, in order that he may, by an official communication from the government of the United States, apprize the French government of the assignee's right to receive the money and give the acquittance; and this notice was not given, and could

not with propriety have been given, by Mr. Niles to Mr. Humann, the drawee, but was necessarily and properly given to the minister for foreign affairs. In other words, this letter from the state department was placed in the hands of the chargé in order that he might demand the money, in behalf of the holder of the bill, from the French minister of foreign affairs, and through him obtain an authority to the drawee to pay it. For this is the real meaning and object of those communications.

[*757 *Here, then, is a paper in the form of a bill of exchange; which the parties to it know gives no right to demand the money mentioned in it, because that money is due from one nation to another, and the mode of payment is particularly specified in a treaty; and that mode is not by a bill of exchange drawn by the Secretary of the treasury upon the French minister of finance. The payment is to be made to an agent appointed by the government of the United States. No person would be recognized as such unless his appointment was authenticated by the President of the United States, nor unless that appointment was regularly notified to the French minister of foreign affairs. Then, and not before, it was the duty of the French government to order the payment to be made; and then, and not before, the holder of the bill, according to the treaty, was entitled to demand and receive the money. This was all known and agreed to, and acted upon by the parties originally or subsequently interested in the contract, and indeed appeared on the face of the papers. Now it seems to me impossible to treat such a transaction as an ordinary mercantile operation, and to apply to it the rules and principles of the law-merchant. It is impossible, with any show of reason, to treat the Secretary of the treasury of the United States and the French minister of finance as if they were mere trading houses, which might lawfully deal with one another, and draw bills upon each other whenever they pleased. The American Secretary acted under a special law of Congress in this instance, and in execution of a treaty, and we might as well apply the rules of the law-merchant and the doctrine of private partnerships to a treaty of alliance between nations, as subject this transaction to the usages of trade.

It is, moreover, worthy of remark, that the Duc de Broglie, in his answer to the note of Mr. Niles, complains of the course adopted by the American government, guarded as it was, and says that in his opinion they had gone out of the natural course, which the treaty itself pointed out, and which was supported by so many precedents: *vid.* 2d vol. Exec. Doc., 2d. sess. 23d Cong., Doc. 40, page 22, 23. I do not, however, mean to admit the justice of this remark, because in the power given by the President, and the official notification of it, according

to the usual forms of diplomatic intercourse, the stipulation in the treaty was complied with, and the only office of the bill of which he complained was to designate the person authorized to act under the power executed by the President and certified under the seal of the United States.

[*758 *Nobody will imagine for a moment, that if the United States are compelled to pay these damages, the French government can be called on to reimburse them. For, if the United States superadded any other instrument to the one pointed out by the treaty, or adopted a different mode of communication from the one which the treaty authorized, and thereby subjected themselves to the payment of damages, they have no right to throw the loss thus sustained upon France. And, certainly, France did not agree by the treaty that a bill might be drawn for this instalment upon their minister of finance, nor that our Secretary of the treasury might hold any communication with him on the subject. The refusal, therefore, of Mr. Humann to accept or pay the bill was not a breach of the treaty stipulation; and, consequently, our government can have no claim to compensation on that account. The breach consisted in not paying the money to the agent duly appointed by the government of the United States, whose appointment was sufficiently authenticated to the proper department of the French government, according to the usages of diplomatic intercourse—that is to say, to the minister of foreign affairs. And the omission to pay when this had been done, undoubtedly entitled the United States to demand the interest provided for by the treaty until the money was paid. But there is no clause in the treaty subjecting the French government to fifteen per cent. damages, if the money was not paid on demand. Yet the money was due; and, unquestionably, if this case is to be treated as a bill transaction in the usual course of business, the drawee would be responsible to the drawer for all the damages he might sustain by the protest of the bill. Is the transaction to be regarded as the sale and purchase of a bill of exchange, in order to charge the United States with the payment of these large damages to the bank, but for no other purpose? I cannot assent to the justice of such a decision, nor to the principles on which it is founded.

In discussing this question, I have so far taken into consideration the letters of the parties, and the other instruments of writing executed and delivered at the same time with the bill, in order to determine the true character of the contract. Unquestionably, upon well settled legal principles, this is the only mode in which the intention of the parties can be ascertained, and their respective rights and liabilities decided. But if we are to throw aside every thing but the bill, and regard that as the only evidence before us, still it will be found that

the act of assembly of Maryland does not apply to the *case. And if it does not, then it is very clear that the damages claimed cannot be recovered.

It cannot be necessary to cite authorities, to prove that by the general law-merchant the holder of a protested bill of exchange is entitled to nothing more than costs, expenses, and re-exchange. In other words, he has a right to be indemnified from loss; but beyond this he has no claim to damages.

In many places, indeed, damages are given by established local usage, or by express statute. But these damages not only differ in amount in different places, but they differ also in the purpose for which they are given. In some instances they are allowed in lieu of expenses and re-exchange, and in that case they stand in the place of such allowances, and are regarded as a just equivalent for them: a general rule or fixed sum being adopted as a matter of convenience, to save the difficulty and inconvenience of proving, in every case, the reasonable costs and expenses actually incurred, and the price of the re-exchange at the time.

But in other places damages are superadded to these allowances, and are given to the holder over and above the usual indemnity. In such cases the damages are not given for the loss supposed to have been sustained. They are imposed upon the drawer as a penalty. And the right to recover them is given to the holder in order to prevent persons from selling exchange without having provided funds to answer it.

The damages given by the Maryland act of Assembly are of the latter description. The law gives the usual compensation allowed by the general commercial code—that is, costs, interest, and re-exchange—the re-exchange being measured by the price of the new bill in Maryland, instead of the country in which it is payable. It also gives fifteen per cent. damages over and above these allowances. The damages, therefore, are, in effect, a penalty imposed upon the drawer, in case his bill is protested. And the question arises, whether this provision of the statute extends to the United States, and embraces bills drawn on behalf of the government, by an officer authorized by law to draw them.

If such be the construction of this law, and it is construed to embrace bills drawn by the state, it is the first instance in the history of nations in which a sovereignty has imposed a penalty upon itself, in order to compel it to be honest in its
*760] dealings with individuals. A sovereignty is always presumed to act upon principles of justice, *and if, from mistake or oversight, it does injury to a nation or an individual, it is always supposed to be ready and willing to repair it. It is bound to compensate the party injured, and to make the indemnity a full and ample one. But it is bound to nothing

more. And it ought not to be supposed to have made a provision so unusual as the one now contended for, unless very clear words were used to indicate that intention.

Nor does it matter whether this fifteen per cent. is technically to be regarded as a penalty or not. It is, at all events, a new provision, engrafted upon the general law-merchant. It is a new charge imposed upon the drawer of a protested bill, beyond that to which he was before subject. The question still recurs, does this statute include bills drawn by the state? In England it is well settled that the king is not embraced by the provisions of an act of Parliament, however broad and general the terms of it may be, unless he is expressly named, or the language of the statute and the nature of its enactments imply that it was intended to operate on the rights of the sovereign as well as upon those of individuals. 5 Co., 14 b; 11 Id., 70; 8 Mod., 8; 1 Str., 516. The same doctrine has been long since firmly established in Maryland. *Murray & Taylor* v. *Ridley, adm'r.*, 3 Har. & M. (Md.), 171; *Contee* v. *Chews' ex'r*, 1 Har. & J. (Md.), 417; *The State* v. *The Bank of Maryland*, 6 Gill & J. (Md.), 226. And if the state of Maryland would not have been liable to this demand under the act of 1785, it follows that the United States are not responsible. For the adoption by Congress of the Maryland law, certainly did nothing more than place the general government, in relation to this contract, upon the same ground that the state would have occupied before the cession of the District.

Now in this law there are certainly no express words including the state; nor is there any thing in its language or its object to lead to that conclusion. And it appears to me that no one who reads the act can for a moment imagine, that the state intended to impose upon itself this fifteen per cent. damages, in case one of its foreign bills, from some unforeseen cause or other, should happen to be protested. It is no answer to this argument, to refer to cases decided or usages adopted, where certain fixed damages are given as a substitute for the charges recognized by the general mercantile law. Such decisions and usages rest upon different principles from the present case, and the reasons upon which they are allowed would undoubtedly apply to government bills as well as to those of individuals. Neither *is it sufficient to say that the government, if it was the holder of a protested bill, would be entitled to these damages from an individual, and that it is therefore just that it should pay them in return. If such a rule be a sound one, and if it ought to be followed by the legislature, yet it would not authorize the court to repeal a statute, and make a regulation different from that enacted by the legitimate authority. It would be difficult, [*761

however, for any one to maintain, that there is any foundation in justice or fair dealing for applying such a rule against the United States in this instance, and in favor of the bank. The justice of the case is most manifestly on the same side with the law.

And, indeed, the law of the case would be the same, even if the contract had been nothing more than the sale of this bill, and the liabilities of the United States were to be determined by the rules which govern similar contracts between two individuals.

The bill, upon the face of it, is drawn upon a particular fund. And such a bill, although usually spoken of as a bill of exchange, is yet not recognized as such in the commercial code. Nor is it subject to the rules and usages which have been established in relation to bills of exchange. It cannot be declared on as such, nor is the drawer answerable to the endorsee or holder upon protest for costs, charges, or re-exchange; nor for any fixed sum in lieu of them. The act of 1785, therefore, does not apply to it; for that statute manifestly intended to embrace those instruments only which are recognized by law as bills of exchange.

The general rule as to what constitutes a bill of exchange, in the legal sense of these terms, is given in Story on Bills of Exchange, sect. 46; where, after stating that bills payable out of a particular fund only, or upon an event which is contingent, are not in contemplation of law bills of exchange, the definition of that instrument is given in the following words:

"And hence the general rule is, that a bill of exchange always implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation; and if the bill wants, upon the face of it, this essential quality or character, the defect is fatal."

The cases which establish and illustrate this principle, and show what bills are regarded as drawn upon a particular fund, are all referred to in the section above mentioned, and in the one succeeding *it, and may, indeed, be found in any of the standard works on bills and notes. It would be useless, to cite here the multitude of cases on the subject. A single one will show the application of the principle, as settled by the current of authorities. In *Jenney* v. *Herle*, 2 Ld Raym., 1361, the bill was in the following words: "Sir, you are to pay to Mr. Herle £1,945, out of the money in your hands, belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West Buckland." It will be observed, that the language of this bill assumes that the money was in the hands of the drawee; that the fund out of which it was payable had

*762]

already been received by the party upon whom the bill was drawn. Yet this was held to be no bill of exchange, in the legal sense of the words, it being payable out of a particular fund. So, too, an order from the owner of a ship to the freighter, to pay money on account of freight, is no bill, because the *quantum* due on the freight may be open to litigation. Chit. on Bills, 58; 2 Str., 1211, *Banbury* v. *Lissett*, so held by Lee, Chief Justice.

And so firmly have the principles decided in these early cases been since adhered to, that it is now greatly doubted whether the cases of *Andrews* v. *Franklin*, 1 Str., 24, and *Evans* v. *Underwood*, 1 Wils., 262, which seemed in some degree to relax the rule, would at this day be held to be law. See Story on Bills, page 60, note.

Now, can any one read the bill in question, and distinguish it in principle from the case of *Jenney* v. *Herle?* or bring it within the definition of a bill of exchange, as given in Story on Bills? Upon the face of the bill, it is drawn by the American Secretary in his official and not in his private character. It is drawn upon Mr. Humann, not for any money he was expected to pay to the American Secretary in his private capacity, but upon a particular fund which was due from the French nation, and which was presumed to be in his hands as the minister of finance. It is upon the credit to which the Secretary supposed himself to be officially entitled, on account of this particular fund, that he draws the bill. This is carefully and distinctly set out in the bill itself. It does not in its terms imply a personal or official credit, not limited or applicable to particular circumstances. On the contrary, it claims the credit, and requests the payment, on account of the particular circumstance that the money was due from the French government, and the funds to pay it presumed to be in the hands of the minister of finance.

Moreover, the Secretary knew, and the bank knew, that France *was a constitutional monarchy, under [*763 which no money could be raised, or applied to any particular purpose, without the sanction of the legislative body. And that the money due from France could not be paid by Mr. Humann, unless money was placed in his hands, and by law appropriated for that purpose: the payment of the bill, therefore, depended upon that circumstance. If that event had not happened—that is to say, if the money had not been provided by the legislature, and the payment authorized out of the fund thus provided, then, upon the face of the bill, it was evident that Mr. Humann would not and could not pay it. It is true that the bill assumes that the money was in his hands. But that was the case, also, in *Jenney* v. *Herle*. Indeed, the bill

there expressly stated the fund to be in the hands of the drawee; yet it was held not to be a bill of exchange.

It will hardly be said that this bill is to be treated as if drawn by the United States against France. But, even if that view of the subject could be maintained, it would not affect the argument. The bill claims no general credit for the United States with France that would give them a right to draw independently of the money due by the treaty. In any aspect of the case, the credit upon which the bill is drawn is expressly confined to this particular sum. And I cannot imagine how this instrument can be dealt with as a bill of exchange, if the rule is to stand, that no instrument is a bill of exchange, in contemplation of law, unless it implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation.

But if none of these objections stood in the way of this claim, and if the transaction were regarded as one between individuals for the purchase of a bill of exchange, in the legal meaning of the terms, and therefore to be governed by the act of 1785, yet the bank would have no claim to the damages in question.

The first clause of the first section of this law gives the fifteen per cent. damages, in addition to the re-exchange, costs, and interest, to the person who is the owner or holder of the bill protested. The second clause of the same section provides, that any endorser who shall have paid to the holder, or other person entitled, the value of the principal, damages, and interest, shall have a right to recover the same from the drawer or other person liable to such endorser on the bill. The plain language of the law gives the fifteen per cent. damages to the *764] party who is the holder of the bill at the time of the protest; and *gives to the endorser the right to recover from the drawer, or other person liable, so much only as he shall be compelled to pay on account of the protest. The endorser is entitled to nothing—neither to principal, costs, re-exchange, nor damages—until he has paid them; and then to so much as he has actually paid; and to nothing more.

The policy of this law is as obvious and as just as its words are plain. It conforms in its provisions to the general commercial code, as nearly as the situation of Maryland would at that time permit.

By the general mercantile law, the holder of a protested bill is entitled to re-draw from the place where it was dishonored, upon the drawer or endorser, in the country where they reside, for an amount that will produce, by its sale, at the existing market price of such bills, a sum exactly equal to the amount of the original bill at the time when it ought to have

been paid, or when he is able to draw the re-exchange, together with his necessary expenses, and interest. He is not, however, obliged to re-draw, but is entitled to recover what would be the price of such a bill, with interest, and the necessary expenses and charges. This is the amount of the holder's damages. But the endorser is not entitled to recover of the drawer the damages incurred by the non-payment of a bill, unless he has paid them or is liable to pay them. 3 Kent's Com., 115, 116 (4th edition); Story on Bills, 470, and notes; Chit. on Bills, 670 (8th edition).

The reason of the difference made between the holder at the time of the protest, and the endorser, who may afterwards by taking up the bill become the holder, is evident. The holder, by purchasing the bill and presenting it for payment, shows that he desires funds to that amount, at that place, at the time when the bill becomes due, and that he has counted upon obtaining them by means of the bill which he holds. His disappointment may subject him to serious loss and embarrassment in his business, and the law therefore authorizes him to raise the same sum immediately by re-exchange, on the drawer or endorser, in the country in which they reside. And if he cannot or does not re-draw, the price of the re-exchange to which he was entitled, together with his costs and expenses, is, of course, the measure of his damages.

But the endorser stands on different ground. He has already sold the bill, and received the consideration for it, at the time and place where it suited his convenience. And, having by his endorsement guarantied the safety of the bill to any subsequent holder, if, in consequence of this engagement, he is compelled to pay it, the natural and just *measure [*765 of his damages against a party answerable over to him is the precise sum he is compelled to pay, with interest upon it. This is the uniform rule, where one person is obliged to pay money, for which he has his remedy against another; and it is daily and familiarly acted upon, where a surety pays money for his principal.

Now the Maryland statute differs from the general mercantile code only in this—that in relation to the holder, it gives him the price of the re-exchange from the place where the bill was drawn, instead of the place where it was payable; and superadds the fifteen per cent. to the usual allowances; and the reason of this difference is readily understood, when we advert to the situation of Maryland at the time this law was passed. The state was then just renewing her commerce with England, which had been broken up by the revolutionary war; and she was for the first time about to open a trade with the other nations of the world; and when that law was passed, there was most probably not a place in Europe (certainly not

one out of England) at which there was any market rate of exchange for bills upon Maryland, by which damages could be measured in the case of a protested bill; and if such a rate happened to exist at any place, it would in the then state of navigation have produced ruinous delays and expenses to procure the testimony to prove it. The price of re-exchange in Maryland upon the same place was, therefore, from necessity substituted for the re-exchange in the foreign country. Because, here, the proof of the sum for which a new bill could be brought could be easily obtained, and would always be within the reach of the party. But as the holder of a bill payable in a foreign country could hardly at that time be expected to find a purchaser for his re-exchange upon Maryland, and the injury and inconvenience produced by the protest could not, therefore, be repaired immediately on the spot, by the sale of a re-exchange upon the drawer or endorser, the act of assembly imposed the penalty of fifteen per cent., in addition to the established allowances of the general mercantile law, in order to insure, as far as practicable, caution and prudence on the part of drawers and endorsers; and to deter the unprincipled and greedy from attempting to create for themselves a fictitious capital, by giving currency to bills which they knew would be dishonored. The second clause of this section, in relation to endorsers, conforms entirely with the general law-merchant. They are entitled to recover over only what they are compelled to pay.

*766] Upon what ground, then, can the bank claim the fifteen per cent. *damages under this law? It was not the holder of the bill at the time it was protested. It appears by the record that the bank had endorsed it to Baring, Brothers and Co.; they to Rothschild, and he had endorsed it to Rothschild and Brothers, who presented it for payment, and were the holders at the time of the protest; and Hottinguer and Co. paid it, *supra protest*, for the honor, as they declared, "of the signature and account of Mr. Samuel Jaudon, cashier of the Bank of the United States, the first endorser." It also appears by the statement in the record, that, although Hottinguer and Co. said they had funds of the bank in their hands, and were apprised that the bill would not be paid by Mr. Humann, they yet declined taking it up, until it should be protested. They did not, therefore, pay it as agents of the bank, but paid it *supra protest;* and they thereby, upon established and indisputable principles of commercial law, became the holders of the bill in their own right, and not as agents of the party for whose honor it was paid. Rothschild and Brothers, having received the amount due them, had certainly no claim to these damages; and they have made none. I shall not stop to inquire, whether Hottinguer and Co., who

voluntarily intervened in this business, could have claimed of the bank, or of the United States, either re-exchange or damages of any kind. It is sufficient for the decision of this controversy, that they neither claimed nor received them. They demanded what they were entitled to by the general law-merchant, and nothing more—that is to say, the principal, the costs and charges, and usual commissions. They had a right to make this demand directly upon the United States, as drawers, or upon the bank as endorser, both being responsible to them. *Ex parte Lambert*, 13 Ves., 129. They made their demand upon the bank as endorser, and as such it paid it. Can the bank enlarge the claim of Hottinguer and Co.? or can it, under and by virtue of the act of 1785, recover from the United States more than it has paid, or is liable to pay as endorser? It will scarcely be said that the bank has become the owner and holder, by paying Hottinguer and Co, and taking up the bill, and are, therefore, entitled to all the rights given to the owner and holder by the first clause of the first section of the act of Assembly. This clause evidently applies to the holder at the time of the protest, and it is the second clause in the same section which defines the rights of endorsers who become holders afterwards by discharging the claim against them; and this clause gives them a right to recover so much as they have paid, and nothing more. If *this claim is to be allowed to the bank, what is to [*767 be done with this clause in the act of Assembly? It is plain and unambiguous in its words; it is consistent with the other provisions of the law; its policy is evident, and it is in perfect conformity to the general commercial code, which has always been celebrated for the justice and equity of its principles; and this claim of the bank cannot be maintained, unless this clause is blotted out of the statute. Can this be done by judicial authority, upon any known rule for the construction of statutes? I think not. There have been many decisions upon the construction of many statutes, but it will be difficult to find a precedent anywhere, or of any time, that would sanction such a decision on an act of Assembly like this. Certainly there never has been any practice in Maryland, nor any decision under this law, to warrant such a construction. Upon the whole case, therefore, the following conclusions appear to me to be irresistible:

1. That the contract with the bank, according to its true construction and meaning, was not for the sale of a bill of exchange, in the legal sense of these terms; but an agreement by which the bank undertook, as agent for the government, to transfer to the United States the first instalment due under the treaty with France; and that the bill in question was

used as one of the instruments for carrying that contract into execution, for the greater convenience of the parties.

2. That if the contract be even considered as one merely for the purchase of a bill of exchange, in the strict legal meaning of the words, yet the bank is not entitled to these damages, because the Maryland act of 1785, under which alone they are claimed, does not extend to bills drawn by the United States.

3. But if the law of 1785 is construed to embrace bills of exchange drawn by the government, and this case is to be decided by the same rules which apply to similar contracts between individuals, still the United States are not responsible for these damages, because the bill in question is drawn upon a particular fund, and, therefore, not a bill of exchange in the legal meaning of the terms, and, consequently, not within the statute.

4. And if the claim were free from the three preceding objections, and to be decided under and according to the provisions of the act of 1785, yet the bank being an endorser of the bill, and not the holder or owner at the time of the protest, it is not by that act entitled to recover these damages, since it has not paid them.

*768] *Upon each of these grounds, I think the bank has no claim in law or equity to the damages in question.

Note. When this subject was before me as attorney-general of the United States, (if my recollection is correct,) I was under the impression, from the evidence, that Hottinguer and Co. had paid the bill out of the money of the bank in their hands, and as agents of the bank. In that view of the subject there could, I presume, be no foundation for the claim of fifteen per cent. damages; because the bank being the agent of the government, with public money in its possession sufficient to take up the bill, the payment by the agents of the bank out of its money ought to be regarded as a payment for the government, and would in substance and effect be a payment out of the public funds in the hands of the bank. But, upon the facts as now presented in the record, upon the evidence offered by the bank, it appears that Hottinguer and Co. declined paying the bill before protest; and that they paid it *supra protest*, reserving their remedy on the bill against the bank as well as the United States. They, therefore, according to the proofs, as now stated, became the holders of the bill on their own account; and it is upon this view of the facts that the foregoing opinion is formed.

738

INDEX

TO THE

MATTERS CONTAINED IN THIS VOLUME.

The references are to the STAR (*) pages.