thereof by the marshal, pay, or give such security as he may require, to pay, such daily allowance, and the prison fees.

The marshal refused to discharge the petitioner; and his counsel, *E. J. Lee*, now moved for a *habeas corpus*.

MARSHALL, Ch. J., after consultation with the other judges, stated, that the court was not satisfied *that a *habeas corpus* is the proper remedy, in a case of arrest under a civil process. [*53

Habeas corpus refused.

O'NEALE *v.* THORNTON.

Sales of lands in Washington.

The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed.

By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defence, affirmed the title of the third purchaser.

Thornton *v.* O'Neale, 1 Cr. C. C. 269, reversed.

ERROR to the Circuit Court of the district of Columbia, sitting in Washington, in an action of *assumpsit*, upon a promissory note, dated August 6th, 1800, payable in nine months thereafter, and given by O'Neale to William Thornton, surviving commissioner of the city of Washington, for the purchase-money of lots No. 1 and 2, in the square No. 107, in that city.

The defence set up by O'Neale was, that there was no consideration for the note, inasmuch as the superintendent of the city, who (by virtue of the act of congress passed the 1st of May 1802, entitled "an act to abolish the board of commissioners in the city of Washington, and for other purposes," 2 U. S. Stat. 175) succeeded to all the powers, duties and rights, of the late commissioners, whose office was abolished by that act, had abandoned or rescinded the contract of sale, by having sold and conveyed the same lots to another person in fee-simple.

The bill of exceptions taken at the trial, stated, in substance, the following case: The states of Virginia and Maryland, having, in the year 1789, offered to the United States a cession of territory, ten miles square, for the permanent seat of government, the United States, by the act of congress of the 16th of July 1790 (1 U. S. Stat. 130), entitled "an act for establishing the temporary and permanent seat of the government of the United States," accepted the same, and authorized the president *to appoint certain commissioners for the purpose of carrying the act into effect. In the [*54 summer of 1791, the greater part of the proprietors of the land included within the present bounds of the city of Washington, conveyed the same to Thomas Beall, son of George, and John M. Gantt, in trust, to be laid out as a city, and that after deducting streets, avenues and public squares, for the use of the United States, the residue should be equally divided; one moiety to be reconveyed to the original proprietors, and the other, to be "sold at such time or times, in such manner, and on such terms and conditions as the President of the United States, for the time being, shall direct;" the purchase-money to be paid over to the president as a grant of money, and to be

applied for the purposes mentioned in the act of congress of 16th July 1790. The lots so sold were to be conveyed by Beall and Gantt to the purchasers. "And because it might so happen that, by the death or removal of the said Thomas Beall and John M. Gantt, or from other causes, difficulties might occur in fully perfecting the said trust, by executing all the said conveyances, if no eventual provision should be made, it was, therefore, agreed and covenanted between all the said parties, that the said Thomas Beall and John M. Gantt, or either of them, or the heirs of either of them, lawfully might, and that they, at any time, at the request of the President of the United States, for the time being, would convey all or any of the said lands which should not then have been conveyed in execution of the trusts aforesaid, to such person or persons as he should appoint, subject to the trusts then remaining to be executed, and to the end that the same may be perfected."(*a*)

*55] *The legislature of Maryland, by an act passed at their November session 1791, c. 45, subjected all the lands in the city belonging to absentees, minors, married women, and persons *non compos mentis*, to the same terms and conditions as are contained in the deeds of trust from the other proprietors, and vested the legal estate thereof in Beall and Gantt: and after declaring the manner in which a division of the property should be made between the original proprietors and the commissioners, it declared, that "all persons to whom allotments and assignments of lands shall be made by the commissioners, shall hold the same in their former estate and interest, and in lieu of their former quantity, and subject in every respect, to all such limitations, conditions and incumbrances, as their former estate and interest were subject to, and as if the same had been actually reconveyed pursuant to the said deed in trust."

By the 4th section, it was further enacted, that "all squares, lots, pieces and parcels of land, within the said city, which have been or shall be appropriated for the use of the United States, and also the streets, shall remain and be for the use of the United States; and all the lots and parcels which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchases." The same section then proceeded to quiet the titles of all persons claiming by purchase from or under original proprietors, who should have been in possession, in their own right, for five years before the passing of the act.

By the act of 1793, c. 58, § 1, the legislature of Maryland further provided, that "the certificates granted, or to be granted, by the said commissioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase-money and interest, if any shall have arisen thereon, and recorded, shall be sufficient to vest the

*56] legal estate in the purchasers, their heirs *and assigns, according to the import of such certificates, without any deed or formal conveyance."

(*a*) In consequence of this clause in the original deeds of trust, and by order of the president, the trustees, Beall and Gantt, transferred the trust to Gustavus Scott, William Thornton and Alexander White, then commissioners of the city of Washington, and the survivors and survivor of them, and the heirs of such survivor, by deed dated the 30th of November 1796. This fact was omitted to be stated in the bill of exceptions, but the cause was argued, as if it had been so stated.

By the 2d section of the same act, it was enacted, that "on sales of lots in the said city, by the said commissioners, or any two of them, under terms or conditions of payment being made therefor, at any day or days after such contract entered into, if any sum of the purchase-money or interest shall not be paid, for the space of thirty days after the same ought to be paid, the commissioners, or any two of them, may sell the same lots, at vendue, in the city of Washington, at any time after sixty days' notice of such sale, in some of the public newspapers of Georgetown and Baltimore-town, and retain, in their hands, sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, together with the expenses of advertisements and sale; and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which shall have been actually received by them, or under their order, on the said second sale; and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

On the 29th of September 1792, the President of the United States, by his order in writing, directed that the sale of lots in the city of Washington, to commence on the 8th of October then next, should be of such lots as the commissioners, or any two of them, should think proper. That the sale should be under their direction, and on the terms they should publish. And it was, on the same day, further ordered by the president, that any lot or lots in the city of Washington might, after the public sale which was to commence on the 8th of October 1792, be sold and agreed for by the commissioners, or any two of them, at private sale, at such price, and on such terms, as they might think proper.

On the 24th of December 1793, after the passing *of the above [*57
recited act of the Maryland legislature, of November session 1793, c. 58, Robert Morris and James Greenleaf entered into a contract with the commissioners for the purchase of 6000 lots in the city of Washington; payable in seven annual instalments. The lots to be selected by Morris and Greenleaf in the manner described in the contract. They selected, among others, the two lots sold afterwards to O'Neale, and for the purchase of which by O'Neale, the note was given upon which the present suit was brought.

Morris and Greenleaf received conveyances for all the lots which they paid for under their contract, but having failed to pay some of the instalments, the commissioners, by virtue of the act of Maryland (1793, c. 58), duly advertised for sale a large number of the lots contracted for by Morris and Greenleaf, including the lots in question. The terms of sale were, that the purchase-money should be paid in three, six and nine months, and secured by good negotiable paper, indorsed to the satisfaction of the commissioners. At this sale, the defendant O'Neale purchased lots No. 1 and 2, in the square No. 107, at a price considerably greater than the amount due thereon from Morris and Greenleaf, and gave his promissory notes therefor, upon one of which the present suit was brought.

By the act of congress passed on the 1st of May 1802 (2 U. S. Stat. 175), it is enacted, "That from and after the first day of June next, the offices of the commissioners appointed in virtue of an act passed on the 16th day of June 1790, entitled, 'an act to establish the temporary and permanent seat

of the government of the United States,' shall cease and determine; and the said commissioners shall deliver up to such person as the president shall appoint, in virtue of this act, all plans, draughts, books, records, accounts, deeds, grants, contracts, bonds, obligations, securities and other evidences of debt, in their possession, which relate to the city of Washington, and the
*58] affairs heretofore under their superintendence *or care." And it was further enacted, "That the affairs of the city of Washington, which have heretofore been under the care and superintendence of the said commissioners, shall hereafter be under the direction of a superintendent, to be appointed by, and to be under the control of, the President of the United States; and the said superintendent is hereby invested with all powers, and shall hereafter perform all duties, which the said commissioners are now vested with, or are required to perform, by or in virtue of any act of congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city, or in any other manner whatsoever." And it was further enacted, "That the said superintendent shall, prior to the first day of November next, sell, under the directions of the President of the United States, all the lots in the said city which were sold antecedent to the 6th day of May 1796, and which the said commissioners are authorized by law to resell, in consequence of a failure on the part of the purchasers, to comply with their contracts."

Under this act, Thomas Munroe was appointed superintendent, and having given the notice required by the act of Maryland (1793, c. 58), and O'Neale having failed to pay his notes, the superintendent proceeded to sell again the lots No. 1 and 2, in the square No. 107, and one Andrew Ross became the purchaser, for a sum less than the amount due thereon from Morris and Greenleaf, the first purchasers. Ross assigned his interest in the lots to James Moore, to whom the superintendent afterwards conveyed the lots in fee-simple, by a deed which recited the contract between Morris and Greenleaf and the commissioners, for the purchase of 6000 lots; the selection of lots No. 1 and 2, in square No. 107, as part thereof; the failure of Morris and Greenleaf to pay the purchase-money therefor; the sale by the superintendent to Ross, and the assignment by Ross to Moore; but took no
*59] notice of the intermediate sale to O'Neale. The money received *upon the sale to Ross, was, by the superintendent, applied to the credit of Morris and Greenleaf, the original purchasers.

The first resale of lots by the commissioners, for default of payment by purchasers, took place on the 2d of May 1797. Another resale of other lots took place on the 28th of August 1797. At these resales, none of the lots contracted for by Morris and Greenleaf were resold, and in every instance, except one, the lots produced, at such resale, as much as was due thereon from the first purchaser, with interest and expenses of sale. On the 18th of October 1797, the first resale of Morris and Greenleaf's lots commenced, and the commissioners then laid it down as a rule, and from which they never afterwards departed, during the existence of their offices, that no lot should be resold for less than the amount due thereon from the first purchaser, with interest and expenses of sale.

The commissioners, at the time of their resale to O'Neale, had a right to resell the lots for the default of Morris and Greenleaf. The notes given by O'Neale for the purchase-money, were indorsed by Basil Wood, but he

indorsed only as security, and the only consideration for the notes and the indorsement was the sale of the lots.

Upon second resales of lots, it was the universal practice of the commissioners, to apply the money actually received therefor to the credit of the account of the first purchaser, taking no notice of the intermediate purchaser, and they always sold as for the default of the first purchaser, and all the deeds which they made to purchasers at such resales, recited the first contract only for the purchase of the lot, and the default of the first purchaser as the only cause of such resale; wholly pretermitting all intermediate purchasers.

Upon this statement of the evidence, the defendant moved the court to instruct the jury, that if they *should find, from the evidence, that the bargain between the plaintiffs and defendant, for the sale of the [*60 two lots, was understood and made by the parties, to be upon the condition and contingency, that if the promissory notes given for the purchase-money should be punctually paid, it should become an absolute sale to the defendant, but if the promissory notes should not be punctually paid, the commissioners should have the option of annulling the bargain for the sale, and of reselling the lots as for the original default of Morris and Greenleaf, the first purchasers. And if the jury should further find, from the evidence, that the superintendent, in reselling to Ross, and conveying to Moore, his assignee, did so resell and convey the lots as for the original default of Morris and Greenleaf, in disaffirmance of the bargain to sell them to the defendant, and in pursuance and exercise of such option reserved to the commissioners; the plaintiffs were not entitled to recover the said purchase-money in this action. Which instruction the court refused to give.

The defendant then prayed the court to instruct the jury, that upon the evidence offered as above, if believed by the jury, the plaintiffs were not entitled to recover any part of the purchase-money bidden by the defendant for the lots, as above mentioned. But the court refused this instruction also; whereupon, the defendant took a bill of exceptions, and sued out his writ of error.

P. B. Key and *F. S. Key*, for the plaintiff in error.—These lots were originally sold to Morris and Greenleaf, by the commissioners, who, upon the default of Morris and Greenleaf, sold them to the plaintiff in error. Upon his default, the superintendent, who succeeded to the rights, powers and duties of the commissioners, sold them to Ross, who assigned his right to Moore, to whom the superintendent conveyed them, by a deed which passed the *legal estate in fee to Moore. The act of congress, directing him [*61 to sell certain lots, does not affect the present question; for it only directs him to sell such lots as the commissioners were, at the time of passing the act, authorized by law to resell. The question then is, what were the rights and the authority which the commissioners then had respecting these lots?

We contend, that the power of resale given to the commissioners by the act of Maryland, 1793, c. 58, § 2, can be used but once, and expires in the using. The evils intended to be remedied by that law, were these. Before that act was passed, whenever the commissioners had contracted to sell a lot, and the purchaser failed to pay the purchase-money, at the time stipulated,

the commissioners could not enforce the payment, by a resale of the lot, without obtaining a decree for that purpose from a court of chancery. This was productive of great delay and expense, which became oppressive in proportion to the great number of sales which they were authorized to make. The expense would not only exhaust the funds intended to be raised from the donation of the lands, but the delay would defeat the object of the donors, which was to provide suitable buildings for the accommodation of the general government.

As the commissioners were public officers of the government, having no personal interest in the subject of their trust, it was deemed prudent and proper, to confide to them a limited portion of the chancery jurisdiction, as to the sales of the public lots. Accordingly, they are authorized by that act, in case the purchase-money should not be paid in thirty days after it ought to have been paid, to sell the lots at vendue, upon sixty days' notice, and to retain sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, with the expenses of sale ; and the original purchaser, or his assigns, was entitled to receive *the balance of the money which should be actually received by them on the second sale ; and such lots were to be freed of all claim, legal and equitable, of the first purchaser, his heirs and assigns.

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This was a short and summary mode of foreclosing the equity of the first purchaser, and of collecting the purchase-money. It was, in effect, a statutory decree for those purposes. It not only does not contain an authority to continue to resell, as often as default should be made, but it contains expressions inconsistent with such a construction. Thus, the commissioners are to retain only sufficient to satisfy the first contract, and the surplus is to be paid to the original purchaser only. Whatever, therefore, might have been the sum received from the sale to Ross, O'Neale could derive no benefit therefrom ; if he would not have been entitled to the surplus, he cannot be chargeable with the deficiency, without attributing to the legislature the most palpable injustice ; an imputation which can never be consistent with the true construction of a doubtful statute. Indeed, the statute does not contemplate the possibility of a deficiency ; it makes no provision for such a case, and it speaks of the balance as being certainly in favor of the first purchaser, in all cases. Nor does it contemplate the necessity of a second resale. It seems to presume, that the first resale would be for cash, and would certainly produce more than sufficient to satisfy the original purchase-money, with interest and charges. If any person is liable for the deficiency, it must be Morris and Greenleaf, who, by the express provisions of the act, are entitled to the surplus. The legislature intended only to give a summary remedy against the lots, not to impose a new personal responsibility upon any third person for the deficiency of Morris and Greenleaf.

The commissioners, then, having a right to resell but once, and having actually resold to Ross, received from him the purchase-money, and conveyed *the legal estate to his assignee, by a good deed in fee-simple, cannot deny it to be a valid resale, it is not for them to say, that it is not the execution of the power granted them by the statute ; they are estopped by their deed to deny their authority to make that resale. If that resale was valid (which they cannot deny), it must be, because the intermediate contract for resale was void, or at least voidable, at their option ; it is

*63]

also evidence that they had made their election under such option, if they had it. Besides, the legal estate is gone to the assignee of Ross, who is a *bonâ fide* purchaser for a valuable consideration, without notice of O'Neale's equity, if he ever had any, so that it is not now in the power of the commissioners specifically to execute the contract on their part; and therefore, they cannot claim a compliance with it on his.

The sale to Ross was made by the commissioners, either in affirmance or disaffirmance of the sale to O'Neale. If it was made in affirmance of the sale to O'Neale, then it must have been sold as his property. The commissioners ought to account with him for the proceeds; he would be entitled to the surplus, and the commissioners would be authorized to retain in their hands sufficient of the money produced by such new sale to satisfy all principal and interest due on the second contract (*i. e.* the contract to sell to O'Neale).

But the statute only authorizes the commissioners to retain in their hands sufficient to satisfy the amount due on the first contract (*i. e.* the contract with Morris and Greenleaf), and obliges them to pay over to them the balance. And in conformity with these provisions of the statute, the commissioners always resold as for the default of the first purchasers, Morris and Greenleaf. They never pretended to retain more than the amount due from Morris and Greenleaf upon the first contract, and they always passed to their credit the surplus. The sale to Ross, therefore, could not have been in affirmance, but must have been in disaffirmance of the contract with O'Neale. *Having, then, by their acts, disavowed that contract, they cannot now set [*64
it up again, after they have sold and conveyed away to another the very subject of the contract, and received its value.

The consideration of the notes has totally failed. The legislature of Maryland might have granted to the commissioners a continuing power to resell upon each default, and each resale might have foreclosed the equity of all preceding parties: but they have not done so, and have used a language wholly inconsistent with such a provision.

Rodney, Attorney-General, and *Jones*, contrà.—The grounds taken by the opposite counsel depend upon the construction of the act of Maryland; and even admitting them to be right in their construction, the notes are not void.

But we contend, they are not right in that construction. The act of assembly authorizes a resale as often as default shall be made by any purchaser. The right to resell, is, *ex vi termini*, co-extensive with the original power to sell. Every resale is a new sale, and within the statute. The terms, "new sale," "first contract," "original purchaser," "second sale," and "first purchaser," are all relative terms. O'Neale is the original purchaser, the first purchaser, as to Ross; and his contract is, as to Ross, the first contract.

The expression in the second section of the act is extensive enough to comprehend all the resales. It is, that "on sales of lots in the said city, by the said commissioners, under terms or conditions of payment being made at a future day," &c.; "and if the purchase-money shall not be paid," &c., "the commissioners may sell the same lots at vendue," &c.

"On sales of lots," means "on any sales of lots;" a resale is as much a sale as the original sale; consequently, if upon a resale, the purchase-
*65] *money should not be paid, the commissioners would have as good a right to sell again, as they had for the first default. It was clearly an error in them, to credit the amount of sales to the account of Morris and Greenleaf. But if the commissioners could resell but once, the second resale to Ross was without authority, and void. The sale to O'Neale remains good, and the notes are valid. In that case, nothing passed to Ross, by the deed to him; for the commissioners, being mere trustees, and having no interest, could convey only what they had authority to convey. But if the legal estate has passed to the assignee of Ross, that circumstance does not invalidate the notes. It was the fault of O'Neale himself, for he might have paid the purchase-money according to his contract, and obtained a title. During the period of two years, he could have availed himself of the contract; he might have sold, or otherwise disposed of the lots. Before he can show the notes to be *nuda pacta*, he must show that there never was a consideration for them.

The act meant to give the commissioners the same right as to the sales of lots which a vendor of personal property has in England. If the purchaser does not pay for the goods on the day stipulated, the vendor may sell them again, at the risk of the first vendee; and if they produce less, he may recover from him the difference; so that the sale to Ross may be valid, and yet O'Neale liable for the difference between the sum paid by Ross, and the sum due from Morris and Greenleaf, upon the first contract.

P. B. Key, in reply, observed, that there must not only be a sufficient consideration for the notes, at the time they were given, but there must be a consideration continuing up to the time of trial.

As to the idea of charging O'Neale with the difference between the amount due from Morris and Greenleaf, and the amount paid by Ross, he asked, *who would pay that difference, if there had been, as there
*66] might be, according to the construction contended for on the other side, fifteen intermediate purchasers who had all failed to pay their notes? Would all the notes be valid? Or, to which of them should the commissioners resort?

February 15th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was instituted on a promissory note, given by the plaintiffs in error, to the commissioners of the city of Washington, in payment for two lots, originally sold to Morris and Greenleaf, and resold to the plaintiff, in consequence of the failure of the original purchasers to pay the purchase-money. The defendant having also failed to pay the purchase-money, the lots were again resold by the superintendent, who succeeded to the powers of the commissioners, and were conveyed to the assignee of the third purchaser. O'Neale, the defendant in the circuit court, contended, that, by this subsequent sale and conveyance, a total failure of the consideration for which the note was given has been produced by the act of the creditor, and that he is consequently discharged from paying the note. This point having been decided against him, he has brought a writ of error to the judgment of the circuit court, and insists here, as in the court below—

1. That the consideration on which the note was given has totally failed,

and that this failure is produced by the illegal conduct of the agent for the city.

In support of the judgment of the circuit court it is contended. 1. That the act of the legislature for the state of Maryland, under which both resales purport to have been made, authorizes a third sale on the failure of the purchaser at the second sale to discharge his note. 2. If this be otherwise, that such subsequent sale could not affect the right of [*67 O'Neale, whose title would still be good.

The first point depends on the second section of the act entitled a further supplement to the act "concerning the territory of Columbia, and the city of Washington." This act enables the commissioners to sell at public vendue any lots sold by them on credit, if the purchaser shall fail to pay the purchase-money, thirty days after the same shall become due, and to "retain in their hands sufficient of the money, produced by such new sale, to satisfy all principal and interest due by the first contract, together with the expenses, &c., and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the second sale, and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

It has been argued, that the terms of this section allow a resale so long as the purchaser shall fail to pay the purchase-money, and that every purchaser, so failing, remains liable for his note, notwithstanding such resale But this court is of opinion, that a single resale only is contemplated by the legislature, and that by such resale, the power given by the act is executed.

The proposition, that a power to resell, if not restricted by the terms in which it is granted, implies a gift of all the power possessed at the original sale, will not be denied; but the court is of opinion, that in this case, the power of reselling is restricted by *the words which confer it. These words are such as, in their literal meaning, apply exclusively to a first [*68 and second sale. The words, "first contract," "original purchaser," and "first purchaser," designate, as expressly and exclusively as any words our language furnishes, the first sale made of the property, and the purchaser at that sale, and no other. It is true, that the natural import of words may be affected by the context, and that where other parts of the statute demonstrate an intent different from that which the words of a particular section of themselves would import, such manifest intent may be admitted, to give to the words employed a less obvious meaning. But, in this statute, no such intent appears.

Men use a language calculated to express the idea they mean to convey. If the legislature had contemplated various and successive sales, so that any intermediate contract or purchaser was within the view of the law-maker, and intended to be affected by the power of resale given to the commissioners, the words employed would have been essentially different from those actually used. We should certainly have found words in the act, applicable to the case of such intermediate contract. But we find no such terms; and the want of them might, in the event of different sales, for different prices, produce difficulties scarcely to be surmounted. No man, intending to draw a law for the purpose of giving the commissioners a continuing power to

resell as often as default in payment should be made by the purchaser, could express that intention in the language of this act.

It has been argued, by the defendants in error, that every subsequent default would produce the same necessity for reselling again, that was produced by the default of the original purchaser, and that, therefore, the legislature, if their words will permit it, ought to be considered as having given
*69] the same remedy. *The influence readily conceded to this argument, in general cases, is much impaired, if not entirely destroyed, by the particular circumstances attending this law.

A contract for 6000 lots was concluded, on the day that this act passed, immediately after its passage. In this large contract, was merged a former contract for 3000 lots made with one of the purchasers in this second contract. It is impossible to reflect on this fact, without being persuaded that the law was agreed upon by the parties to this contract, and was specially adapted to it. The immensity of property disposed of by this sale, furnished motives for legislative aid, by giving a speedy remedy to the commissioners, which might not exist on the resale of particular lots occasioned by any partial default in the purchasers. In consideration of the magnitude of the contract, the lots would, according to the ordinary course of human affairs, rate lower than in cases of a few sold to individuals. Consequently, it could never enter the mind of the commissioners, or of the legislature, that one of these lots resold would not command a much higher price than the estimate made of it in the original contract. We, therefore, find no provision made, in the law, for the event of a lot's selling for a less sum, when resold, than was originally given for it. This furnishes additional inducements to the opinion, that the legislature considered itself as having done as much as the state of the city required, by giving this summary remedy for the default of the first purchaser, and leaving the parties afterwards to the ordinary course of law.

It is, then, the opinion of the court that the act of assembly, under which the superintendent has acted, did not authorize the resale to Ross of the lots which had been previously resold to O'Neale.

2. It remains, then, to inquire whether this sale and conveyance so affects the title of O'Neale, as to produce a failure of the consideration on which
*70] the note was given. *In this case, the impropriety which has occurred, in consequence of an agent's misconstruing his powers, is a fact *dehors* the title papers : it is not apparent on the face of the conveyances. They purport to pass a title which is entirely unexceptionable. How far such a conveyance may be valid in law, or how far it may be affected in equity by actual or implied notice to such subsequent purchaser, this court will not now decide. The city, by reselling the property, and conveying it to the purchaser (an act to be justified by no state of things but the nullity of the previous sale), has not left itself at liberty to maintain the continuing obligation of that sale ; and the plaintiff, by setting up this defence, has affirmed the title of the last purchaser.

This court is of opinion, that the city has disabled itself from complying with its contract, and that, on the testimony in the cause, the plaintiff below ought not to have recovered.

Judgment reversed.

This cause came on to be heard, on the transcript of the record from the circuit court for the county of Washington, and was argued by counsel; all which being seen and considered, this court is of opinion, that the circuit court erred, in refusing to give the opinion prayed by the counsel for the defendants in that court, that, on the whole testimony, if believed, the plaintiffs in that court could not support their action: This court doth, therefore, reverse and annul the judgment rendered in this cause by the said circuit court, and doth remand the cause to that court for a new trial thereof.

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*King *v.* Delaware Insurance Company. [*71

Marine insurance.—Illegal voyage.

The questions whether the voyage be broken up, and whether the master was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court.

The British orders in council of the 11th of November 1807, did not prohibit a direct voyage from the United States to a colony of France.

If, from fear, founded on misrepresentation, the voyage be broken up, the insurers on freight are not liable.[1]

King *v.* Delaware Insurance Co., 2 W. C. C. 300, affirmed.

Error to the Circuit Court for the district of Pennsylvania, in an action of covenant, upon a policy of insurance upon the freight of the Venus from Philadelphia to the Isle of France.

The vessel sailed early in December 1807, before the British orders in council of the preceding November were known in the United States. On the afternoon of the 16th of January 1808, while prosecuting her voyage, she was arrested by the British ship of war Wanderer, by whom she was detained until the morning of the 18th, when she was restored to the master, her papers being first indorsed with these words:

"Ship Venus warned off, the 18th of January 1808, by his majesty's ship Wanderer, from proceeding to any port in possession of his majesty's enemies.

Edward Medley, 2d Lieut."

The master was verbally informed by an officer of the Wanderer, that the Isle of France was blockaded, and that the Venus would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the Wanderer, he, on that account, abandoned to the underwriters.

These facts were specially found by the jury, who also found, that "by the interruption, detainment and warning off of the British force, the voyage of the ship Venus was broken up." They also found, that the Isle of France was not *actually blockaded, from the 6th of December [*72
1807, to the 1st of February 1808. And that by the information and warning given by the officers of the British fleet to the master of the Venus, he was fully justified in returning to Philadelphia; and that by reason of the embargo, she was unable to renew the voyage.

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[1] And see Jordan *v.* Warren Ins. Co., 1 Story 342.