is impossible to produce living testimony. To exclude hearsay in such cases, would leave the party interested without remedy. It was decided also, that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right. It appears to me, that the reason for admitting hearsay evidence upon a question of freedom, is much stronger than in cases of pedigree, or in controversies relative to the boundaries of land. It will be *universally admitted, *299] that the right to freedom is more important than the right of property.

And people of color, from their helpless condition, under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence, in such cases, shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur.

Judgment affirmed.

Bank of Columbia *v.* Patterson's administrator. (*a*)

Indebitatus assumpsit.—Merger.—Corporation.

Upon a special contract, executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price.[1]

A simple contract is not merged in a sealed instrument, which merely recognises the debt, and fixes the mode of ascertaining its amount.

Upon general counts, a special agreement executed, may be given in evidence.

The recital of a prior, in a later agreement, after it has been executed, does not extinguish the former.

Whenever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action lies.[2]

Error to the Circuit Court for the district of Columbia, in an action of *indebitatus assumpsit*, brought by the defendant in error against the president, directors and company of the Bank of Columbia, in their corporate capacity.

There were four counts only in the declaration. 1st. *Indebitatus assumpsit*, for matters properly chargeable in account: 2d. *Indebitatus assumpsit*, for work and labor done: 3d. *Quantum meruit:* and 4th. *Insimul computassent.* The defendant pleaded *non assumpsit*, and a tender.

On the trial below, the defendant took three bills of exception. The first stated, that the plaintiff read in evidence a sealed agreement, dated 10th December 1807, between Patterson and a duly authorized committee of the

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(*a*) February 5th, 1813. Absent, Johnson and Todd, Justices.

[1] Chesapeake and Ohio Canal Co. *v.* Knapp, 9 Pet. 541; Dermott *v.* Jones, 2 Wall. 1; Stanley *v.* Whipple, 2 McLean 35; Ames *v.* Le Rue, Id. 216; Maupin *v.* Pic, 2 Cr. C. C. 38; Brockett *v.* Hammond, Id. 56; Pipsico *v.* Bentz, 3 Id. 425.

[2] S. P. Fleckner *v.* United States Bank, 8 Wheat. 338; Commercial Ins. Co. *v.* Union Ins. Co., 19 How. 318.

directors of the bank, under their private seals. It recited, that a difference of opinion had arisen between *Patterson and the committee for building the new banking-house, as to certain work *extra* of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon, it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called, in Georgetown, "old prices," and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the out-houses, respecting which there had been no specific agreement, should be measured and valued by the same persons, in the same manner. The agreement of 1804 referred to in, and annexed to, the agreement of 1807, was also offered in evidence by the plaintiff, and stated, that Patterson had agreed with the committee to do all the carpenter's work required, agreeable to the plan of the new bank, and stated particularly the manner in which it was to be done; and that "in consideration of the work being done" as stated, the committee agreed to pay Patterson $3625 as full consideration; and that if, when the work should be finished, the committee should be of opinion, that that sum was too much, Patterson agreed to have the work measured, at the expense of the bank, by two persons mutually appointed, who should take the *old prices* as the standard, and in case the bill of measurement did not amount to the sum of $3625, Patterson agreed to take the amount of measurement, for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan, and the agreement; and that any work other than that stated in the plan and agreement, was to be charged separately as *extra* work, and that it was so charged by Patterson, before the 10th of December 1807 (the date of the second agreement), who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also for the work done under the agreement of 1804, the sum of $3625, and proved, that while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof. [*300 [*301 *The court was thereupon prayed by the defendants to instruct the jury, that if they believed, that the agreement of 1804 was assented to by Patterson and the committee, as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of $3625 therein mentioned was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done, *extra* of the said agreement; which instruction the court refused to give.

It was contended by the defendants' counsel, *Morsell* and *Key*, that in that refusal, the court below erred, because,

1. Although there were alterations in the building, after the agreement of 1804, yet Patterson was bound by that contract, so far as it could be traced; and could only recover for the extra work done, under the counts of this declaration, which were all general. 1 Comyn on Contracts 360; Peake's Cases 103.

2. Because the plaintiff was allowed to recover the value of certain work,

by measure and value, under the general counts, when he had contracted to do the said work for a certain stipulated price. Esp. N. P. 138.

The second bill of exception stated, that the defendants, upon the same evidence, prayed the court to instruct the jury, that the plaintiff was not entitled to recover under any of the counts; which instruction the court refused to give, but declared, that the evidence was competent.

In this refusal, it was contended, that the court erred, because, the implied promise to pay for the extra work was merged in the agreement of 1807, and there was no count on that, or the other agreement of 1804. *Foster* v. *Allanson*, 2 T. R. 479.

The third bill of exception stated, that the defendants prayed the court to instruct the jury, upon the same evidence, that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount *thereof to the plaintiff; and that the jury could not, from the evidence offered, presume any such promise. This instruction the court also refused.

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It was contended, that the court erred in this refusal, because there was an express agreement under seal, relative to the work; and there was no count on that agreement. It was also contended, that a corporation aggregate could not promise otherwise than under its seal; and therefore, the law could not imply a promise. In support of this proposition, the following cases were cited. Bac. Abr. 13, tit. Corporation; 4 Com. Dig. 258, tit. Franchises; Bro. Corporation, pl. 34; 1 Vent. 47; 1 Salk. 191; 1 Bl. Com. pt. 2; 1 Roll. Rep. 82; *Rex* v. *Bigg*, 2 P. Wms. 419.

Jones and *C. Lee*, contrà, cited *Deveaux* v. *United States Bank*, 5 Cr. 61; Doug. 526; and Kyd on Corporations generally. As to the form of action, viz., *assumpsit* and not covenant, they said, the instruments were under the private seals of the committee, not the corporate seal. The declaration need not show whether the *assumpsit* be express or implied. 1 Chitty on Pleading, 33, note 2. Where the contract is executed, general *indebitatus assumpsit* lies. Fitzgibbon 302; *Weaver* v. *Burroughs*, 1 Str. 648; *Alcorn* v. *Westbrook*, 1 Wils. 117, Dennison's opinion; 4 Bos. & Pul. 330; 3 Ibid. 582; 6 East 564, 569; 1 Saunders 272, 276, note 2; Cowp. 284, 289; 9 East 349; 1 T. R. 134; *Watson* v. *Downes*, 1 Doug. 24; 4 Dall. 428.

Story, J., delivered the opinion of the court, as follows:—Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say, that the practice of filing numerous bills of exception is very inconvenient; *for all the points of law might be brought before the court in a single bill, with a simplicity, which would relieve the bar and the bench from every unnecessary embarrassment.

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As the argument on the first exception has proceeded upon the ground, that the agreement of 1804 was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration, it will at present be considered in this view. And we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipula-

ted price due on a special contract, not under seal, where the contract has been completely executed; and that it is not, in such case, necessary to declare upon the special agreement. *Gordon* v. *Martin*, Fitzgibbon 303: *Musson* v. *Price*, 4 East 147; *Cook* v. *Munstone*, 4 Bos. & Pul. 351; *Clarke* v. *Gray*, 6 East 564, 569; 2 Saund. 350, note 2. In the case before the court, we have no doubt, that *indebitatus assumpsit* was a proper form of action to recover, as well for the work done under the contract of 1804, as for the extra work. It may, therefore, safely be admitted (as is contended by the plaintiff in error), that where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall, notwithstanding, be considered as subsisting, so far as it can be traced. *Pepper* v. *Burland*, Peake's Cas. 103. The first exception, therefore, wholly fails.

Under the second exception, the plaintiff in error has made various objections.

1. The first is, that though a promise would be implied by law, for the extra work, against the corporation, yet that such promise was extinguished, by operation of law, by the provisions of the sealed contract of 1807. It is undoubtedly true, that a security under seal, extinguishes a simple contract debt, because it is of a higher nature: Cro. Car. 415; 1 Ld. Raym. 449; 2 Jones 158; 1 Burr. 9; 5 Com. Dig. tit. Pleader, 2, G. 12. But this effect never has been attributed to a sealed instrument which merely recognises an existing debt, and provides a mode to ascertain its amount and liquidation. At most, the sealed agreement of 1807, could not be *construed to extend beyond this import. In no sense, could it be considered as a higher [*304 security for the money originally due. This objection, therefore, cannot prevail, even supposing that the agreement were the deed of the corporation.

2. A second objection is, that the special agreements, connected with the certificates of admeasurement, were inadmissible evidence under the general counts, and could be admissible only under counts framed on the special agreements. To this objection, an answer has already, in part, been given. And we would further observe, that if the agreements, connected with the admeasurements, were the means of ascertaining the value of the work, the evidence was pertinent under every count. 2 Saund. 122, note 2. And if the certificates of admeasurement were of the nature of an award, they were clearly admissible under the *insimul computassent* count. *Keen* v. *Batshore*, 1 Esp. 194.

3. Another objection is, that as the agreement of 1807 is sealed, and is connected, by reference, with the prior agreement, they are to be construed as one sealed instrument, and *assumpit* will not lie upon an instrument under seal. The foundation of this objection utterly fails, for the agreement is not under the seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument, that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend, that the mere recital of a prior, in a later agreement, after it has been executed, extinguishes the former. Two other objections are made under this exception; but as they are answered in the preceding observations, it is unnecesary to notice them farther.

Under the third exception, the only objections relied on, are, in principle,

the same, as the objections urged under the former exceptions, and they admit the same answers.

*305] *The case has thus been considered all along, as though the contracts were made between the plaintiff's administrator and the corporation, and indeed, some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee, in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has, therefore, occurred, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved, show an express or an implied contract on the part of the corporation.

Anciently, it seems to have been held, that corporations could not do anything without deed. 13 Hen. VIII. 12; 4 Hen. VII. 6; 7 Ibid. 9. Afterwards, the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters, without deed; as to retain a servant, cook or butler (Plowd. 91 *b;* 2 Saund. 305); and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107; Moore 512. At length, it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. *Rex* v. *Bigg*, 3 P. Wms. 419. And courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonbl. 305 (Phila. ed.) note *o*. The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded, in the present case, that the committee were fully authorized to make agreements, there could then be no doubt, that a contract made by them in the name of the corporation, and not in their own

*306] names, *would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established, that its regularly appointed agent could contract, in their name, without seal, it was impossible to support it; for otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie. And it seems to the court,

that adjudged cases fully support the position. *Bank of England* v. *Moffat*, 3 Bro. C. C. 262; *Rex* v. *Bank of England*, 2 Doug. 524, and note; *Gray* v. *Portland Bank*, 3 Mass. 364; *Worcester Turnpike Corporation* v. *Willard*, 5 Ibid. 80; *Gilmore* v. *Pope*, Ibid. 491; *Andover & Medford Turnpike Corporation* v. *Gould*, 6 Ibid. 40.

In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia (act of Maryland, 1793, c. 30) contains no express provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes, not under seal. The corporation is made capable to have, purchase, receive, enjoy and retain, lands, tenements, hereditaments, goods, chattels and effects, of what kind, nature or quality soever, and the same to sell, grant, demise, alien or dispose of; and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of *the money or credit of the bank, in the common course of banking, for [*307 the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question, how far the bank-notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question, to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider, what is the evidence in this case, from which the jury might legally infer an express, or an implied promise of the corporation? The contracts were for the exclusive use and benefit of the corporation, and made by their agents, for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money, from time to time, to the plaintiff's intestate. Although, then, an action might have laid against the committee, personally, upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court, that from this evidence, the jury might legally infer, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work, respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court, that there was no error in the court below, and that the judgment ought to be affirmed.

Judgment affirmed.