negligence of the plaintiffs in not having the facts, or the points and consent, stated on the record. It is evident, that what was done, was by consent. The plaintiffs do not appear to have wished to bring the case here; but were at the time contented to rely on the opinion of the court below.

Marshall, Ch. J.—The case is too plain for argument. The jury did not intend to find a general verdict; but to submit the points of law to the court. If the law had been for the plaintiffs, the court could only have awarded a *venire de novo.* The facts ought to have appeared, so that the judgment might have been either reversed or affirmed, upon the merits.

Judgment reversed, and a new trial awarded.

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*436] *Holker and others *v.* Parker. (*a*)

Powers of attorney-at-law.

An attorney-at-law, as such, has authority to submit the cause to arbitration.[1]
But an attorney-at-law, merely as such, has no right, strictly speaking, to make a compromise for his client.

This was an appeal from the Circuit Court for the district of Massachusetts, in a suit in chancery, brought by Holker and others, his assignees, against Parker, to set aside an award made under a rule of court, in a suit at law, in the same court, between Holker and Parker. The case, as stated by Marshall, Ch. J., in delivering the opinion of the court, was as follows:

In the year 1782, John Holker, one of the plaintiffs in this cause, Daniel Parker, the defendant, and William Duer, who is dead, insolvent, formed a trading company, under the name and firm of Daniel Parker & Co., of which Daniel Parker was the acting partner. After receiving large sums of money, and contracting debts to a great amount, Parker absconded from the United States, without making any settlement of his accounts. In the month of December 1785, Holker commenced a suit against Parker, in the court of common pleas for the county of Philadelphia, where the said Parker had resided and carried on the business of the copartnership. This suit was commenced by attaching the effects of Parker in the hands of Thomas Fitzsimmons. In June 1788, a judgment in favor of the said Holker was rendered on the verdict of a jury for the sum of 47,231*l.* 12*s.* 9*d.*, Pennsylvania currency, equal to $125,951.03. The property attached, amounting to $5000, was sold and paid to the said Holker towards satisfying this judgment.

Other attachments were laid by Holker on the property of Parker, and proceedings were also instituted against him, by other persons, creditors of the company. On the 31st of December 1788, while these were depending, an indenture of six parts was made and executed between said Parker, by Andrew Craigie, his attorney, of the first part, John Holker, of the second *437] part, Samuel Rogers, of the fourth part, by Andrew *Craigie, his attorney, Royal Flint, of the fifth part, and sundry creditors of

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(*a*) March 1st, 1813. Present, all the judges, except Todd, J.

[1] Somers *v.* Balabrega, 1 Dall. 164, and cases cited in the notes to that case.

Daniel Parker & Co., of the sixth part. William Duer was named in the said indenture as of the third part, but never executed the deed.

The object of this deed was to convey to Royal Flint, in trust for the creditors of Daniel Parker & Co., and for other purposes therein specified, the partnership effects of Geyer, De la Lande and Fynye, to which Parker represented himself to be entitled, and which he had previously conveyed to the said Samuel Rogers. By this indenture, the said Parker covenanted, among other things, that he would, within eight months from the date thereof, repair to Philadelphia, personally, or by attorney, and then settle all the accounts of the company. It was further agreed, that the said Parker and Holker should, within eight months from the date of the first indenture, reciprocally give bonds to each other, in the penal sum of 50,000*l.*, Pennsylvania currency, conditioned for the settlement of their respective accounts, within ten months thereafter, and for payment of their several balances to Royal Flint, and his successors, for the trusts in the said indenture mentioned. The bonds to be assigned to the said Royal Flint, or his successors, in trust as aforesaid.

In consideration of the premises, the said Holker, and also the said parties of the sixth part, severally covenanted with the said Parker, that they would immediately " vacate, annul, discontinue and withdraw all suits, actions and proceedings whatever, which they or any or either of them shall, or may, at any time or times heretofore, have commenced, brought or prosecuted against the said Daniel Parker or his estate, goods, chattels or property, in any court or place whatsoever, in Europe or America, and shall and will place him, the said Daniel Parker, and his property in the same situation as they were before the commencement of such suits or proceedings." And the said Holker further covenanted, not to commence or prosecute any action against him, the said Parker, for any balance that might be due, until after eighteen months after the eight months aforesaid should have expired.

The bonds were given, but Parker failed to comply *with the covenant for settling the accounts of the copartnership transactions. The [*438] effects of Geyer, De la Lande and Fynye, which were assigned to Royal Flint, being insufficient to satisfy previous charges on them, proved totally unproductive. Debts to a large amount due from Daniel Parker & Co. were recovered from Holker and paid by him.

On the 21st July 1796, Holker made a power of attorney to James Lloyd, of Boston, for the purpose of recovering from the said Parker the moneys supposed to be due to him, and at the same time, transmitted to the said Lloyd copies of the judgment obtained by him against Parker, in June 1788, and of a judgment obtained against Holker, by John Ross, for the sum of 12,933*l.* 7*s.* 1*d.*, Pennsylvania currency, equal to $34,488.95. This judgment was for a debt due from Daniel Parker & Co., was rendered subsequent to the indenture of six parts herein before stated, and had been discharged by Holker.

Mr. Lloyd placed these papers in the hand of Mr. Lowell, an attorney-at-law of Boston, who instituted an action of debt on the judgment obtained by Holker against Parker ; this suit was brought by way of attachment. At the June term 1797, Daniel Parker appeared by his attorney, and filed four several pleas in bar of the action, in all of which the indenture of six parts,

herein before stated, was pleaded as a release of the judgment on which the suit was instituted.

The plaintiff's attorney prayed *oyer* of the instrument of which the defendant had made a *profert* in his pleas, and in the October term 1797, not having replied or demurred to the said pleas, entered into a rule of court, by which the said action and all demands were referred to Nathan Goodale, George Deblois and Fisher Ames, Esquires, with liberty reserved to Holker of disagreeing to the rule, thirty days after he should receive notice of it. Notice of this rule was received by Holker, in August 1798, but he does not *439] appear to have been informed *that any liberty of dissenting from it was reserved to him. It would seem, that he submitted to it with some repugnance, and under the idea that it was unavoidable.

On the 8th of September 1798, Holker made an affidavit, which he transmitted to his attorney, stating many reasons why the referees should not immediately proceed to make up their award in the case, and showing that in the settlement of the complex accounts between Parker and himself, much testimony would be required respecting transactions both in Europe and America, and that so much depended on the entries in the books of the bank at Philadelphia, that the settlement ought to take place there. He declared, however, that he would endeavor to be prepared to appear before the arbitrators, in the succeeding months of November or December, or sooner, if practicable.

In October 1798, the rule of reference was made absolute. Mr. Holker had assigned this claim to Mr. Lowell, the father of his attorney-at-law, the administrator of Mr. Russell, so far as would be necessary to satisfy a debt due to Russell's estate. On the 6th of November 1798, Mr. Lloyd wrote a letter to Mr. Holker, informing him that his affidavit had been laid before the court, in consequence of which his cause had been continued until the succeeding June term. On the 23d of the same month, Mr. Lloyd addressed another letter to Mr. Holker, informing him that the "referees would attend to his business, whenever it might be convenient for him to appear before them."

Suits had been instituted against Holker, in Philadelphia, in which he had been compelled to give bail in large sums. He then resided in Virginia, and was arrested in Baltimore, by his bail, in April 1799, and carried to Philadelphia, where he was enabled to obtain other bail, on no other condition than the express stipulation of not proceeding to Boston. On the 18th of May, he made an affidavit before the mayor of Philadelphia, stating that he was prevented by this detention from proceeding to Boston, in order to attend the referees in person, as he proposed to do. That he was about petitioning the supreme court of Pennsylvania for a special court, which he *440] had reason to believe he *should obtain in the course of the succeeding July or August, but that in the meantime, it was utterly out of his power to go to Boston. This affidavit was transmitted to his attorney in Boston. On the 24th of June, Mr. Lowell addressed the following letter to Mr. Holker:

"I received your affidavit, through my friend Mr. Lloyd, and with much difficulty, obtained a delay. The referees adjourned to the first of September next, when the cause will go on, at all events, whether you are here or not. As to success, without your aid, it is out of the question, as we know

nothing of the cause, and as your subsequent covenants with Parker will appear to annihilate your claims under the judgment. Whether you will eventually succeed in getting a nominal judgment against Parker, if you do attend, you alone can judge. I am rather inclined to think, I could persuade the adverse counsel to give us a judgment for the whole or part of the property attached ($7200). They appear to be heartily sick of defending Parker, as they know him to be immersed beyond hope of recovery, and are doubtful whether they will be compensated for their trouble. Whether some arrangement of this sort would not be advantageous to you, if it can be effected, considering your doubt of recovery, and the certainty of Parker's inability to pay what may be decreed, you best can judge. Whatever you do on this point, let it be explicit, as Mr. Lloyd and myself mean to avoid all responsibility, and every hazard of future blame. I beg you will inform me speedily, what we shall do about your action, as the referees will meet in sixty days or thereabouts."

This letter was transmitted to Mr. Holker by Mr. Lloyd, who subjoined thereto the following letter :

"Immediately on the receipt of your favor, covering a memorial to the circuit court, I delivered them both to Mr. Lowell, who duly attended thereto : the result is communicated in the foregoing letter from that gentleman. His obtaining the delay is what could not have been calculated on. The court would *not have granted it. To avoid expense in feeing counsellors, it was acceded to by the other party. The period now fixed [*441 can no longer be protracted on any account whatsoever. From what I can learn of the disposition of the defendants, it is truly depicted to you in Mr. Lowell's letter : they would, as he observes, probably confess judgment for the greater part, if not the whole, of the property attached. It must be understood, that they would do this only on the condition that they should receive a full discharge from you on account of Daniel Parker. You will please to let me receive your determination as soon as may be convenient."

These letters were never answered by Mr. Holker. A petition had been presented by Holker to the supreme court of Pennsylvania, to have his person liberated, on delivering up all his property for the use of his creditors, in pursuance of a law of that state. This petition came on to be heard, on the 13th of September 1799, but was continued, from time to time, until the 14th day of April 1800 ; when, by the judgment of that court, he was discharged from custody.

The referees made the following report to the circuit court, during the October term 1799. "The subscribers, pursuant to the annexed rule, met at the office of Nathan Goodale, on the 8th day of June 1799, after notifying John Lowell, jr., esquire, attorney for the plaintiff, John Holker, and William Hull, esquire, attorney for said Daniel Parker, the said attorneys attending our meeting and John Lowell, jr., esquire, in behalf of said Holker, having asked a delay or adjournment, until the first day of September then next, now last past, and on the said first day of September, the referees having again met, and the said parties appearing by their attorneys, and having been fully heard, the said meeting was again adjourned, at the request of the said Lowell, until this day, being the 23d day of October 1799, when the said attorneys having again appeared, and nothing further

being offered in support of their several allegations, we do award, that the *442] said John Holker, the plaintiff, *recover against the said Daniel Parker the sum of $5000, in full satisfaction and discharge of all debts costs, judgments, executions, accounts, controversies, claims or demands, subsisting between them, of what name or nature soever."

The award was read and accepted, and judgment immediately rendered for $5000, without costs, which sum was received by the attorney of Mr. Holker, and the balance, after deducting costs and commissions, was paid to the administrator of Russell, to whom Holker was indebted, and to whom he had made an assignment of his claims against Parker, so far as it should be necessary to satisfy the said debt.

It appears, that the evidences in support of Holker's claims, other than the two judgments which have been mentioned, were never in the hands of his counsel, and were, consequently, never laid before the referees, that the counsel for Holker never controverted the allegation made on the part of Parker, that the judgment obtained by Holker, in the court for the county of Philadelphia, was released by the indenture of six parts, nor ever insisted that it was to be considered as *primâ facie* evidence, subject to such objections, or to such discounts as Parker might make. The accounts between the parties do not appear to have been examined, nor the judgment of the arbitrators exercised on any part of the case. The award for $5000 was made with the consent of Parker's attorney, and without objection on the part of Holker's attorney. That transaction is thus stated by Mr. Lowell:

"Some time before the trial, the counsel for Parker did lead this deponent to understand, that as they were desirous of closing the affair, they should not object to our taking judgment for the amount attached, but the deponent wholly and absolutely did reject the said proposal. He, however, stated it to said Holker, and begged his instructions thereon, but said Holker never replied to said letter; when the referees met and this deponent found they would proceed to final judgment against his client, for defect of evidence, he, this deponent, stated the former offer, but the adverse counsel refused to agree to it, but said, that they had no objection to *443] our taking judgment, if the referees saw fit, for $5000, instead of *$7200 or thereabouts, the amount attached; though they declared they had doubts whether, on a final liquidation, there would be so much due. The referees taking their admission against them, awarded that sum. But it was never agreed by this deponent, that such a sum should be taken in full of the said Holker's demands. It was no compromise, nor was there any secret understanding; but he deemed it his duty to obtain even this sum, rather than an award, which would have been otherwise made, that the said Parker owed the said Holker nothing."

The attorney for Mr. Parker whose deposition is also in the record states the transaction thus: "After a considerable examination of the accounts by the arbitrators, without coming to a decision, Mr. Lowell agreed, that they should award to Mr. Holker $5000, in full of all demands, provided I would agree to give security for the payment of the money to Mr. Holker or to his attorney; Mr. Parker being abroad. I agreed to it. We both agreed to it. It was done: When Mr. Lowell and myself had agreed, we stated our agreement to the arbitrators." To another interrogatory the same wit-

ness answers : "I did not recommend to the arbitrators any award, unti the parties had agreed upon a sum ; myself and Mr. Lowell."

Two of the arbitrators are dead. The deposition of the third has been taken. He says, that the award was founded entirely on the admission of Mr. Parker's attorney.

The correspondence of Mr. Holker with his attorneys showed his confident reliance on the judgments placed in their hands as amounting to *primâ facie* evidence, and that his claims considerably exceeded those judgments. The evidence now taken in the cause swells them to a very great amount.

There is evidence that Daniel Parker was, at the time, much embarrassed, in consequence of deep speculation in the national debt of France ; and that he was certainly believed by the attorney of Mr. Holker to be insolvent. This was, at that time, the general impression. It was afterwards known to be erroneous.

*Mr. Holker instituted a suit against Mr. Parker, in France, where it was determined that he was barred by the judgment rendered against him in the circuit court of the United States on the award. [*444

Holker and his trustees have now brought this suit in the circuit court of the United States setting in chancery, praying that the award may be set aside, in whole or in part, that the accounts between Holker and Parker may be settled, and that Parker may be decreed to pay the sum which shall appear to be due. Parker has pleaded the award and judgment thereon, in bar of these claims and of any account. On a hearing, the bill of the plaintiffs was dismissed, and from that decree, an appeal was made to this court.

Harper, for the appellants, contended, that the award ought to be set aside : 1st. Because the rule of reference was entered into without authority. 2d. Because if there was authority, the rule and the award exceeded it. 3d. Because the award was founded on a mistake in law. 4th. Because it was made on an agreement or compromise, made collusively, or inadvertently, or by mistake, between the plaintiff's attorney and the agent of the defendant. 5th. Because, if no such agreement or compromise were made, the award was founded on a belief of one, and therefore, void for mistake.

1 & 2. The reference was made without authority. The letter of attorney to Lloyd is "generally to do and perform all that may be necessary in the premises." It cautiously avoids giving a power to refer to arbitration. Lowell so understood it, as appears from his answer to the 11th interrogatory. Lowell, as attorney-at-law, had no such authority. If he had, it could only *extend to submit that action, not all demands. His authority was limited to the case in which he was employed, and Lloyd had authority over two causes of action only, the judgment in Pennsylvania, recovered by Holker against Parker, and the judgment recovered by Ross against Holker, and which he had paid. [*445

3. The award was void, because it was founded on a mistake of the law. It is true, this mistake does not appear on the face of the award, but that is an objection at law only, and not in a court of equity, which may go into collateral circumstances, and may set aside the award, if the law be mistaken. The mistake in law was, in supposing that the causes of action on the judgments of Holker *v.* Parker, and Ross *v.* Holker, were barred by the indenture

of six parts. Ross's judgment was obtained in 1795, and paid in 1796, and the indenture of six parts was made in 1788. Holker's covenant does not extend to judgments—it is only to "vacate, annul, discontinue and withdraw all suits, actions and proceedings," clearly alluding to the attachments which Holker and others had then recently instituted against him. This covenant is further explained by the subsequent covenant not to sue Parker, until the expiration of 26 months from that date. The expression "suits, actions and proceedings" does not include judgments. And if it did, yet the covenant of Parker to appear in Philadelphia, within eight months, and settle his accounts, was a condition precedent to the covenant on the part of Holker to vacate and withdraw the proceedings then pending. This covenant is expressed to be "in consideration of the premises," which expression implies a prior performance on the part of Parker. It was *quid pro quo.* A man is not presumed to part with his right, until he receive the compensation, unless he expressly stipulates so to do. The pleas do not state a performance on the part of Parker. *Thorpe* v. *Thorpe,* 1 Ld. Raym. 662; 2 Burr. 899; *Collins* v. *Gibbs,* 2 Burr. 899; Cro. Eliz. 188; 7 Co. 9, 10; Hob. 106; 1 Esp. N. P. 128.

4. The award was founded on a compromise entered into between the attorney of Holker and the agent of Parker, either by collusion, or by imposition of the latter *upon the former; and was without any authority from Holker. It was an award in form only, but was in fact a compromise. General Hull, in his deposition, states it to have been a compromise, and that it was stated as such to the arbitrators. Mr. Deblois, the surviving arbitrator, says the award was made upon the defendant's acknowledgment alone, which implies a compromise. And Mr. Lowell admits, there was an understanding that Parker's attorney should acknowledge a balance. This, then, was a compromise, founded on the collusion of the plaintiff's attorney, contrary to his duty to his client, and expressly contrary to his instructions, which were not to agree to arbitration, unless Parker would give security to pay the award. Why did he waive this condition? Why not inform Holker of his right to dissent to the arbitration?

*446]

Holker repeatedly informed Lowell and Lloyd, that the covenant was no bar, because Parker had never settled his accounts agreeable thereto. Yet the attorney yielded to the suggestion of the plea. Again, Holker's letters informed him, that the judgment against Parker could not be opened; yet he waived that judgment (although it was at least *primâ facie* evidence, even if it could be opened), and admitted before the referees, that the claims of Holker could not be supported. But if there were no collusion on the part of Lowell, he was imposed upon by Hull. He was made to believe that Parker was wholly insolvent, and might have believed that the amount of the attached effects was so much saved out of the wreck of his estate.

But if there was neither collusion nor imposition, the compromise was made without authority. Neither Lloyd nor Lowell had power to make it. Holker had forbidden a reference, but he knew nothing of a compromise. And if it were not a compromise, yet the award was made by the arbitrators, upon the supposition that there was one; and being founded on a mistake into which they were led by the opposite party, it is void. *If it is not void for these reasons, yet it is void for misbehavior in the

*447]

arbitrators, in not looking into the case. They had sufficient evidence before them, but confided in the representations of General Hull.

Amory and *P. B. Key*, contrà.—In the articles of copartnership, it is covenanted, that all matters in dispute between the partners shall be left to arbitration; so that Holker could not refuse to agree to the rule of court.

Lowell and Lloyd were to have fifteen per cent. commission upon all moneys collected, and were, therefore, interested to recover as much as possible. The legal right to the debt was assigned to Russell's administrators, with full power to collect it; so that Holker was fully represented.

The plea of the indenture was a good bar to the judgment in Pennsylvania. It was a covenant to open all judgments, and to go into a settlement of accounts. The parties could not have gone into a settlement of accounts, without opening that judgment; for the judgment included all Holker's claims up to a certain time. If it be a covenant to release, it is equivalent to a release. The words of the covenant are, "immediately vacate, annul, discontinue and withdraw, all suits, actions and proceedings whatever, which they, or any or either of them, shall or may, at any time or times heretofore have commenced, brought or prosecuted against the said Daniel Parker, or his estate, goods, &c., in any court or place whatsoever, in Europe or America, and shall and will place him, the said Daniel Parker, and his property, in the same situation as they were before the commencement of such suits or proceedings." This is not limited to any suits or proceedings then pending, but includes all suits and proceedings which had been at any time before commenced. It included those which had been prosecuted to judgment, as well as those then pending.

But a judgment by default in another state is not conclusive. This judgment was by foreign attachment in Pennsylvania. It was a proceeding entirely *ex parte*. It was in itself an imperfect voucher. It was examinable *everywhere—even in Pennsylvania. *Nil debet* was a good plea to an action upon it, in that state; and *à fortiori*, in another state. [*448 *McClenachan* v. *McCarty*, 1 Dall. 375. But the covenant was a good bar to it. The covenants on the part of Parker were not conditions precedent. They could not be so, in the nature of things, for the actions, suits and proceedings were to be vacated immediately, and Parker was not to account, until eight months afterwards. A covenant not to sue may be pleaded as a release. 2 Bac. Abr. 93; Cro. Eliz. 352.

A mistake of the law in a doubtful point is no ground to set aside an award. Kyd on Awards; 2 Eq. Cas. Abr. 92; 9 Mod. 63; 2 Com. Dig. 146.

Lloyd's power authorized a reference. It was to compel payment of all demands against everybody, by all lawful ways and means. Whatever Holker could do in the premises, Lloyd could do. He was not confined to a jury trial. Having the general power to collect, he was, of course, to use all reasonable and usual means. But Lowell, as attorney-at-law, had power to refer the case to arbitration; Kyd on Awards 45; 1 Dall. 164; and under the circumstances of the case, it was a discreet act. He was led by Holker's letter to suppose that he was to submit the case to arbitration, if he could get security. He knew it to be impossible to get security, and therefore, took the other part of his instructions, and submitted to arbitration without

security. The probability is, that Lowell did give him notice of his right to dissent. Holker's letter of September 1798, shows that he knew that all demands were submitted. Lowell, believing that the judgment was barred by the indenture, and being desirous to support the action and the attachment, thought that he was doing a benefit to Holker, by extending the reference to all demands. But Lowell's mistakes of the law, if they be such, or even his mismanagement of the cause, cannot affect Parker. It is a matter entirely between Holker and his attorney.

The reference, then, was a discreet act, and fully authorized. The parties were bound then to produce their claims and their evidence, or to be for ever foreclosed. *449] *Holker knew the time. He asked delay, supported by his affidavit, and obtained it. He knew that his personal attendance was necessary; he knew that Lowell had not evidence to support the case, yet he neglected to furnish him with evidence, and abandoned his rights, if he had any, and cannot resume them when he pleases.

There was no compromise. Lowell swears expressly there was not. After writing the letter of the 24th of June 1799, it is not probable, that he would have taken such a responsibility upon himself.

The bill does not charge fraud in the referees, if it had, they ought to have been made parties. The object of the bill is to open an account which cannot now be settled with justice.

All the objections now alleged against the award, were good in a court of law, and might have been urged upon the return of the award. Where a man has lost his legal remedy by his negligence, he shall not have relief in equity.

March 10th, 1813. Marshall, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—On the part of the appellants, it is contended, that an attorney-at-law has no power, without the consent of his client, to transfer a cause to other judges than those appointed by the laws, and to place it before a tribunal distinct from that before which the party himself has chosen to place it. In this opinion, however, the majority of the court does not concur. It is believed to be the practice throughout the Union, for suits to be referred by consent of counsel, without special authority, and this universal practice must be founded on a general conviction, that the power of an attorney-at-law over the cause of his client extends to such a rule. Were it otherwise, courts could not justify the permission which they always grant, to enter a rule of reference, when consented to by counsel on both sides. In this case, however, the letter *450] *and affidavit of Mr. Holker of the 8th of September 1798, manifests at least an acquiescence in the rule, which the opposite party had a right to consider as an assent to it. The same letter and affidavit will meet the still stronger objection which has been made to the reference of matters not involved in the suit actually depending in court. They certainly impair very much the weight and influence of those arguments which have been urged against so much of the award as respects those demands of Holker which were not in suit.

The court, however, does not perceive, in the transactions which took place previous to the award itself, any circumstance which could justify a decree to set it aside. The great and real question in the cause is, has the

award been made under such circumstances, and is it of such a character, that it ought to bind the parties? In examining this question it is natural to inquire, whether this be, in fact, an award, in forming which the judgment of the arbitrators has been exercised, or a compromise wearing the dress of an award. The evidence upon this point is thought very clear. Nothing can be more explicit than the testimony of General Hull, who was the attorney of Mr. Parker. He states an agreement, in the most express terms, between himself and Mr. Lowell, on the sum for which the award should be given; and the arbitrator, whose deposition has been taken, declares that the award was made solely on the acknowledgment of the defendant's counsel. To the deposition of Mr. Lowell himself, great respect is due. He denies a compromise; but on examining his testimony, the court is of opinion, that his denial goes no further than to the form of an agreement. The facts he states prove one in substance. Believing himself that Holker's judgment against Parker was released, and that the referees would entirely disregard it, he himself not having insisted on it, or questioned the validity of the pleas in bar; he reminded Parker's attorney, in the presence of the referees, of his former offer to give $7200 in satisfaction of all demands. *It was impossible to misunderstand this declaration. [*451 It was substantially a proposition to accept an offer which had been formerly rejected. General Hull replied, that he would not now give that sum, but would give $5000. Mr. Lowell did not agree to accept this offer, but he did not reject it. He looked on silently, and saw the referees about to make up an award, not on the testimony of the cause, but on a declaration on the part of the defendant that he would give $5000, made in answer to one from himself apparently clinging to a former offer to give $7200. The referees necessarily construed this silence into consent, and Mr. Lowell was not unwilling that they should put this construction on it. He thought it his duty, he says, to secure even this sum for his client, rather than have an award that Parker owed him nothing; which would have been equally obligatory.

This, then, is substantially a compromise, and not an award. It is difficult to examine this cause, and to feel the clear conviction which was felt by Mr. Lowell, that the referees, had the case of Holker been brought as fully before them as it was in the power of his attorney to bring it, and pressed as earnestly on them as its importance deserved, would have awarded that Parker owed him nothing.

Had not the sufficiency of the pleas in bar been impliedly admitted—had the legal operation of the covenant of six parts been seriously contested, it is far from being clear, that the referees would have affirmed the sufficiency of these pleas, or have construed the covenant to be a release of the judgment. There is certainly much reason to doubt, whether the covenant of Holker, although it may be an independent covenant, amounts to a release of the judgment he had obtained against Parker. The mind of the referees does not appear to have been exercised on, or called to this question; they do not appear to have had a fair opportunity to form an opinion on it. It does not appear, that the indenture itself was inspected by them, and the description given of it in the pleas is inaccurate. The pleas describe the covenant as containing the word "judgment," which it does not contain. [*452 The covenant is "to vacate, annul, discontinue and withdraw, all *suits,

actions and proceedings whatever." The pleas introduce the word "judgment" in their description of the covenant; a word which essentially varies its construction. Had the real case been brought before the referees, and their attention been directed to this circumstance, it cannot be assumed as certain, that they would have considered the judgment as vacated, or would have refused to receive it as *primâ facie* evidence of a claim to its full amount, open to such objections as Parker might make to it. Had they even been of a different opinion, they could not have believed it certain, that Parker, who had absconded from this country, leaving debts to an immense amount, which Holker was compelled to pay, against whom, when only part of those debts were paid, Holker had obtained a judgment for $125,951.04, was not the debtor of Holker to a large amount. With this view of the case, had they understood that Holker was intercepted in his attempt to attend them, and detained by legal process, it ought not to have been supposed, that they would have refused to suspend their award, until the issue of his application to the supreme court of Pennsylvania, for the liberation of his person, should be known.

To this court, then, it appears, that this award is not the judgment of the arbitrators in the cause, but a compromise between the attorneys, taking the form of an award, and a compromise made at a time when the cause was not so desperate as the attorney supposed it to be. It was a sacrifice of great and important interests, at a time when that sacrifice does not appear to have been absolutely necessary. Has the attorney a right to make such a compromise? Although an attorney-at-law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge *453] of every circumstance, such a compromise could be fairly *made, there can be no hesitation in saying, that the compromise, being unauthorized, and being, therefore, in itself, void, ought not to bind the injured party. Though it may assume the form of an award, or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable, because it is scarcely possible, that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another, from a man who is not authorized to make it.

The testimony in this cause accounts for the readiness with which Mr. Lowell acceded to the offer of General Hull. He acted under a mistake, and that mistake is fully disclosed in the record. He believed Parker to be irretrievably ruined; he thought him totally and absolutely insolvent. This impression was communicated to the referees; they too were of opinion, that to drudge through the trunks of papers arrayed before them, for the purpose of ascertaining how much one insolvent owed another, would be a useless waste of time. Mr. Lowell was apparently of opinion, that nothing beyond the attached effects was worth pursuing. He believed sincerely that an award of $700,000 would not avail his client more than an award

for $7000, and that he should ill perform his duty, if he put the attached effects in any hazard, in the vain attempt to get a judgment for a larger sum. He could not, therefore, venture on any measure which might have produced a release of those effects. They were the sole object of his contemplation and pursuit. Those he knew to be substance, everything further he thought a shadow. This opinion seems to have influenced his whole conduct, and to have determined him to accede to the compromise offered by Parker's attorney.

It has been said, that an award rendered under these circumstances ought not to bind Holker, unless his own gross negligence may have deprived him of that equity which would otherwise belong to his case. *Let his conduct be examined. [*454

He appears to have been strongly impressed with the importance of his personal attendance on the arbitrators. Indeed, it could scarcely be otherwise. Although his judgment against Parker might not be viewed as a nullity, it would certainly be opened, and all the items on which it was founded be liable to exception. His personal explanations would certainly be essential. They would also be essential in encountering the credits which might be claimed by Parker. His personal attendance was impossible. He appears to have indulged the hope, that he might be liberated in time, until the period allowed for appearing before the referees had passed away.

It is true, that he ought to have transmitted his papers to his attorneys. The evidence now adduced, or a considerable part of it, might then have been obtained. That he was led to believe Parker insolvent, would not be a sufficient excuse for neglecting to do so, unless it could be shown that this impression was made by Parker himself, or by his agents. The evidence to this point does not amount to more than light suspicion.

Yet, when it is recollected, that the plaintiff was embarrassed and detained by legal process ; that he did not possess a clear and distinct knowledge of the testimony which would be required ; that some apology for not making an early exertion to obtain that testimony is to be found, in the hope he indulged of being enabled, by the discharge of his person, to attend the referees ; that the expectation, that the judgments in the hands of his counsel would be regarded by the referees, ought not to be considered as entirely unfounded ; this court is of opinion, that it would be too rigid an application of the rule which exacts from those against whom iniquitous judgments have been obtained, evidence of having done all that was practicable at law, to deny relief in this case.

With the single exception of his omitting to furnish the evidence on which his judgment against Parker was obtained, and to furnish copies of other judgments rendered *against him as one of the firm of [*455 Daniel Parker & Co., as he did in the case of Ross (of the efficacy of all which, if furnished, nothing decisive can be said), no negligence can be imputed to Holker. He has not rested under the decision against him, until Parker, confiding in his security, may have lost the means of protecting himself from an unjust demand, but has pursued him diligently in the courts of France. Finding this award, and the judgment thereon, to be an insurmountable bar to the examination of his claim in the courts of France, he has, without loss of time, instituted this suit. Nothing appears in the cause

to induce an opinion, that the claims of the parties may not now be as fairly and as fully examined as they could have been before the referees in 1799.

Upon a full view of the whole cause, this court is of opinion, that the circuit court erred in dismissing the bill of the plaintiffs; and that the decree ought to be reversed and annulled, with directions to set aside the award, and the judgment rendered in October 1799, and to direct an account between the plaintiff, Holker, and the defendant.

Decree.—This cause came on to be heard on the transcript of the record, and was argued by counsel: on consideration whereof, this court is of opinion, that the award made in October 1799, in a suit brought by the plaintiff, John Holker, against the defendant, Daniel Parker, in the circuit court of the United States for the district of Massachusetts, and referred by a rule of that court to referees therein named, and the judgment of the said court rendered thereon, ought not to bar the claim of the plaintiffs in this cause to an account of all the transactions of the parties, Holker and Parker, with each other, as members of the firm of Daniel Parker & Co.; and that there is error in the decree of the circuit court dismissing the bill of the plaintiffs: This court doth therefore decree and order, that the decree of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court to be further proceeded in, according to law.

*456] *After the opinion was delivered, *P. B. Key* mentioned, that in the opinion, the court had said, that an account ought to be taken, but the decree only directs that the proceedings below should be according to law. We wish for leave to answer fully, before an account be taken, and wish it may be understood, that this court does not mean to prevent a further answer.

Marshall, Ch. J.—That is the meaning of the court.

Decree reversed.

Barnitz's Lessee *v.* Robert Casey. (*a*)

Descent.—Executory devise.—Merger.—Ejectment between tenants in common.

The statute of descents, in Maryland, has not declared how an intestate estate shall descend, which was derived to the intestate from his half-brother, or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law.

A devise to A. in fee, and if he shall die under the age of twenty-one years, and without issue, then to B. in fee, is a good executory devise; and if B. die before the contingency happen, it devolves upon his heir, and so, from heir to heir, until the contingency happens, when it vests absolutely in him only who can then make himself heir to B., the executory devisee.

And although A. be the heir-at-law of B., yet the executory devise, thus devolving on him, is not merged in the precedent estate, but on the death of A., devolves to the next heir of B.

One tenant in common cannot maintain ejectment against his co-tenant, without actual ouster.

Error to the Circuit Court for the district of Maryland, in an ejectment, brought by the lessee of Barnitz against Casey, to try the title of Barnitz to

(*a*) March 10th, 1813. Present, all the judges.