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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN FEBRUARY TERM 1812, AND FEBRUARY TERM 1813

By WILLIAM CRANCH,

CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.
CIC. DE LEGIBUS, DIAL. 1.

VOL. VII.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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1883.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL,	Chief Justice.
" BUSHROD WASHINGTON,	Associate Justices.
" WILLIAM JOHNSON,	
" BROCKHOLST LIVINGSTON,	
" THOMAS TODD,	
" GABRIEL DUVALL,	
" JOSEPH STORY,	

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the Star *pages.

A

B

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1812.

HUDSON and SMITH *v.* GUESTIER. (*a*)

Rehearing.

This court will not rehear a cause, after the term in which it was decided.[1]

ON the first day of the term, *Harper* moved for, and obtained a rule to show cause why this case, which was decided at February term 1810, should not be reheard. The motion was grounded upon a statement of facts which was filed.

March 12th. When this rule was mentioned again by *Harper*, he was informed—

BY THE COURT, that the case could not be reheard, after the term in which it had been decided.

GENERAL RULE.

February 10th. *Winder*, requested information from the court whether the general rule which directs that only two counsellors should be heard on each side of any cause in this court, was intended to prevent the division of a cause into distinct points, and the hearing of two counsellors on each point.

(*a*) February 3d, 1812. Present, WASHINGTON, LIVINGSTON, TODD, DUVALL and STORY, justices. The Chief Justice did not attend until Thursday, February 13. He received an injury by the over-setting of the stage coach, on his journey from Richmond.

[1] Browder *v.* McArthur, 7 Wheat. 58; Washington Bridge Co. *v.* Stewart, 3 How. 413; Peck *v.* Sanderson, 18 Id. 43. Nor in any case, unless desired by some member of the court, who concurred in the judgment. Brown *v.* Aspden, 14 Id. 25. For the practice, on a motion for a rehearing, see Public Schools *v.* Walker, 9 Wall. 603.

WASHINGTON, J. (The chief justice being absent), informed the bar, that the court considered the rule as inflexible, whatever may be the number of points or parties in a cause.

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*2] *FITZSIMMONS and others *v.* OGDEN and others. (*a*)

Equity.

He who has equal equity, may acquire the legal estate, if he can, so as to protect his equity.[1]

THIS was an appeal from the decree of the Circuit Court for the district of New York, sitting in chancery, entered, by consent, *pro formâ*, to bring the case before this court.

The material facts, as stated by Washington, Justice, in delivering the opinion of the court were as follows:

For the purpose of securing certain of his creditors, Robert Morris, on the 14th of February 1798, conveyed to the appellants, as trustees for those creditors, a certain tract of land, lying in Ontario county, in the state of New York, containing 500,000 acres, described by certain bounds. Previous to this, he had made conveyances to sundry persons of considerable portions of this tract, and amongst others, to the defendants, S. Ogden, J. B. Church and to G. Cottringer, under whom the heirs of Sir William Pulteney claimed, of which the appellants had full notice. He had also, by different conveyances, granted to the Holland Company more than three millions of acres of land, purchased (as this tract of 500,000 acres had been) from the state of Massachusetts, all in the same county and adjoining the land in question.

On the 8th of June 1797, a judgment, at the suit of Talbot & Allum against Robert Morris, was docketed in the supreme court of the state of

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(*a*) February 4th, 1812. Present, WASHINGTON, LIVINGSTON, TODD, DUVALL and STORY, Justices.

[1] It is a general principle in courts of equity, that where both parties claim by an equitable title, the one who is prior in time, is deemed the better in right; and that where the equities are equal in point of merit, the law prevails. This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Strong as a plaintiff's equity may be, it can, in no case, be stronger than that of a purchaser, who has put himself in peril, by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it; and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief. Brown *v.* Chiles, 10 Pet. 210, BALDWIN, J. Where the equities are equal, the court will not deprive a party of a legal advantage, which his vigilance has conferred upon him, by a purchase of the legal title. Philips *v.* Cramond, 2 W. C. C. 441; Reed *v.* Dickey, 2 Watts 459. But this doctrine only applies where the legal title has been conveyed, and the purchase-money fully paid. Villa *v.* Rodriguez, 12 Wall. 338, SWAYNE, J.; Union Canal Co. *v.* Young, 1 Whart. 431; Chester *v.* Bishop, 1 Barb. Ch. 105; Peabody *v.* Fenton, 3 Id. 451. But the court will not permit the party having the subsequent equity to protect himself, by obtaining a conveyance of the legal title, after he has taken actual or constructive notice of the prior equity. To protect a party as a *bonâ fide* purchaser, he must show not only an equal equity in himself, by reason of his having actually paid the purchase-money, but that he had also clothed his equity with the legal title, before he had notice of the prior equity. Grimstone *v.* Carter, 3 Paige 436–7; Union Canal Co. *v.* Young, *ut supra*. And it is not sufficient, that the defendant has purchased, in good faith, what he erroneously supposed was the legal title. Gaines *v.* New Orleans, 6 Wall. 716.

New York; which, being prior in date to the conveyance made to the appellants, bound all the land which passed by it to the appellants. The bill stated, that Robert Morris, being confined in the jail at Philadelphia, in order to prevent any improper *use from being made of the above judgment, and on condition that the title to the land conveyed to the trustees [*3 should in no wise be impaired by it, procured Gouverneur Morris to advance the money for such judgment, from motives of friendship; that the said judgment was assigned to Adam Hoops, the mutual friend and agent of the parties, which was done, to prevent it from being used injuriously against the trustees and the creditors for whom they acted, and also to preserve to Robert Morris the right of redemption in 1,500,000 acres which he had conveyed to the Holland Company, in nature of a mortgage, as he supposed. That A. Hoops afterwards assigned the said judgment to Gouverneur Morris, and on the 16th of September 1799, Robert Morris confirmed the said trust deed (of which it is worthy of remark, no mention had been made in the previous parts of the bill), and further agreed, that any other land he might have in that county, which had not being previously conveyed, should be applied to pay that judgment, in the first place, and the said last-mentioned lands were to be sold upon an execution, and to be purchased by A. Hoops under Talbot & Allum's judgment, for the trustees, to which G. Morris assented, the trustees agreeing to mortgage the land to be purchased, to repay G. Morris the sum advanced for the purchase of the judgment.

It appeared by the evidence, that, previous to the promise thus charged in the bill to have been made by G. Morris, to R. Morris, the judgment of Talbot & Allum had been conditionally purchased by R. Morris, jun., one of the appellants, avowedly for his individual use, from Cotes, Titford & Brooks, who then held it by assignment. That when this purpose was effected, it was agreed, that the assignment should be made to A. Hoops, though in reality for the use of R. Morris, jun., and should remain in the hands of a third person, as an escrow, to take effect on the payment of the note given by the said R. Morris, jun., for the purchase of the judgment, and that the same should belong to Thomas Cooper, who indorsed the said note, in case he should be compelled to discharge the same.

R. Morris, about the time when this note would become due, found himself unable to take it up, and on *this account, G. Morris had been [*4 solicited by R. Morris, and consented to pay the money and to retain the judgment to secure the advance. G. Morris, in his answer, expressly denied, that any communication was made to him by R. Morris, of his motives for asking his assistance in procuring an assignment of the judgment; or that he had ever heard or knew of the claim of the trustees to any part of this 500,000 acre tract, or that the same would, in any manner, be affected by the judgment of Talbot & Allum, until some time after he had paid for the judgment, when it was accidentally communicated to him by A. Hoops, who held the assignment of the same for R. Morris, jun., as before mentioned. Upon receiving this information, G. Morris, with the assistance of his counsel, Thomas Cooper, projected a plan for protecting the interests of the trustees from being sacrificed by a sale under the execution which might issue on that judgment. Articles of agreement were accordingly drawn and executed by G. Morris and A. Hoops, on the 29th of August 1799, by which it was stipulated, that the whole of the lands in the

county of Ontario, purchased by R. Morris from the state of Massachusetts, amounting to upwards of 4,000,000 of acres, should be sold under the judgment, and should be purchased by A. Hoops, who should convey a certain part thereof to G. Morris, and should also mortgage that part of the said land which then belonged to the trustees, to the said G. Morris, for securing the advance made by him on the purchase of the said judgment. Although this large tract of country was, by this arrangement, to be sold under the above judgment, yet that judgment being posterior to the conveyances made to the Holland Company, as well as to the other defendants below, they were consequently not bound by the judgment, nor could the title of the grantees have been affected by a sale under it. The object of this agreement, however, in relation to those lands, was to secure to G. Morris a supposed, but totally unfounded, claim which R. Morris had asserted to an equity of redemption in one of the large tracts sold by him to the Holland Company, and also an imaginary quantity of surplus land, presumed by R. Morris to be somewhere within the bounds of this great tract of country which was to be sold, which surplus, as it afterwards turned out, had no
*5] *real existence. As to the land belonging to the trustees, which it is admitted was bound by this judgment, G. Morris was contented to receive a mortgage of that, to secure his advance for the judgment.

A draft of an agreement was also made by Thomas Cooper, by the directions of G. Morris, and delivered to A. Hoops, to be carried to Philadelphia, and to be proposed to R. Morris and the trustees; but the terms of that agreement did not appear in any part of this record, although it is fairly to be presumed, that it did not vary materially from the above agreement between G. Morris and A. Hoops. This draft was not altogether approved by the parties in Philadelphia, and another agreement was accordingly drawn, and executed by R. Morris, the trustees and A. Hoops, bearing date the 16th of September 1799, which did not materially differ from the agreement of the 29th of August preceding, except that, by the latter, the surplus land, if there should be any, was to be mortgaged to the trustees, as a security for reimbursing the whole or such part of the aforesaid judgment, as the trustees might be obliged to pay, for the discharge of the mortgage to be given by A. Hoops, for securing the advance made by G. Morris, for the purchase of the judgment.

This agreement was afterwards shown to G. Morris, who expressed some displeasure at its departure from the plan which he had himself arranged; but he admited in his answer, that he never communicated his disapprobation either to R. Morris or to the trustees.

It appeared in evidence, that there was a stay of execution on the judgment of Talbot & Allum for three years from the time it was entered, which, of course, would not have expired before the 8th of June 1800. This stay was released by R. Morris, at some period subsequent to the interview which took place at the jail between R. Morris and G. Morris; but the particular time when it was executed did not appear from the record. It is not, however, improbable, that it was not long subsequent to the 2d of May 1799, since it appeared, that, on that day, R. Morris, jun., in a letter addressed to
*6] T. Cooper, directing him to assign the said *judgment to G. Morris, requested him also to forward to him the form of a release, to be executed by his father.

In pursuance of the arrangement which had been agreed upon between these parties, as above mentioned, all the lands which R. Morris had purchased from the state of Massachusetts, in the county of Ontario, were advertised to be sold under the said judgment, on the 6th of February 1800. Hoops, as it had been agreed, attended on the day of sale and bid for the land; but being overbid, and not having the means to pay for the same, in case it should be struck off to him, he prevailed upon the sheriff to adjourn the sale to the 13th of May following, upon his engaging to pay the sheriff his poundage, which undertaking G. Morris, soon afterwards, on application, furnished him with the means of discharging.

On the 22d of April 1800, G. Morris, without having communicated to R. Morris, or to the trustees, the slightest intimation that he had come to such a determination, assigned over the said judgment to the Holland Company, for a full consideration paid therefor, and without notice, as they, the Holland Company, expressly alleged, in their answer, of the claim of the trustees or of the equity stated in their bill.

The same day, articles of agreement were entered into between Thomas L. Ogden, the Holland Company, and G. Morris, by which it was stipulated, that the sale of all the lands by the execution on the aforesaid judgment, should take place, and should be purchased by the said Ogden, in trust to convey to the Holland Company the several tracts of land which had been granted to them by R. Morris, and to the several persons to whom conveyances had been made, within the limits of the 500,000 acre tract, prior to the deed to the trustees, the tracts to which they were respectively entitled, or such parts thereof as three persons, Hamilton, Cooper and Ogden should direct; and as to the residue of the said 500,000 acres, in trust to convey the same to such persons, in such parcels and upon such terms as the said Hamilton and others should direct. In execution of this agreement, Ogden attended the sale on the 13th of May, *and purchased the whole of the lands taken in execution under the said judgment, for the sum of $5200, and received [*7
a sheriff's deed for the same. Hamilton, Cooper and Ogden, in virtue of the powers vested in them, directed conveyances to be made by Ogden to the Holland Company, according to the bounds expressed in the several conveyances to them by R. Morris, except so far as such bounds would interfere with Watson, Cragie and Greenleaf. In order to compensate the defendants, Samuel Ogden, Sir William Pulteney and John B. Church, for the land taken on the westward of their tracts, by fixing the true meridian line of the Holland Company to the east, the eastern line of those persons was made to run in upon the lands claimed by the trustees, so far as to give the former the full quantity of land mentioned in their respective conveyances. The direction, or award as it is called, then proceeded to allot to the trustees 58,570 acres (not half the quantity they claimed), upon certain conditions, one of which was to pay to the said trustee, for the use of the Holland Company, $5623, with interest from the 22d of January, 1800. This sum, together with others charged upon such of the grantees as were benefited by this arrangement, was intended to reimburse the Holland Company, the sums they had advanced, not only for the purchase of Talbot & Allum's judgment, but of another, which, being posterior to the conveyance to the trustees, created, of course, no lien upon any part of the 500,000 acre tract.

The prayer of the bill was for a conveyance by Thomas L. Ogden, of all

the land to which the trustees were entitled, according to its real boundaries, upon the trustees paying such proportion of the money due by Talbot & Allum's judgment, as is fairly chargeable on their land, and for general relief.

This cause was argued at great length, in February 1810, by *Pendleton* and *Lewis*, for the complainants, and by *Edwards* and ————, for the defendants; and again at this term, by *Joseph R. Ingersoll*, *E. Tilghman*, *P. B. Key* and *Lewis*, for the complainants, and by *D. B. Ogden* and *Stockton*, for the defendants.

*8] For the *complainants*, it was contended, *that Thomas L. Ogden, who purchased the land at the sheriff 's sale, under Talbot & Allum's judgment, was, under all the circumstances of the case, to be considered in equity, as a trustee for the complainants, to the extent of their legal title before that sale; or in other words, that the sale was void as to the complainants, and ought to be set aside, upon the complainants paying their proportion of the amount due upon the judgment, which was a lien upon two smaller tracts, as well as upon that which was claimed by the complainants.

Thomas L. Ogden was the agent of the Holland Company to whom Gouverneur Morris had assigned the judgment. This assignment having passed, not a legal, but an equitable right to a *chose in action*, was subject to the same equity in the hands of the Holland Company, as it was in the hands of Gouverneur Morris, whether the Holland Company had actual notice of that equity or not; because nothing but the equitable right of Gouverneur Morris passed by the assignment. The Holland Company had no right to use it in any other way than he could have used it. They could make no use of it, which he could not have made with a good conscience. They were bound by the same conscientious principles towards Robert Morris, the elder, and the complainants, which ought to have guided Gouverneur Morris. Their agent, T. L. Ogden, could not give a better estate under the sale, than G. Morris himself could, if he had continued to hold the judgment and had become the purchaser. The only equity which he had was to the extent of the security necessary to reimburse the money which he had advanced, at the request and for the use and benefit of Robert Morris. He merely became a creditor of Robert Morris, with a lien upon the lands to the extent of the debt; which lien he held under a trust, a confidence, a plighted faith, that it should not be enforced, to the injury of Robert Morris, or his assignees; and even that it should be used for the benefit of R. Morris, or his assignees, so far as it could be used consistent with G. Morris's security as to the amount paid for the judgment. Indeed, as the only interest or equity which G. Morris had in the judgment was merely as a security *sub modo* for the amount due upon the judgment, the judgment, as to every other use which could be made of it, consistent with the security of G. Morris, belonged

*9] *to R. Morris; and G. Morris was bound in conscience and good faith to use it in such manner as R. Morris should direct. If, therefore, Gouverneur Morris, instead of T. L. Ogden, had purchased the land under the judgment, he would have holden it merely as an indemnity, and as to every other purpose, would have been a trustee for R. Morris, or his assigns.

The facts, so far as the conscience of G. Morris was concerned in the case, are simply these: Robert Morris, the elder, knowing that the judg-

ment threatened the validity of the deed of trust which he had made to the complainants, who represented a class of creditors to whom he felt himself under peculiar obligations, entered into an engagement, through the agency of his son R. Morris, jun., to purchase the judgment, for the purpose of holding it as a shield for the protection of the conveyance to the complainants. Being unable to comply with the terms of the purchase, he requested Gouverneur Morris to advance the money due to the judgment, saying that he would thereby render him an essential service, and would be safe, as the judgment was a lien upon a very large tract of land. To this, G. Morris assented, from motives of friendship, and to render his friend an essential service. How it was to have that effect, was not, perhaps, at that time explained; but the natural inference was, that the judgment was to be subject to the control of R. Morris, as to every disposition of it, consistent with the security and indemnity of G. Morris; who was bound in conscience, in honor and in friendship, to have submitted it to his control. The disposition which he did make of it, was in violation of all these obligations, and therefore, ought in equity to be set aside.

The complainants had a right to tender the amount due upon the judgment, to G. Morris, at any time. They knew that the judgment was a lien upon their lands, but they knew that there was a stay of execution until the 8th of June 1800. Until that period, they were safe; and Mr. R. Morris himself could not in equity release that stay, so as to affect those lands, without giving notice to the complainants. It would have been a fraud, if he had. They knew that the judgment had been assigned to G. Morris. They knew the circumstances under which that assignment was made. They knew the understanding, *the friendship, the confidence which subsisted between Gouverneur Morris and Robert Morris, the elder. [*10 They had a right to rely upon it, and to consider themselves as safe. They had a right to believe, that no use would be made of the judgment, without their knowledge. They knew of the release of the stay of execution, and that the release was made for their benefit. They were parties to the agreement under which it was made, they knew that this agreement had been made known to G. Morris, and that he had acquiesced, if not assented. But neither his acquiescence nor assent was necessary, except as to the provision made for his indemnity; for so far only was he interested. They knew that a sale for their benefit had been attempted, under the judgment, but was postponed to a future day. They knew that the failure of this attempt and the postponement of the sale, were known to G. Morris, and that he had even paid the poundage demanded by the sheriff upon the postponement. He knew that all these things were so understood by the complainants, and that they had this confidence in him, and were lulled into security. At this moment, without any notice, or intimation to the complainants, he assigned over the judgment to the Holland Company, for purposes which he knew to be repugnant to the interests of the complainants. It is this, of which the plaintiffs complain, as unconscientious and injurious; and the consequences of which they seek to avoid.

It is true, that G. Morris himself cannot properly be charged as a trustee, because an equity cannot, with propriety, be said to be the subject of a trust, or to be holden in trust; for the equity will always be in the *cestui que trust*, and not in the trustee. But if G. Morris, under all these circum-

stances, had himself acquired the legal estate to the lands conveyed to the complainants, he would have been a trustee for them, upon their paying or tendering him the money due by the judgment. He had no other equity to protect, and could not have protected his legal title, under the equity of others. Nor had the Holland Company any equity to protect. There were no interfering lines, nor any other cause of dispute between them and the complainants. Their agent, Thomas L. Ogden, even after the sheriff's sale, was in no better situation than G. Morris would have been in, if he had been
*11] the purchaser. He had no right to claim *protection under the equity of any third person. He had full notice from the complainants, before he made any conveyance under what is called the award of Hamilton, Ogden and Cooper. He, therefore, is to be considered merely as the agent of the Holland Company, who took only the equity of G. Morris; and having acquired the legal estate, with full knowledge that the complainants were entitled to every possible benefit under that judgment, beyond the interest of Gouverneur Morris, whose right extended only to indemnity for the advance he had made, he is to be considered as a trustee for the complainants for all beyond that indemnity; and upon receiving the amount due upon the judgment, ought to be decreed to convey to the complainants all the lands which he purchased at the sheriff's sale, which lie within the tract conveyed to them by R. Morris, by the deed of the 14th of February 1798.

It was also contended by the counsel for the complainants, that inasmuch as Mr. R. Morris, had agreed to release the stay of execution, for one purpose only, the execution could not legally be issued for another purpose, and therefore, the sale was void at law. But whatever intrinsic force this argument might have had, it could not be considered by the court, because it was expressly admitted upon the record, that the execution was regularly issued.

It was further said, in behalf of the complainants, that although, at the time when G. Morris agreed to purchase the judgment, it was not stated, in what manner the judgment should be used, so as to be of service to his friend R. Morris, yet, as G. Morris varied the conversation, he must be considered as having agreed that R. Morris should direct in what manner it should be used; and that as R. Morris by his agreement of the 16th of September 1799, did direct how it should be used (to which agreement G. Morris did not object), he was, in equity, bound to suffer that agreement to be carried into effect; and therefore, his assignment of the judgment to the Holland Company, with a view to defeat the purpose of that agreement was against conscience, and affected all the subsequent proceedings under that assignment.

The conveyances made by T. L. Ogden to Church and others, being made
*12] after notice given to him by the complainants *cannot injure their rights. He is liable to them, at all events, and must look to those to whom he has conveyed the lands for his indemnity—an indemnity which he has taken care to secure.

The counsel for the complainants, to show that by the assignment of the judgment, nothing but an equitable interest passed, and that the assignee held it liable to the same equity to which it had been liable in the hands of

the assignor, cited *Hill* v. *Caillovel*, 1 Ves. 123 ; *Turton* v. *Benson*, 2 Vern. 765 ; s. c. Prec. in Chancery 524.

To show that a purchaser without notice is not protected, if he has notice, before he pays the purchase-money and gets a deed, they cited, *Wigg* v. *Wigg*, 1 Atk. 384 ; *Story* v. *Lord Windsor*, 2 Ibid. 630–1 ; *Jones* v. *Stanly*, 2 Eq. Ca. Abr. 685, pl. 9 ; *Tourville* v. *Naish*, 3 P. Wms. 307.

To support the position that where the assignment passes only an equity, notice is not necessary, and that if no legal estate passes, *qui prior est in tempore, potior est in jure*, they cited, *Tourville* v. *Naish*, 3 P. Wms. 308 ; *Williams* v. *Lambe*, 3 Bro. C. C. 264.

To show that a trustee is liable for a breach of trust, they cited, *Pye* v. *George*, 1 P. Wms. 128 ; s. c. 2 Salk. 680 ; *Mansell* v. *Mansell*, 2 P. Wms. 610, and Gilbert's Forum Romanum.

To show that where a recital in a deed leads to notice, there notice shall be presumed ; they cited, *Bisco* v. *Earl of Banbury*, 1 Cas. Ch. 291 ; *Moore* v. *Bennett*, 2 Ibid. 246 ; Ambler 311, 312 ; *Smith* v. *Law*, 1 Atk. 490 ; *Ferrars* v. *Cherry*, 2 Vern. 385.

And to show what will raise an implied trust, they cited, *Barnesly* v. *Powell*, 1 Ves. 289 ; *Palmer* v. *Young*, 1 Vern. 276 ; *Brown* v. *Litton*, 1 P. Wms. 141 ; *Wigg* v. *Wigg*, 1 Atk. 383–4 ; *Sonley* v. *Clockmakers' Company*, 1 Bro. C. C. 81 ; and the case of *Slocum and wife* v. *Marshal and others*, in the circuit court of the United States, for the district of Pennsylvania (2 W. C. C. 397).

On behalf of the *appellees*, it was said, 1st. That there was no trust for the benefit of the complainants ; and consequently, they have no equity. 2d. That if there was originally a trust for their benefit, yet, as the defendants have acquired the legal title (without notice of the equity of the complainants), they, the defendants, have equity enough to support the legal estate they have thus acquired, to the extent of the number of acres intended originally to have been conveyed to them by R. Morris, the elder.

*1. There was no trust for the benefit of the complainants. The complainants set forth the trust in Gouverneur Morris to be, to prevent the judgment from being used injuriously to them, and to preserve to Robert Morris his right of redemption in that part of the lands which was supposed to be mortgaged to the Holland Company. No consideration flowed from the complainants, whereby to raise an implied trust in their favor. The consideration was merely personal between Gouverneur Morris and Robert Morris ; it was a matter of confidence ; and if the former violated that trust or confidence, he was liable only to Robert Morris. [*13

At law, no man can support an action upon an agreement, unless he is a party ; or some consideration flowed from him. *Jordan* v. *Jordan*, Cro. Eliz. 369 ; *Crow* v. *Rogers*, 1 Str. 592 ; *Bourne* v. *Mason*, 1 Vent. 6. It is true, there are some modern cases in which it has been holden that the person to whose use the promise was made may maintain an action in his own name, but it must be in a case where the whole use and benefit are to accrue to the plaintiff. But here, even as stated in the bill, the trust was, in part, for the benefit of Robert Morris.

If the complainants would not have a right to enforce the agreement at law, neither can they compel its execution in equity. This bill is in the

nature of a bill for the specific performance of the agreement between Robert Morris and Gouverneur Morris, charging the Holland Company with notice. *A court of chancery decrees a specific execution of a contract, because a suit at law would not give a complete remedy; but a court of chancery will not decree a specific performance, unless the party would have a right to recover damages in a court of law. Here was no right at law, and therefore, this court cannot decree a specific performance of the agreement. *Penn* v. *Lord Baltimore*, 1 Ves. 444; *Harvey* v. *Yielding*, 1 Sch. & Lef. 552.

*14]

It is an universal principle in chancery, that the complainant must show himself entitled by his bill. Mitford 43 (15); Barton's Suit in Equity 36, 37. He must recover according to his allegations and his proofs. Proofs without allegations are not sufficient, even if his proofs should show a good title to relief. The only allegation like an averment of a trust is, that G. Morris agreed that he would not use the judgment to the injury of the complainants, nor to bar R. Morris's right of redemption. As to the latter part of the supposed trust, the complainants cannot recover, and R. Morris is no party to the suit. On this account, the bill is defective. *Darwent* v. *Walton*, 2 Atk. 510. But even the allegation in the bill, imperfect as it is, is not supported by the evidence. G. Morris, in his answer, denies that R. Morris communicated to him his motives for wishing him to purchase the judgment, and most expressly denies any agreement on his part, not to use it to the prejudice of the complainants. This answer, being directly responsive to the allegation of the bill, is conclusive evidence, unless contradicted by more than one witness. But it is confirmed by the deposition of R. Morris, so far as it relates to that interview. G. Morris states that he was induced to become the purchaser, by motives of personal friendship towards R. Morris. It was the duty, therefore, of R. Morris to have explained to his friend, in what manner the purchase was to be made serviceable to him, and who were the parties really to be benefited thereby. If he did not do it, and intended that others should derive the benefit, it was a fraud upon the feelings of friendship. But it is clear, that R. Morris did not request it, with a view principally to the security of the complainants. He states in his deposition, that his objects were, 1. The equity of redemption; 2. The surplus tract which it was supposed remained unconveyed; *and 3. To prevent injury to the complainants. The visit of R. Morris, jun., to New York, was to prevent the effect of certain attachments, and to secure the surplus lands, so as to make a provision for his mother. Hoops, in his deposition, says, that the security of the complainants was not an object in the first purchase of the judgment.

*15]

There was neither equity of redemption nor surplus land. How then was G. Morris to be secured for the amount of the judgment, unless by the lands of the complainants? And yet, they say, that the judgment was not to affect those lands. It would be absurd, to suppose such a trust. The agreement of 16th of September 1799, shows that there was no such trust. And the answer of G. Morris, not being contradicted, is conclusive evidence that the trust did not exist. *Kingdome* v. *Boakes*, Prec. Ch. 19; *Janson* v. *Rany*, 2 Atk. 140; *Only* v. *Walker*, 3 Ibid. 407; *Pember* v. *Mathers*, 1 Bro. C. C. 52.

The time and place of sale were fixed by the agent of the complainants, and therefore, they cannot complain, nor allege the want of notice.

No equity arose from the release of the stay of execution. If there did, it was an equity in R. Morris, and not in the complainants.

The inadequacy of price is by no means so great as the complainants pretend; but if it was, it cannot affect the equity of the defendants' case. If they obtained the legal title, they have equity enough to support it, even if it cost them much less than $5000. But a sheriff's sale, fairly and publicly made, has never been set aside for inadequacy of price. If there be no trust, the inadequacy of the price is immaterial.

There must be in every trust, a subject of the trust, a trustee, and a *cestui que trust*. But here is no subject; the proceeds of the judgment were not for the complainants: they were the absolute property of G. Morris. He never held the land. But what sort of a trust was it? Not a resulting trust, for that can only be raised in favor of the person from whom the consideration moved. *And that it was not an express trust, is admitted. If it was neither an implied nor an express trust, G. Morris was the absolute owner of the judgment. A man cannot be made a trustee, unless the extent of his trust be fully explained to him. *Lench* v. *Lench*, 10 Ves. jr. 511. [*16

The fact of the trust is to be found by the court from the evidence as a jury would find it. Secret trusts are dangerous. Since the statute of frauds, nothing is left of the whole fabric of parol trusts but a resulting trust, which is a trust arising by implication, from the fact that the purchase-money was paid by, or the consideration moved from, the party who claims the benefit of the trust. *Parteriche* v. *Powlet*, 2 Atk. 384; *Fordyce* v. *Willis*, 3 Bro. C. C. 577. And it is only lately, parol evidence has been admitted, to prove the facts from which a trust, as to lands, would result. Cruise's Digest 472; *Gascoigne* v. *Thewing*, 1 Vern. 366; *Rider* v. *Kidder*, 10 Ves. jr. 366.

In the case of *Lloyd and Jobson* v. *Spillet and others*, in 2 Atk. 150, Lord HARDWICKE said,—"I am now bound down by the statute of frauds and perjuries, to construe nothing a resulting trust, but what are there called trusts by operation of law; and what are those? Why, first, when an estate is purchased in the name of one person, but the money or consideration is given by another; or secondly, where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of, results to the heir-at-law, and they cannot be said to be trustees for the residue. I do not know any other instance where this court have declared resulting trusts by operation of law, unless in cases of fraud and where transactions have been carried on *malâ fide*." Lord HARDWICKE was not perfectly correct as to the extent of the doctrine. Later cases have added the cases of a failure of the consideration, and where the consideration is merely nominal. 1 Cruise Dig. 471, § 29, &c. A purchaser for full value has never been adjudged to be a trustee for another. **Pilkinton* v. *Bailey*, 7 Bro. C. C. 526; 1 Cruise 485, § 60; s. c. 4 Burr. 2255. [*17

2. But if there had been a trust, and although the assignment by G. Morris to the Holland Company, was an assignment of an equitable right only, and therefore, not protected by want of notice, yet the agent of the Holland Company having obtained the legal title, without notice of the trust, either by himself or the Holland Company, he has a right to hold

against a mere legal claim on the part of the complainants. For the mistake as to the boundary, being a mistake to the prejudice of the defendants, can create no equity in favor of the complainants. It was a mistake by which the complainants would have gained, and the defendants would have lost, more than 1000 acres of land. If Gouverneur Morris had purchased the judgment, with a full knowledge of this mistake of the boundaries, and with a view to secure the benefit thereof for the complainants, and to do this injustice to the defendants, no court of equity would have aided him in accomplishing the purpose; and even if he had acquired the legal title to the land, under such circumstances, it is more than probable, that a court of equity would have granted relief to the defendants.

A court of equity will never interfere against a *bonâ fide* purchaser, for a valuable consideration, without notice, but will permit him to save himself by any legal plank which he can lay hold on. 1 Eq. Ca. Abr. 353, 322. And in the case of *Jerrard* v. *Sanders*, 2 Ves. jr. 457, Lord LOUGHBOROUGH said, that in such, a case a court of equity has no jurisdiction.

Inasmuch, therefore, as the complainants who seek to gain by the loss of the defendants, have no equity arising from the mistake of the boundaries; and as the defendants have the legal title, supported by a strong case in equity, the complainants are not entitled to the aid of a court of equity.

February 20th, 1810.(*a*) WASHINGTON, J., after stating the facts of the case, delivered the opinion of the court, as follows:—*The first point made by the counsel for the appellants is, that G. Morris ought to be considered as a trustee of Talbot & Allum's judgment for the trustees. On this point, it is contended, that although in the first instance, G. Morris might have had no other inducement in purchasing that judgment than to perform a friendly service to R. Morris, yet he afterwards charged himself with the interests of the trustees, by an express declaration, contained in the agreement of the 29th of August 1799, connected with the subsequent agreement of the 16th of September 1799, which, notwithstanding his disapprobation of some parts of it, he adopted, by his silence and subsequent conduct. The trust being thus established, it is then contended, that the Holland Company, the purchasers of this judgment from G. Morris, took the same clothed with all the equitable rights of the trustees, which were attached to it in the hands of G. Morris, upon the ground, that a judgment is a *chose in action*, and the assignment passes no more than an equitable interest to the debt of which it is the evidence. Having arrived at this point, the title of the trustees is placed upon the well-known principle which governs a court of chancery, that between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time, has the advantage in right.

*18]

If the cause rested upon this state of the case, it would be incumbent on the court to examine these principles and their application to the respective pretensions of the trustees and of the Holland Company. Whether an equity arising to a third person, who claims the *chose in action*, and whose title depends upon a secret trust and confidence between him and the ostensible assignee, has equal equity with the person who afterwards purchases

(*a*) Absent, MARSHALL, Ch. J., and LIVINGSTON, J., the other five present.

the judgment, *bonâ fide*, and without notice of a fact not disclosed by the previous assignments, is a question which the court deems it unnecessary to decide, because, though the equity of the trustees and the Holland Company should be admitted to be equal, yet the latter have acquired another title to the subject in controversy, which a court of equity will never disturb. They, or rather their trustee, have got the fruits of their execution, and have obtained the legal estate in the land on which the judgment gave them only a lien. Having at least equal equity with the trustees, it was perfectly justifiable in them, to obtain a superiority, by buying in the legal estate.

*Aware of this difficulty, one of the counsel for the appellants found it necessary to contend, that the sale on the 13th of May was absolutely void, the execution having been taken out, before it could lawfully issue, in consequence of the stay on record, which prevented its emanation prior to the 8th of June following. This, however, is arguing against the fact; because we find, that long prior to the sale and assignment of the judgment to the Holland Company, the *testatum fi. fa.* had issued, by the consent of R. Morris, as well as of the trustees, who, on the 6th of February 1800, had endeavored to render it effectual, by a sale attempted on that day. The release of the stay is not spread on the record, so that the terms of it, or its date, might be examined. But since the execution could not legally issue, without a regular release filed in the court where the judgment was of record, and since the form of such a release was applied for, by one of the trustees, so early as the 2d of May 1799, it must be presumed, against the trustees, and in favor of the regularity of the proceedings, that the release was in due form, and bore date prior, at least, to the emanation of the execution. [*19

But it is contended, that the consideration for this release was the trust declared by G. Morris, in August 1799, or acquiesced in by him, under the agreement of the 16th September, and that his breach of trust in selling the judgment to the Holland Company, with a view to the intended purchase of the lands in dispute by them, did away the effect of the release previously executed by R. Morris. That this was a legal consequence of the alleged breach of trust, can scarcely be maintained. The release being once regularly executed and delivered, could never afterwards be avoided at law, by a failure of one of the parties to perform an act, in consideration of which the release was given. It could extend no further than to charge G. Morris with a breach of contract, for which he might be personally liable to the party aggrieved. But as to third persons, claiming fairly under him, without notice of the alleged breach of trust, the legal effect of the release would remain unimpaired.

It is very obvious, however, that the whole of this argument is founded on an assumption of facts, which are not proved, and which cannot and ought not to be presumed. It does not appear from the evidence in the *cause, that the trust assumed by G. Morris was the consideration of that release, and yet, if the trustees would avail themselves of that circumstance, to invalidate the sale, and to deprive the Holland Company of the shield by which they have protected their equitable interest, such proof should be clearly made out. On the contrary, the court must consider the fact as established (since it is asserted on oath by G. Morris, in answer to a charge in the bill, that the object of G. Morris, in purchasing the judgment, [*20

was to confer a personal benefit on R. Morris only), that, in consequence of this undertaking, made with the knowledge of one of the trustees, and for the purpose of giving effect to this intention, the release was made, and it is fairly to be presumed, that it was executed long prior to the arrangement made by G. Morris and the trustees, in August and September 1799, because, as has been before observed, the form of a release was applied for, as early as the 2d of May preceding. If the date of the release was contemporaneous with, or subsequent to, the agreements of August and September, it was in the power of the trustees fully to have established the fact. Being essential to their argument, their having omitted to furnish the proof, affords a strong presumption against them.

It is contended, that the Holland Company ought to be considered in the light of purchasers of the judgment, with notice of the trust, because, knowing, as they were bound to do, that the execution could not issue before the 8th of June 1800, they were necessarily led to inquire into the right which they assumed of taking out execution at a prior day, and in making this inquiry, they must have come to a knowledge of the trust. But the previous issue of the execution, fortified by the circumstance of the sale under it, attempted in February, and continued by adjournment to the 13th of May, rendered all inquiries into the cause of the release unnecessary. It was enough for them, that the impediment to the issuing of the execution was removed, at the time they purchased the judgment.

The cause appears to the court to be so clearly in favor of the Holland Company and those claiming under them, upon the point which has been examined, that it seems almost unnecessary to notice those circumstances which detract from the equitable title of the trustees. *But it is *21] obvious, that the injury of which they complain has arisen, in a great measure, from the want of energy in themselves, and a kind of helpless dependence upon others, even after they were fully apprised of the steps which were being taken, and which finally led to the loss from which they now seek to extricate themselves. Mr. Fitzsimmons was informed by A. Hoops, prior to the 22d of April 1800, that the agent of the Holland Company had gone on to New York, and the intention of this visit was most probably communicated to him, as Mr. Hoops, at the same time, advised him to have an understanding with G. Morris. If he received from this advice nothing further than a hint of possible mischief, it was sufficient to put them upon inquiry and exertion.

An attempt was made, though not much pressed, to charge G. Morris with a breach of trust, and with the legal consequences thereof. That his declining to communicate to the trustees his intended sale of Talbot & Allum's judgment to the Holland Company, upon terms which might seriously affect the interest of the former, was unkind, and a departure from the friendly conduct he had manifested towards them, may be admitted. But since it must be taken as a fact in the cause, that no promise of any kind had been made by G. Morris, in favor of the trustees, or to his knowledge, in reference to their interests, prior to the agreement of the 29th of August 1799 (and even this agreement, or the draught made by Cooper, and forwarded by Hoops to R. Morris and the trustees for their signature, is not alleged in the bill with any degree of certainty, as a ground on which the trust is founded), and since the arrangement proposed by G. Morris in that

agreement and draught was rejected by those parties, and another substituted in their stead, to which G. Morris was no party, it would be going too far, for a court of equity, in such a case, and in favor of persons who would do nothing for themselves, to make G. Morris a trustee by implication, for the purpose of charging him with a breach of trust. It is true, that G. Morris might have communicated to the trustees his disapprobation of the change they had made in his arrangement, and his refusal to abide by that which they had proposed as a substitute, so as to have afforded them an opportunity to retrace their steps. But surely, he was not, in point of law, as much bound to make such a *communication, as the trustees were to obtain a certain knowledge of his assent to the agreement of the 16th September. He had gratuitously offered to do a favor to the trustees, upon certain conditions. They reject the offer as made, and propose other conditions. It was incumbent on them to obtain his assent to the new proposal, if they meant to consider him in the light of a trustee. [*22

The opinion given upon these points renders it unnecessary to consider the question of boundaries.

Decree affirmed, without prejudice.

The James Wells. (*a*)

The Brig James Wells *v.* United States.

Evidence on appeal in admiralty.—Embargo.

In cases of admiralty jurisdiction, new evidence will be admitted in this court; and for that purpose, a commission may issue.[1]

The evidence of that necessity which will excuse a violation of the embargo laws, must be very clear and positive.[2]

The James Wells, 3 Day 296, affirmed.

This was an appeal from a sentence of the Circuit Court, which affirmed that of the District Court of Connecticut, restoring the cargo, but condemning the brig James Wells, an American registered vessel, for a violation of the 3d section of the embargo act of January 9th, 1808, in making a voyage to St. Bartholomews, under a clearance for the port of St. Mary's, in the state of Georgia.

The excuse suggested by the claimant of the vessel was stress of weather. He stated in his claim and answer, that the vessel, laden with 1272 barrels of flour, sailed from New York, on the 26th of February 1808, cleared and bound for St. Mary's, with a *bonâ fide* intention of going there, and without any intent of going to any foreign place. But that by contrary winds and stress of weather, and the leaky condition of the vessel, he was compelled, against his will (he being owner and supercargo), and against the will of the master and crew, to go to, and enter the port of Gustavia, in the island of St. Bartholomews, in the West Indies, where he was obliged, by the leaky and shattered condition of the vessel, to unlade the cargo, which was greatly

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(*a*) February 8th, 1812. Absent, Marshall, Chief Justice.

[1] Hawthorne *v.* United States, *post*, p. 107.

[2] The Argo, 1 Gallis. 150; Thompson *v.* United States, 1 Brock. 407.

damaged, and he could not afterwards obtain permission to carry it away again, but was compelled to sell it there.

*23] *The evidence on the part of the claimant tended to prove, that after the vessel got to sea, and the weather was rough, she leaked considerably in her upper works, so that in bad weather, they had to keep two pumps going at the rate of three or four hundred strokes every half hour, that after being six days at sea, it was judged "best for the preservation of their lives, as well as for the safety of vessel and cargo, to bear away for any of the West India Islands;" that when they arrived at St. Bartholomews, part of the flour was damaged, and they were obliged to unlade the vessel, to have her surveyed and repaired. That the governor of the island had prohibited the exportation of provisions, and would not permit them to take away their cargo.

New evidence, which had been taken under a commission issued from this court, was offered.

Pinkney, Attorney-General, stated, that he could not consent to admit it, but wished the objection might be saved. He supposed that a distinction ought to be taken between cases of admiralty, and cases of maritime jurisdiction, and by the act of congress, new evidence is admissible in this court in cases of admiralty only.

On the next day, however, he said that he was induced, by the particular circumstances of this case, to waive his objection; especially, as the question would be made in another case, at this term.

Harper and *Pitkin*, for the appellant, cited the cases of *United States* v. *The Betsey and Charlotte*, 4 Cr. 443; and *Yeaton* v. *United States*, 5 Ibid. 281.

The Court said, that the admission of the evidence in this case, being by consent, would not prejudice the question, if it should afterwards arise in another case.

Pitkin and *Harper*, for the appellant.—The plea of necessity by stress of weather has been heretofore admitted as an excuse for violating the positive

*24] law of the embargo; and the only question in this *case is, whether the necessity was so urgent as to justify the bearing away for a port of safety. We contend, that reasonable apprehensions of loss, by persisting in the voyage to St. Mary's, was a sufficient justification. Fraud is not to be presumed. The fact is incontestable, that the vessel leaked very much, and the weather was very bad. Such an apprehension of loss as would have justified a deviation, under a policy of insurance, is a sufficient justification in the present case. And in such case, it is sufficient to justify a deviation, that the master has acted fairly and *bonâ fide*, and according to the best of his judgment, for the benefit of all parties concerned, and has no other view but to conduct the ship and cargo by the safest and shortest course to her port of destination. Marshall on Insurance 408–11.

By the original embargo act of December 22d, 1807, the master is to give bond in double the value of the vessel and cargo, to reland the goods in the United States, "dangers of the seas excepted." That act being *in pari materia*, the exception of the dangers of the seas ought to be considered as extending to the present case.

The James Wells.

WASHINGTON, J.—There is no doubt as to the law—the only question is, whether this case be within the exception?

Pitkin.—It is strong evidence, that the master thought he was doing right, that he returned directly to the United States, and subjected himself at once to the penalty of his bond; and that, in fact, he obtained only $12 per barrel for his flour, at St. Bartholomews.

Dallas, contrà.—It was the duty of the owner to have a vessel fit for the voyage and the season of the year. This vessel was badly built, her condition upon the former voyage was given in evidence, and was known to the owner when she sailed. He knew she would leak, and probably, he intended she should leak. He knew the leak was in her upper works only, and that, therefore, the lives of those on board were not in danger. He did not have the proper *repairs made, at home, which he knew were [*25
wanting. Nothing was done to her at St. Bartholomews, except caulking, and she brought home her cargo in excellent order. When they found that she leaked, she might have returned. The wind, which was contrary to St. Mary's, would have been fair to bring her back—other vessels arrived about the same time, with fair winds.

Nothing but imminent danger to the lives of those on board could justify their going to the West Indies, contrary to law. The safety of the vessel and cargo was a matter of no consideration, as a justification. There is, therefore, no analogy to the case of deviation.

February 20th, 1812.—All the judges being present, WASHINGTON, J., delivered the opinion of the court, as follows:—That the law under which this prosecution is founded, has been, *primâ facie*, violated, is admitted; and it becomes absolutely necessary for the defendant, if he would excuse the breach, to bring himself within the exception made for his benefit, not by doubtful testimony, but by such as shall leave no reasonable doubt of the sincerity of his exertions to proceed to some port in the United States, and the danger or apparent impossibility of doing so.

That the vessel, shortly after leaving New York, leaked considerably, is proved; but it is also proved, that the leak was in her upper works; that she could be freed, and by great exertions, was kept free of water.

It is clearly proved, that, after a sail of six days, she bore away for the West Indies, and the danger of continuing on the coast, is indirectly stated, though nowhere positively affirmed. But it is not proved by a single witness, that an exertion was made to gain a port of the United States, or that the attempt, if it had been made, would, in the opinion of one person on board, have failed, or been attended with danger. Nor are the state of the winds, or the latitude *and longitude of the vessel, when she bore [*26
away, given in evidence, so as to enable the court to judge. In short, had the original destination been to the West Indies, and this known to the crew, it would be difficult to fix perjury upon any one of those who have given evidence in this cause.

In such a case, where no presumption can, or ought to be made in favor of the owner of the vessel, and with so strong a temptation as he had to violate the law, her condemnation is inevitable.

Sentence affirmed, with costs.

Maryland Insurance Company *v.* Le Roy, Bayard and McEvers. (*a*)

Marine insurance.—Deviation.

The discharge of underwriters from their liability, in case of taking on board an additional cargo, not authorized by the policy, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance.

The consequences of such a violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters; and the law attaches no importance to the degree, in cases of voluntary deviation.

Necessity alone can sanction a deviation, in any case; and that deviation must be strictly commensurate with the *vis major* producing it.[1]

Error to the Circuit Court for the district of Maryland, in an action of covenant, brought by Le Roy and others against the Maryland Insurance Company, upon a policy of insurance upon the ship John, from New York to five ports on the coast of "Africa, between Castle D'Elmina and Cape Lopez, including those ports, and at and from them, or either of them, back to New York, with liberties, as per order for insurance."

The order of insurance was as follows, viz: "At what rate will you insure $3500 upon freight of the ship John, of New York, valued at that sum, at and from New York to Castle D'Elmina, on the gold coast of Africa, with liberty for the vessel to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water?

*27] *Also, $9000 on the American ship John, valued at this sum; and $11,800 on cargo by said ship, consisting of wine, rum, beef, geneva, dry-goods, tobacco, molasses, &c., at and from New York to five ports on the coast of Africa, between Castle D'Elmina and Cape Lopez, including those ports, with liberty of touching and trading at all or any of said ports, backwards and forwards, and at and from her last port on the coast, to New York, with liberty of touching at the Cape de Verds, on her return-passage, for stock and take in water. It is understood, that the captain returning to one or more ports that he had touched and traded at before, shall not be considered a deviation. The John was ready and expected to sail the 13th inst. There are no contraband goods on board, and the ship is armed with eight carriage-guns, with ammunition in proportion, and is an excellent vessel, and Captain Lawrence, who commands her, is a native of New York, well acquainted on the coast of Africa, and has been at most of the places it is intended the vessel is to stop at, and is a careful experienced seaman."

The declaration was for a total loss by the perils of the sea. The cause was tried upon the issue of *non infregit conventionem*, and the verdict and judgment were for the plaintiffs, with $5476 damages.

Upon the trial of this issue, the defendants (the plaintiffs in error) took twelve bills of exception, but as the opinion of this court was given upon the 7th only, it is deemed unnecessary to state the others.

1. The first bill of exceptions stated not only the facts which the plaintiffs and defendants offered to prove, but detailed at great length the testimony and circumstances tending to prove those facts, or from which they might be inferred. Among other facts, it stated, that the ship, in the prose-

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(*a*) February 11th, 1810. Absent, Marshall, Chief Justice.

[1] The Paul Sherman, Pet. C. C. 98. See Hughes *v.* Union Ins. Co., 3 Wheat. 159.

cution of her voyage, arrived at the island of Fogo, one of the Cape de Verd islands, on the 7th of May 1805, where the master received on board four bullocks and four jack-asses, besides water and other provisions, and unstowed the dry-goods, and broke open two *bales, and took out 40 pieces of each for trade. That the ship remained there until the 24th [*28 of May. That the time generally employed by a vessel in taking in stock and water, at the Cape de Verd islands, is from two to three days, unless the weather should be very unfavorable; that the weather was good; and that the bullocks and jack-asses incumbered the deck much more than small stock would have done.

7. The 7th bill of exception stated, that the defendants gave in evidence all the facts detailed in the preceding bills of exception, and thereupon prayed the court to direct the jury, that if they believed the same, then the taking the said jack-asses on board the said ship John, while she lay at the Island of Fogo, was not within the privilege allowed to the plaintiffs in this cause, to touch at the Cape de Verd Islands, in the performance of the voyage insured, for the purchase of stock, and to take in water, and therefore, vitiates the policy, which direction the court refused to give; but the court was of opinion, and accordingly directed the jury, that the taking in the four jack-asses at the Isle of Fogo as aforesaid, did not avoid the policy, unless the risk was thereby increased; whereupon, the counsel for the defendants excepted.

Martin, for plaintiffs in error, as to the 7th exception, contended, that the liberty to touch at the Cape de Verds, to purchase stock and take in water, did not authorize the taking the jack-asses on board. The natural tendency was to increase the risk; and it was immaterial, whether the risk was, in fact, increased.

Winder, contrá. The question upon the 7th bill of exceptions is only whether the court did right in leaving it to the jury to decide, whether the risk was increased by taking in the jack-asses. It is like the case of *Livingston* v. *Maryland Insurance Company*, 6 Cranch 274, where this court decided, that the question whether a fact was material to the risk, was a question to be decided by a jury, under the direction of a court.

**Harper*, on the same side, as to the 7th bill of exceptions, contended, that it was a question of fact, to be decided by the jury, [*29 whether the taking in the jack-asses increased the risk. This court has so decided, in the case already alluded to of *Livingston* v. *Maryland Insurance Company*. The principle of the case of *Rayne* v. *Bell*, is, that there was no increase of risk and no delay. The case of *Sheriff* v. *Potts*, is overruled by that of *Rayne* v. *Bell*. But the license to take in stock included jack-asses.

Pinkney, Attorney-General, in reply.—The 7th bill of exceptions states in effect that the court refused to say, that the taking in of the jack-asses discharged the underwriters, although it might produce delay. It is not stated, that it did not produce delay; and the evidence shows, that it did. The principle of deviation is not increase of risk, but delay. If, therefore, here was any delay, the policy was void from that time.

But it is said, they had license to take in jack-asses, because they were

stock. But the order for insurance upon the vessel refers to the preceding order for insurance on the freight, which was written on the same paper, and connected by the word "also." In the order for insurance upon the freight, the stock is particularly stated to be "such as hogs, goats and poultry." They could no more take jack-asses, under this license, than they could take plows, horses, carts, or goods and merchandise, which are also stock.

The ship had a special license to touch, for a special purpose, and *expressio unius est exclusio alterius.* The contract of insurance is upon a voyage specific as to its nature, destination, &c. If the act done be calculated to tend to increase the risk, it is immaterial, whether the risk be actually increased. The case of *Rayne* v. *Bell*, 9 East 195, in some respects, is not law; but in this respect it is good law, and supported by analogy. It goes on the ground of delay or risk. The case of *Sheriff* v. *Potts*, cited in the late edition of Marshall, is not overruled by *Rayne* v. *Bell*, although *Stitt* v. *Wardell* is.

*30] *February 22d, 1810.—All the judges being present, JOHNSON, J. delivered the opinion of the court, as follows:—In deciding on this cause, the court will confine itself to the case made out on the 7th exception. Its decision on the point presented by that exception disposes of the case finally. The opinion prayed for was, that, by taking in, at Fogo, an additional cargo, not sanctioned by the contract of insurance, the insurers were discharged from their liability under the policy. The charge, delivered by the court, was, that the subsequent liability of the underwriters must depend upon the question, whether any increase of risk resulted from the shipping of that additional cargo.

In this charge, this court are of opinion, that the court below erred. The discharge of the underwriters from their liability, in such cases, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree, in cases of voluntary deviation; necessity alone can sanction a deviation, in any case; and that deviation must be strictly commensurate with the *vis major* producing it.

The case of *Rayne* v. *Bell* has been cited as supporting a contrary doctrine. Without being understood to acquiesce in the correctness of that decision, it may be remarked, that the question was not, in that case, whether the lading, taken in at Gibraltar, was within the terms of the policy, as in the present, but what acts were lawful to be done, during the delay occasioned by a justifiable cause of deviation. On the contrary, the case of *Sheriff* v. *Potts* was a case of voluntary departure from the stipulations of
*31] the policy, and the decision supports the opinion we now give. *It may also be remarked, that, in the case of *Rayne* v. *Bell*, the notice which Lord ELLENBOROUGH takes of the case of *Sheriff* v. *Potts*, virtually admits the doctrine upon which this court founds its decision.

The terms of this policy so far as connected with this decision, are, "with liberty of touching at the Cape de Verd islands, on her outward passage, for stock, and to take in water." Touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case.

Construing the license according to the subject-matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds. It might, indeed, admit of a doubt, whether any of the larger animals used for food, were included within the policy. The words of the first offer certainly were intended to confine the permission to the smaller animals. Stock is a term of the most general import: in its present extended application, it would include a great variety of subjects that never could have entered into contemplation of the parties.

In what sense was the term used? is the question to be decided: not what uses it might have been applied to in other contracts, or between other parties. The general want of precision in the language of maritime contracts, is an endless source of litigation among mercantile men. Courts of justice are, therefore, obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties.

We feel no inclination to add to the number of causes which vitiate a policy; but the amount of the premium depends upon such a variety of considerations (as often suggested by caprice as by judgment), that the contract, whatever it is, must be substantially adhered to.

Judgment reversed.

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*United States *v.* Hudson and Goodwin. (*a*) [*32

Criminal jurisdiction.—Contempts.

The courts of the United States have no common-law jurisdiction, in cases of libel against the government of the United States.[1]

But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c.

This was a case certified from the Circuit Court for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the president and congress of the United States, contained in the Connecticut Currant, of the 7th of May 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte, for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the circuit court of the United States had a common-law jurisdiction in cases of libel?

Pinkney, Attorney-General, in behalf of the United States, and *Dana*, for the defendants, declined arguing the case.

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by Johnson, J.—The only question which this case presents is, whether the circuit courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of

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(*a*) February 13th, 1812. Absent, Washington, Justice.

[1] See note to United States *v.* Worrall, 2 Dall. 384.

libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now, for the first time, to be decided by this court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

*33] *The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose; and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire, whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough, that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation. And such is the opinion of the majority of this court: for the power which congress possess to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction, much more extended, in its nature very indefinite, applicable to a great variety of subjects, varying in every state in the Union and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district.

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and

*34] object of its creation, necessarily results to it. But, *without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked, that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it, which is here contended for. If it may communicate certain implied powers to the general government, it would not follow, that the courts of that government are vested with jurisdiction over any particular act done by an individual, in supposed violation of the peace and dignity of the sovereign power. The legislative authority

of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers.

ALEXANDER SHIRRAS, JOHN BLACK, WILLIAM MILLIGAN, WILLIAM BLACKLOCK and JOSEPH VERREES *v.* JOHN CAIG and ROBERT MITCHELL.

Mortgage.—Future advances.

A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also; the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power.[1]

A plat referred to in the deed as being annexed to it, but which was never in fact annexed, and was not recorded with the deed, affords no evidence in aid of the description of the property mentioned in the deed.

A person cannot be charged with fraudulently secreting a deed, who places it upon record, as soon as the law requires.

It is not necessary to the validity of a mortgage, that it should truly state the debt it is intended to secure; but it will stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards, upon the faith of the mortgage, before notice of the defendants' equity.[2]

ERROR to the Circuit Court for the district of Georgia, by Shirras and others, original complainants, *against Caig and Mitchel, original defendants, in a suit in equity, to foreclose a mortgage of a lot, [*35

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[1] Where one has both a power and an interest, a conveyance, without reference to the power, will be deemed to have been made in virtue of his ownership, though the ownership was not co-extensive with the power. Hay *v.* Mayer, 8 Watts 203; Jones *v.* Wood, 16 Penn. St. 25. S. P. Birdsall *v.* Richards, 18 Id. 256; Wetherill *v.* Wetherill, Id. 265.

[2] A mortgage may be given to secure future advances, and contingent debts, as well as those which are due and certain; the only question is, as to the *bona fides* of the transaction. Conard *v.* Atlantic Ins. Co., 1 Pet. 387; Conard *v.* Nicoll, 4 Id. 306; Lawrence *v.* Tucker, 23 How. 14; Jones *v.* Guaranty and Indemnity Co., 101 U. S. 622; Leeds *v.* Cameron, 3 Sumn. 488; Brown *v.* Keifer, 71 N. Y. 610; Taylor *v.* Cornelius, 60 Penn. St. 187. It is not absolutely necessary, that such mortgage should express that object upon its face, provided the extent of the intended lien be clearly defined. Craig *v.* Tappen, 2 Sandf. Ch. 78; Garber *v.* Henry, 6 Watts 57. And see Jones *v.* Guaranty and Indemnity Co., 101 U. S. 632-33. But such mortgage is only a lien, as against intervening incumbrances, from the time of making the advances, not from its date. United States *v.* Lenox, 2 Paine 180; Ripley *v.* Harris, 3 Biss. 199; Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320; Bank of Montgomery County's Appeal, 36 Penn. St. 170; McClure *v.* Rowan, 52 Id. 458; First National Bank *v.* Morsell, 1 McArthur 155. Otherwise, if the mortgagee be under obligation to make the advance stipulated. Moroney's Appeal, 24 Penn. St. 372; Taylor *v.* Cornelius, 60 Id. 187; Griffin *v.* Bartnett, 4 Edw. Ch. 673; Hall *v.* Crouse, 13 Hun 557.

houses and wharf in Savannah, called Gairdner's wharf, which were in the possession of the defendants.

The mortgage was made on the 1st of December 1801, by Edwin Gairdner, in his own name, and also as attorney for the defendant, Caig (but without any authority from Caig so to do), to secure the payment of 30,000*l.* sterling, for which E. Gairdner had, on the same day, executed a bond for himself and Caig.

In the year 1796, this property had been purchased by James Gairdner, Edwin Gairdner and Robert Mitchel, as joint-tenants, who took a conveyance from Levi Sheftall to themselves, by the description of James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners, of the city of Savannah. The name of the firm was Gairdners & Mitchel. In 1799, this firm was dissolved, and the business was carried on, in Charleston, by Edwin Gairdner alone, under the firm of Edwin Gairdner & Co.; and by mutual consent, in December 1799, an entry was made in the books of Gairdners & Mitchel, by James Gairdner, charging this property, to the account of Edwin Gairdner & Co., at the price of $20,000. In 1800, Edwin Gairdner entered into partnership with John Caig, the defendant, at Savannah, under the firm of Edwin Gairdner & Co., under which name he continued to carry on business alone, at Charleston; and upon his books, at that place, made an entry, charging this property to the Savannah house (consisting of himself and Caig) at an agreed price; and the Savannah house, by an entry on their books, credited the same on the account of the Charleston house, consisting of Edwin Gairdner alone.

On the 7th of January 1802, Edwin Gairdner and John Caig dissolved their partnership at Savannah, and a new firm was established, consisting of Edwin Gairdner, John Caig and the defendant, Robert Mitchel, under the name of Gairdner, Caig & Mitchel, who, by their articles of copartnership, under seal, agreed to take the property in question, at a valuation, and hold it as their joint property.

*36] *Previous to this, viz., in March 1800, Mitchel had, by deed, conveyed his third part of this property to Edwin Gairdner and John Caig, as joint-tenants; and at the time of executing the mortgage (viz., December 1st, 1801), Edwin Gairdner had full power and authority from James Gairdner to sell and convey his share of the property.

Subsequent to the mortgage, viz., on the 27th of July 1802, Edwin Gairdner, as attorney for James Gairdner, by deed, conveyed to Mitchel one-third of the property, and by his own deed, of the same date, he conveyed one-sixth of the property to Caig, who had before received a conveyance of one other sixth from Mitchell.

These two last deeds were proved and recorded on the 14th of September 1802. The mortgage was proved on the 10th, and recorded on the 17th of September 1802.

By the law of Georgia, deeds of bargain and sale are to be recorded in twelve months; and by a law of 1768, every mortgage and deed, recorded within ten days after its execution, shall have preference of other deeds and mortgages, not recorded within that period.

At the time of executing the mortgage, therefore, the legal title of three-sixths of the property was in Edwin Gairdner, and according to the book-entries of the several copartnerships, he was also equitably entitled to the

same. The legal title of two-sixths was in James Gairdner, and of the other sixth in Caig, who, according to the book-entries, was equitably entitled to three-sixths; so that although Edwin Gairdner had a legal power to sell and transfer James Gairdner's two-sixths, yet he was bound in equity to transfer them to Caig.

The complainants in their bill claimed the whole. They stated that Edwin Gairdner was the real *bonâ fide* owner of the property; that the book-entries were made only to give a credit to the Savannah house, and were without consideration; that the Savannah house was only to hold it in trust for Edwin Gairdner, during the copartnership. That Edwin Gairdner became bankrupt on the 3d of November 1802, had received his certificate of discharge, *and that two of the complainants, Blacklock and Verrees, were duly appointed his assignees. That Caig and Mitchel, [*37 and the firm in which they were partners, were still largely indebted to Edwin Gairdner, who was also very largely indebted to the complainants. And they prayed that all conveyances, under which Caig and Mitchel claimed to hold possession of the property, might be declared void, and be cancelled; that the property might be sold, and the proceeds applied towards payment of the debts due to the complainants; and for general relief.

The answers of Caig and Mitchel, the defendants, did not admit that anything was due by E. Gairdner to the complainants, on the 1st of December 1801, the date of the mortgage, and suggested that, if anything was due, it had since been paid off, or otherwise settled. That Caig was made a party to the bond and mortgage, without his authority and consent. That the bond and mortgage were carefully kept secret, until the 13th of September 1802. That it was not a regular transaction, and ought not to avail against the defendants, who were *bonâ fide* purchasers. They set forth the several copartnerships and entries in the books, and averred that they and all the parties considered them as good transfers of the property, which was always holden and considered as stock in trade. They denied all private, secret or confidential trust for the benefit of E. Gairdner. They averred, that they believed, that at the date of the mortgage, the Charleston house was indebted to the Savannah house, after allowing credit for the property in question.

In this state of the cause, the defendants, Caig and Mitchel, filed a cross-bill against the complainants, Shirras and others, alleging secret transactions between them and E. Gairdner, and praying a discovery. They charged, that the execution of the bond and mortgage was an act of hurry and despair, in the confusion and embarrassment of entangled circumstances, and on the eve of one of the greatest and most distressing bankruptcies. That the deeds were not signed, until some weeks or months after their date. That no title papers were shown to the mortgagees (they being all in the hands *of Caig, at Savannah), nor any authority from Caig to [*38 convey his interest. That the mortgage was taken without reflection or previous contemplation, as to the security intended to be given, but as the last hope of saving or securing something from a person on the eve of insolvency. That the bond and mortgage were not executed for advances made, or money lent on the security, or hope of security, arising from the mortgage, but with the intent to indemnify the mortgagees for indorsements at the banks in South Carolina, for E. Gairdner, and for other

collateral securities entered into for him ; all which were settled and discharged by the exertions of E. Gairdner, and the resources he was then enabled to bring into activity. That there was no money due on the bond, or on the consideration for which the bond was given. That all the obligees had been fully paid, satisfied and indemnified, without having recourse to the mortgaged premises, and that the mortgage was kept up for speculating purposes, and to oppress Caig and Mitchel, or to cover some transaction between E. Gairdner and one of the obligees, subsequent to the execution of the mortgage, and which had no relation to the same. That the mortgage was concealed from Caig and Mitchel, for fear of injuring E. Gairdner's credit, and was not delivered to the mortgagees, until some time before it was recorded ; and was not recorded, until Caig and Mitchel had paid a valuable consideration for two-thirds of the property, and were in the quiet possession thereof, with the knowledge of the mortgagees. They claimed title to two-thirds of the property, under the various book-entries of the several firms.

The bill then sought a discovery of the day, and consideration, on which the bond and mortgage were really executed ; and whether the mortgages had not notice of the claim of Caig and Mitchel ; whether the mortgagees gave notice of the mortgage to them ; and required Shirras and others to disclose the real debts, together with the particulars thereof, actually due from E. Gairdner, to each of them, at the date of the mortgage. It prayed, that the mortgage may be decreed to be fraudulent and void as to Caig and Mitchel, and for general relief.

The separate answers of the several defendants, Shirras and others, to the cross-bill, set forth minutely *their several claims against E. Gairdner, and averred, that the moneys loaned and responsibilities incurred were upon the faith of the mortgage ; except Wm. Blacklock, who did not know that he was included in the mortgage, until some time after its date. Black, in his answer, produced, on oath, the plat referred to in the mortgage, which he said had remained with him ever since the execution of the mortgage.

*39]

They all admitted, that Caig and Mitchel were not notified of the mortgage, and that they knew of no authority from Caig to E. Gairdner, to incumber his share of the property. They admitted, they did not see any title papers, and that they did not require them, having a perfect confidence in the representations and character of Edwin Gairdner. They denied, that they had any knowledge of any transfer to Caig & Mitchel, except that E. Gairdner stated that Caig held one-sixth. They admitted, that the mortgage was kept secret until the 10th September 1802, lest it should injure the credit of the mortgagors. They averred, that it was executed on the day of its date, or within a very few days afterwards, and was not retained by E. Gairdner, but immediately delivered to the defendant, Black. The testimony in the cause related merely to the authentication of the instruments ; and the entries upon the books, and to the balance of the accounts between the Charleston and the Savannah house, tending to prove that the Savannah house was considerably indebted to the Charleston house, at the date of the mortgage.

In May 1807, the circuit court, consisting of Judges JOHNSON and STEVENS, gave the following opinion:

"In the great confusion of legal and equitable interest which exist in this case, the mind can resort to no other means of making a just discrimination, but that of recurring to the original state of the interests of the several parties, and following their respective portions through the several changes of property which resulted from subsequent transactions.

"By the conveyance from Levi Sheftall to James Gairdner, Edwin Gairdner and Robert Mitchel, each acquired a fee-simple in one-third of the property in question. *In legal language, they were each seised *per my et per tout* of a third part, in joint-tenancy. The third part of James [*40 Gairdner never was legally conveyed, until the deed of July 1802, by Edwin, attorney for James Gairdner, conveying it to Robert Mitchel. With regard, therefore, to that third, and the one-sixth conveyed by Mitchel and Caig, making up a moiety of the whole, there can be no doubt, that the complainants are not entitled to recover; both law and equity are on the side of the defendants. The only difficulties that exist, arise in relation to the one-sixth conveyed by Mitchel to Edwin Gairdner, and by him conveyed to Caig, and the remaining third, originally vested in Edwin Gairdner. With regard to these proportions, the complainants are in possession of the legal right, and the question is, how far are the defendants relieved in equity?

"It is contended, that this court ought not to aid the complainants, on several grounds: 1. Because this property ought to be considered as a part of the copartnership funds of the first firm of Gairdner, Caig & Mitchel, and of E. Gairdner & Co.; and neither copartner is at liberty to alienate his share, until the debts of those concerns are discharged, and their balances adjusted. 2. Because the amounts claimed by the several mortgagees were for loans and assumptions not existing at the time of the mortgage, but incurred afterwards, with a small exception. 3. Because by the articles of copartnership, the property is legally pledged to the last concern of Gairdner, Caig & Mitchel, and this instrument, as well as the conveyance of one-sixth to Caig, from E. Gairdner, are entitled to a preference to the mortgage, in consequence of the mortgagee's having neglected to record their mortgage, and thereby to put others on their guard.

"On the first of these grounds, we remark, there are many cases in which real property may be pursued, as part of a copartnership stock, but it is only in the hands of legal representatives, in cases of descent, bankruptcy, *&c., but not where a legal alienation has been made, or the property [*41 is unaffected by articles of copartnership.

"With regard to the 2d and 3d grounds, we think them of much importance. This court will certainly support a mortgage, when there exists no actual debt, if the mortgagee is under any liability or engagement which may ultimately subject him to loss, or the payment of money for the mortgagor; such, for instance, as the indorsement of notes; the renewal of notes originally indorsed, or an arbitration or administration bond, or other undertaking, from which a debt only may be incurred. But it is evident, that some bounds ought to be set to this mode of mortgaging on contingencies, especially, when the mortgagee retains an absolute unrestrained option, whether the mortgagor shall or shall not be his debtor; when he is under no legal or

moral obligation to make loans, or assume a liability in his behalf. But as we do not mean to found our decree in this case on this ground, we shall not now attempt to draw the line. The subject is a very delicate one.

"On the 3d ground, the court feel themselves compelled to decree in favor of the defendants. The complainants, by not making known to the world the existence of this mortgage, have lost their right to the aid of this court in obtaining a foreclosure in their behalf. The defendant, Caig, ought not to lose the benefit of the conveyance of the one-sixth executed to him by Gairdner. He was legally proprietor of the one-sixth, and, by book-entries, equitably, of another sixth. We consider the acknowledgment of interest in him, by Gairdner, upon the face of the mortgage as sufficient notice, to the complainants, of his interest, both legal and equitable. This alone would be sufficient to entitle him to the favor of this court, independently of his having become purchaser, afterwards, of the legal title, without notice of the mortgage. With regard to the remaining third, we consider the articles of copartnership, accompanied with the payment of the consideration, as a covenant to stand seised to the use of the firm, and entitled to a precedence to the mortgage, because of the latter's not having been recorded.

*42] *"The copartners, therefore, will be entitled to a preference as to Gairdner's third, both as to payment of creditors of the last house of Gairdner, Caig & Mitchel, and for the satisfaction of any demand which the copartnership may have upon him. Subject to their claims, the complainants will be entitled to relief."

In May 1808, the circuit court made the following final decree:—"The court, referring to the interlocutory decree of May term 1807, order, adjudge and decree, that the bill be dismissed, with costs, as against the defendants, John Caig and Robert Mitchel, as to the two-third parts of the mortgaged premises; and that the bill be sustained as to one-third of the mortgaged premises, reserving a preference on the said third part of the premises, both as to the payment of the creditors of the late house of Gairdner, Caig & Mitchel, and for the satisfaction of any demand which the copartnership may have upon him, said Gairdner." To reverse this decree, the present writ of error was sued out by Shirras and others.

C. Lee, for plaintiffs in error.(*a*)—The mortgage ought to avail the mortgagees, to the extent of the power and interest of the mortgagor. Edwin Gairdner had the legal estate of three-sixths in himself, and had full power and authority from James Gairdner to dispose of, sell and convey the two-sixths, whereof the legal estate remained in him. So that Edwin Gairdner's power and interest extended to five-sixths. It is true, he omitted to refer to his power of attorney, in making the mortgage; but this defect

*43] may *be supplied in a court of equity. *Sir Edward Clere's Case*, cited by Ch. J. Parker, 10 Mod. 35; s. c. 6 Co. 71 *b*; 3 Lev. 372;

(*a*) When this case was called, and before it was opened, *C. Lee* suggested, that it would be desirable to wait for a fuller court, as the judge who rendered the decree might think proper to retire from the bench.

LIVINGSTON, J.—That practice has been abandoned.

JOHNSON, J.—We have agreed among ourselves not to excuse the judge who passed the decree.

Tollet v. *Tollet*, 2 P. Wms. 490; Ibid. 623; *Smith* v. *Ashton*, 1 Cas. Ch. 263; *Wade* v. *Paget*, 1 Bro. C. C. 368; *Coventry* v. *Coventry*, 2 P. Wms. 222; s. c. 1 Str. 596, 604; *Jackson* v. *Jackson*, 4 Bro. C. C. 462; Amb. 640, 684; Hob. 165; 4 Ves. jr. 631; 7 Ibid. 567; 10 Ibid. 246; 6 East 105; Carth. 427.

There was no obligation upon the mortgagees to prove or record the deed sooner than they did. The law allows twelve months. Neither of the deeds was recorded within ten days after its date, and therefore, neither can claim a preference under that law.

It is no objection, that the mortgage was made to indemnify against future indorsements. *United States* v. *Hooe*, 3 Cr. 73.

If the power from James had been given to a third person, he would have conveyed to Edwin; but the power being to Edwin, he could not convey to himself, and the law will consider the equitable title, united with the power, as a legal conveyance to him.

The creditors of Edwin, who are the mortgagees, are superior in equity to Caig or Mitchel, who never paid anything for the property, and who are indebted to Edwin at this time; and who, if so indebted, would, if necessary, be decreed, in equity, trustees for the mortgagees, rather than they should lose their debts.

The entries on the books conveyed no legal title to the property: but if it is to be considered as stock in trade, and therefore, liable to be transferred by book-entry, E. Gairdner, being a partner, had a right to sell and dispose of the whole partnership effects.

Harper, contrà.—It is admitted, that the mortgage transferred all the legal and equitable estate of Edwin Gairdner, but not of James Gairdner. If an attorney means to convey the rights of his constituent, he must speak in the name of *his principal: Edwin had only one-half; the other half belonged to Caig and Mitchel. [*44

The plat not having been recorded with the deed, the description of the property is imperfect; it can convey, at most, only Gairdner's Wharf; and not the lot which lies at a distance, on the other side of the street.

The articles of copartnership between E. Gairdner, Caig and Mitchel, being under seal, operate as a conveyance by way of covenant to stand seised. Each party covenants to stand seised to the use of the firm.

The complainants admit, that they concealed the mortgage, and held it up, to prevent injury to the credit of Edwin Gairdner, and they contend they had a right so to do. Although they might have such a right at law, yet they have not in equity. Where the mortgagee does anything to induce a belief, that the mortgagor has still a right to incumber the property (such as suffering him to retain the title papers, whereby he gains a false credit), the first mortgagee shall be postponed to the second, who is deceived thereby. So, in this case, the deeds to Caig and Mitchel are to be preferred to the mortgage which was thus concealed. 1 Fonbl. 153.

Besides, the mortgage untruly recites the whole transaction. The bond was altogether fictitious. It was calculated to impose upon the world. The mortgage was, in truth, made only to cover future contingent responsibilities.

This property is to be considered as part of the joint funds of Gairdner, Caig & Mitchel, and liable, in the first place, to the debts of that firm. The

separate creditors of Edwin Gairdner can only claim his share, after payment of all the joint debts.

P. B. Key, in reply.—It cannot be denied, that, at the date of the mortgage, Edwin Gairdner had a legal estate in one-half of the mortgaged premises. *The mortgage, therefore, to that extent, is good, unless it want some formality, or unless the defendants have a prior title at law, or some prior equity of which the complainants had notice previously to the mortgage. No want of formality, nor prior legal estate are suggested; nor can it be contended, that Mitchel or Caig had any prior equity as to one-half the property. Mitchel in his answer expressly disclaims any interest prior to the mortgage.

*45]

It is, indeed, suggested, that this real estate is to be considered as part of the joint stock in trade of the firm of Edwin Gairdner & Co., of Savannah, consisting of E. Gairdner and John Caig; and one partner cannot dispose of any part of the joint funds, to his own use, without the consent of the other partner. But neither at law, nor in equity, will real estate be considered as stock in trade, so as to alter the nature of the estate, unless there be some express agreement for that purpose. *Thornton* v. *Dixon*, 3 Bro. C. C. 199, 200. In the present case, there were no articles of copartnership, prior to the mortgage, nor any agreement that the real estate should be converted into stock in trade. *Smith* v. *Smith*, 5 Ves. 189. In order to make partnership stock of real estate, it must be purchased with partnership funds, or there must be an agreement, at the time of purchasing, that it shall be used and invested as partnership stock. But in the present case, nothing was paid by the firm of E. Gairdner & Co., of Savannah, for this property, nor was there any agreement converting it into stock. The firm of Gairdner, Caig & Mitchell was formed, after the mortgage, and therefore, whatever interest they took in this property was subject to the mortgage.

There can be no doubt, that the mortgagees had a right, under such a mortgage, to recover, in equity, all advances made upon the credit of the mortgage, subsequent to its date, and before notice of junior incumbrances; and recording the subsequent incumbrance, is not of itself notice. Powell on Mort. 229, 230, 285.

*As to the objection, that one of the mortgagees was not a creditor, at the date of the mortgage, and did not become a creditor upon the faith of the mortgage, it is laid down in Powell on Mort. 275, that if one purchase in the name of another, without any authority to do so, yet, if he afterwards agree to it, he makes the former his agent *ab initio*.

*46]

The complainants, therefore, are entitled to a decree for a foreclosure of one-half of the property described in the mortgage, and for the recovery of all sums advanced on the faith of the mortgage, before the mortgagees had notice of the second incumbrance.

February 17th, 1812. All the judges (except WASHINGTON, J.) being present (*a*), MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This is an appeal from a decree rendered by the circuit court for the district of Georgia.

(*a*) Judge WASHINGTON was prevented by indisposition, from attending on the 13th, 14th, 15th, 17th and 18th of February.

Shirras v. Caig.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears, that on the 17th May 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners, of the city of Savannah. In 1799, this partnership was dissolved; and in December in the same year, James Gairdner made an entry *on the books of the company, charging this property to Edwin Gairdner & Co., of Charleston, at the price of $20,000. This firm [*47 consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney, authorizing Edwin Gairdner to sell and convey his interest in this and other real property. In March 1801, a partnership was formed between Edwin Gairdner and John Caig, to carry on trade in Savannah, under the firm of Edwin Gairdner & Co.; and in the same month, Robert Mitchel conveyed his one-third of the lots in question to Edwin Gairdner and John Caig. About the said time, it was agreed between the house at Charleston and that in Savannah, to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner and Co. of Savannah. Such was the state of title, in December 1801, when the deed of mortgage bears date.

The plaintiffs claim the whole property, or, if not the whole, five-sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion, that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner; he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently, the power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seised, under the original deed, and the deed from Robert Mitchel, of one undivided moiety of the property. Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity, he held one *moiety of the premises [*48 in question; the other moiety was in John Caig. To one-sixth, Caig was legally entitled by the conveyance from Robert Mitchel, and to two-sixths, he was equitably entitled, by the agreement with Edwin Gairdner and the consequent entries on the books. Of the equitable interest of John Caig, the mortgagees were bound to take notice, because the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property. The

mortgage deed of December 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed, respecting the extent of the property comprehended in it. The plaintiffs contend, that both lots are within the description; the defendants, that only the wharf lot is conveyed. The property conveyed is thus described: "All that lot of land, houses and wharfs, in the city of Savannah, as is particularly described by the annexed plat, and is generally known by the name of Gairdner's wharf." The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected. The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied, by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe, that lot No. 6 was "generally known by the name of Gairdner's wharf." The court therefore, cannot consider that lot as comprehended within the conveyance.

*49] *The mortgaged property is in the possession of the defendants, Caig and Mitchel, who derive their title thereto in the following manner. On the 7th of January 1802, a new partnership was formed between Gairdner, Caig and Mitchel, and by the articles of copartnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm, transferring this property to the new concern. On the 12th of the same month, the copartnership of Gairdner and Caig was dissolved. On the 27th of July 1802, by deeds properly executed, one-third of the property became vested in John Caig and one other third in Robert Mitchel. On the 3d of November 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because, they say, 1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy. 2d. That the transaction is not *bonâ fide*, there being no real debt, nor any money actually advanced by the mortgagees. 3d. That the mortgage was kept secret, instead of being committed to record. 4th. That the whole transaction is totally variant from that stated in the deed. They, therefore, claim the property for the creditors of Gairdner, Caig & Mitchel.

1. From the testimony in the cause, it appears, that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

*50] *2. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and in part, to secure sums to be advanced, and to indemnify some of the mortgages for liabilities to be incurred.

3. The mortgage is dated the 1st of December 1801, and was recorded in September 1802. By the laws of Georgia, a deed is valid, if recorded within twelve months; but any deed recorded within ten days after its

execution, takes preference of deeds not recorded within that time, or previously on the record. It appears to the court, that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the dispatch which the law requires. If subsequent purchasers, without notice, sustain an injury, within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition. In this case, the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and were they to be preferred, the court would invert the well-established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4. It is true, that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of 30,000*l.* sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied, that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a *rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented, to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation. That cannot have happened in the present case. [*51

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed, without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court, that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

The following is the Decree of this Court:—This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the deed of mortgage in the proceedings mentioned, and dated on the 1st of December 1801, is, in law, a valid conveyance of one moiety of that lot of land, houses and wharves in the city of Savannah, which was generally known by the name of Gairdner's Wharf, being the parcel of ground lying between the river and the street, and that the mortgagees in the said deed mentioned, are entitled to foreclose the equity of redemption in the said mortgaged property, and to obtain a sale *thereof, and to apply the proceeds of the said sale to [*52

the payment of what remains unsatisfied of their respective debts, which were either due at the date of the mortgage, or have been since contracted, either on account of moneys advanced, or liabilities incurred prior to their receiving actual notice of the title of the defendants, John Caig and Robert Mitchel. And the decree of the circuit court for the district of Georgia, so far as it is inconsistent with this opinion, is reversed and annulled, and in all other things is affirmed; and the cause is remanded to the said circuit court for the district of Georgia, that further proceedings may be had therein, according to equity.

The Paulina's Cargo.

The Schooner Paulina's Cargo *v.* United States.

Forfeitures.

The 3d section of the act of congress of the 9th of January 1808, which prohibited the transshipment of goods from one vessel to another, did not include the case of a vessel lading in port, by means of river craft, &c.

The 2d section of the act of congress of the 25th of April 1808, did not require a permit to lade any vessel, nor authorize the forfeiture and condemnation of the vessel or cargo, for lading without the inspection of a revenue officer; the only penalty for such lading being the denial of a clearance.[1]

Error to the Circuit Court for the district of Rhode Island.

The schooner Paulina and cargo were seized and libelled by the collector of the port of Newport, alleging that the cargo was laden on board, within the district of Newport, between the 1st of June and the last of July, in the year 1808, in the night season, without a permit from the collector, and without the inspection of the proper revenue officers, and contrary to the 2d section of the act of congress, entitled "an act in addition to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States, and the several acts supplementary thereto, and for other purposes," passed the 25th of April 1808; and contrary to the 50th section of the act to regulate the collection of duties, &c., passed the 2d of March 1799. In the district court, the vessel and cargo were both ordered to be restored.

Upon the appeal in the circuit court, the libellant had leave to amend
*53] his libel, by stating that on the waters *of Warwick bay, in the district of Rhode Island, at a place called the Fulling Mill, in Warwick, and about 120 fathoms from the landing, at sundry times, between the 1st of June and the last of July, in the year 1808, the articles constituting the cargo of the Paulina, were transshipped from a small sloop called the May Flower into the schooner Paulina, without the intervention of any other water-craft, or of any intermediate landing, with intent to be transported without the United States, contrary to the 3d section of the act of congress, entitled "an act supplementary to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," passed on the 9th of January 1808, whereby the said cargo is forfeited, &c.

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[1] The Enterprise, 1 Paine 32.

The Paulina's Cargo.

The words of the 2d section of the act of 25th of April, 1808 (2 U. S. Stat. 499), are "That during the continuance of the act laying an embargo on all ships and vessels in the ports and harbors of the United States, and of the several acts supplementary thereto, no ship or vessel of any description whatever, other than those described in the next preceding section, and wherever bound, shall receive a clearance, unless the lading shall be made hereafter, under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of goods, wares and merchandise imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding."

By the 50th section of the act of 2d of March 1799 (1 U. S. Stat. 665), to regulate the collection of duties, &c., it is enacted, "that no goods, wares or merchandise, brought in any ship or vessel, from any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, that is to say, between the rising and setting of the sun, except by special license from the collector of the port, and naval officer of the same (where there is one), for that purpose, nor at any time, without a permit from the collector, and naval officer (if any), for such unlading or delivery; and if any goods, wares or merchandise shall be unladen or delivered from any such ship or vessel, contrary to the directions aforesaid, or any of them, the master" &c., *"shall forfeit and pay, each and severally, the sum of $400 for each offence, and shall be disabled from holding any office of trust or profit, for a term not exceeding seven years,"—"and all goods, wares or merchandise, so unladen or delivered, shall become forfeited, and may be seized by any of the officers of the customs;" and if the value shall exceed $400, the vessel, &c., shall be subject to like forfeiture and seizure. [*54

By the 3d section of the act of the 9th of January 1808 (2 U. S. Stat. 453), it is enacted, "That if any ship or vessel shall, during the continuance of the act to which this is a supplement, depart from any port of the United States, without a clearance or permit, or if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel, any goods, wares or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares and merchandise shall be wholly forfeited;"—"and the master or commander of such ship or vessel, as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage, shall each respectively forfeit and pay a sum not exceeding $20,000," &c.

The circuit court affirmed the sentence of the district court so far as it decreed the restitution of the vessel, but reversed it so far as it decreed restitution of the cargo, which the circuit court condemned. To reverse this sentence of condemnation, the present writ of error was sued out by Simeon Jones, the owner and claimant of the vessel and cargo.

On the 20th of February 1810, a *dedimus* was issued from the supreme court to take depositions in Rhode Island, which was executed and returned on the 14th of March. The material facts appearing upon these depositions were, that the former owners of the Paulina, being prevented by the embargo

from using their vessel, in order *to save expense, took her into Warwick bay, which was near the residence of one of the owners. Shortly afterwards, they sold her to the present claimant, Jones, who caused her to be, publicly, and in open day, laden by means of the sloop May Flower, which was a little vessel of fifteen tons burden, whose usual business it was to carry goods from Providence to Warwick and East Greenwich. That he thus caused her to be laden, in the expectation that the embargo would be very shortly taken off. There was also some evidence tending to excite suspicion that the intention was to evade the embargo.

Pitkin, for the plaintiff in error.—Neither this vessel nor cargo were liable to forfeiture under either of the laws mentioned in the libel.

1. As to the 2d section of the act of the 25th of April 1808 (2 U. S. Stat. 499). It has been uniformly decided in all the circuit courts, that this section does not impose a forfeiture of either the vessel or cargo. In the present case, Judge CUSHING condemned the cargo, not under this section, but under the 3d section of the act of the 9th of January 1808, which prohibits the transshipment. The only penalty for lading the vessel, without the inspection of a revenue officer, is the refusal of a clearance. The 2d section of the act of the 25th of April does not refer to the 50th section of the collection law, but to the 53d, 54th and 55th sections, which apply to the duties of inspectors, and provide for their due execution, by penalties, but they contain no regulation whereby either the vessel or cargo can be forfeited. The construction contended for by the government, is contrary to the spirit of the embargo system. Nothing had been before said respecting the lading of a vessel. She might lade as she pleased, and might go to sea upon giving bond, &c. This act is the first which regulates the lading.

The object of the embargo was, to prevent foreign voyages. The provision that the lading should be under the inspection of a revenue officer, was intended to enable the collector to judge, from the nature of the cargo, whether it was intended for a foreign voyage; and *if he should be
*56] of that opinion, he was, by the same law, authorized to detain the vessel, until the pleasure of the president should be known. The object of the legislature was completely answered, by denying a clearance, and thereby preventing the vessel from going to sea, in case she had taken in her lading, without the inspection of a revenue officer. It was not intended to prevent the owner from using his vessel as a store-house, without a permit, or from putting goods on board, without the inspection of an officer.

That this was the understanding of the legislature upon the subject is evident, from the act of the 9th of January 1809, usually called the enforcing act, the 2d section of which (2 U. S. Stat. 506) requires a permit, and prohibits the lading of any vessel without one, and without the inspection of a revenue officer, all which would have been necessary, if the law was the same before.

2. As to the 3d section of the act of the 9th of January 1808 (2 U. S. Stat. 453), the supposed violation of which is, by the amendment of the libel, made a ground for the claim of condemnation of the cargo, it does not apply to a lading or transshipment in port.

The objects of this law were three: 1. To prevent a vessel from depart-

ing, without a clearance : 2. To prevent her, after having obtained a clearance, from going to a foreign port : and 3. To prevent her, after clearance, from taking in goods at sea.

It does not contemplate an act done in port. The expression " such prohibited foreign voyage," shows that the legislature were contemplating foreign voyages only, and not merely the lading of a vessel in port. There were many ports in which a vessel could not be laden, but by the intervention of lighters. It cannot be supposed, that the legislature meant to prohibit all lading at those ports. The act of 25th of April has an express exception in favor of all vessels then laden, without regard *to the manner of their lading ; so also has the act of the 9th of January 1809. [*57

Dallas, Attorney of the United States for the District of Pennsylvania, contrà.—Penal laws are to be construed according to their plain intent. No construction ought to be given which would defeat the object of the law.

I. As to the claim of forfeiture, under the 2d section of the act of the 25th of April 1808, and the 50th section of the collection law. Let us consider what was the previous law ; the mischief intended to be remedied ; and the remedy intended to be applied.

1. As to the previous law. The first embargo law, of the 22d of December 1807 (2 U. S. Stat. 451), required bonds from registered and sea-letter vessels only, conditioned to reland their cargoes in the United States. The second embargo law, of January 9th 1808 (2 U. S. Stat. 453), required vessels, licensed for the coasting trade, to give a similar bond ; and those licensed for the fisheries, or whose employment had been uniformly confined to rivers, bays and sounds, were to give a general bond. It also forfeited the vessel and cargo, if she departed without a clearance or permit, or proceeded to a foreign place, or traded with, or put goods on board any other vessel, or if (being a foreign ship) she took in a cargo.

2. The mischief intended to be remedied was, that there was no provision for compelling vessels which were confined to bays, &c., to take a clearance, and give a manifest of their cargoes, and to produce a certificate of relanding them in the United States. Nor any provision for inspecting the lading of vessels.

3. The remedy provided by the legislature was, to prohibit all bay craft, &c., from departing from a district, without having obtained a clearance, and delivering *a manifest of their cargoes ; and to require a certificate of the relanding of the cargo within the bay, &c. And to prohibit all other vessels from receiving a clearance, unless the lading should be made under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties, and forfeitures, as are provided by law for the inspection of goods, wares and merchandise, inported into the United States, upon which duties are imposed. [*58

We are thus referred, expressly, in a case of lading for exportation, to the rule of a case of importing to unlade. There is no case of inspection on lading, but for the benefit of drawback, which is a case of exportation and not importation, and is, therefore, out of the reference. The penalties and forfeitures apply to a relanding, or to not producing a certificate of relanding, and not to the lading.

We are, therefore, to adopt the restrictions, regulations, penalties and forfeitures of the import law, *mutatis mutandis*. Under that law, goods must be unladen in the day-time: under this, they must be laden in the day-time. Under that, there must be a permit to unlade: under this, there must be a permit to lade.

Under that, the unlading must be under the inspection of a revenue officer: under this, the lading must be under the like inspection. Under that, goods unladen without permit, are forfeited: under this, they are forfeited, if laden without permit.

*59] *If the legislature meant this, it is well; if they did not, there is no meaning in the sentence; nothing upon which the reference can operate. That this is the true construction of the act, appears from the provisions made by the legislature *in pari materia* in the act of the 9th of January 1809 (2 U. S. Stat. 506), where the same ideas are expressed in different language.

II. As to the claim of forfeiture, under the 3d section of the act of January 9th, 1808. (2 U. S. Stat. 507.)

1. What was the previous law? 1. An embargo had been laid on all American vessels, but no penalty was inflicted. 2. Foreign vessels might sail in ballast, and with the goods then on board. 3. Bonds were to be given by registered and sea-letter vessels only, not to violate the embargo.

2. What was the mischief to be remedied? 1. American vessels might slip away, without clearance or permit. 2. Registered and sea-letter and licensed vessels might go to foreign places. 3. Or might trade. 4. Or might put goods on board another vessel.

3. What was the remedy provided? 1. That licensed and fishing vessels should give bond. 2. That no vessel should sail, without a clearance or permit. 3. That no vessel should proceed to a foreign place. 4. That no ship should trade with another: and 5. That no vessel should transship goods, under the penalty of the forfeiture of the goods.

The fact is not denied, that the Paulina took in her lading, without a permit, and without the inspection of a revenue officer, and that it was transshipped from the May Flower. She is then within the letter of the law, and we say, she was also within the spirit and meaning. The circumstances also show that the intention was to violate the embargo; and the provisions of the law were intended to punish that intention, when it should be manifested by certain acts.

*60] **Pitkin*, in reply.—The words of the 2d section of the act of the 25th of April, are, "subject to the same restrictions, &c., as are provided by law for the inspection of goods imported. If we are to be guided by the grammatical construction of the sentence, the revenue officers, being the last antecedent, are to be subject to the same restrictions, regulations, penalties and forfeitures, &c. But if the lading is to be subject to the restrictions, &c., it is only to be subject to the restrictions, &c., respecting the inspection of goods imported. We are not referred to the law respecting the necessity of a permit. And there was no reason for a permit to lade. The permit was evidence that the duties had been paid or secured, upon goods imported. But as there were no duties to be paid upon goods

exported, no such evidence was required, and a permit would have been useless.

February 21st, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows:—The libel in this case, as amended in the circuit court for the district of Rhode Island, claims the schooner Paulina and her cargo as forfeited, under the 3d section of the act supplementary to the act laying an embargo, and under the 2d section of the act in addition to the original embargo act and its several supplements, and under the 50th section of the act regulating the collection of duties on imposts and tonnage. In the district court, both vessel and cargo were acquitted; but in the circuit court, the cargo was condemned.

In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. The legislature has declared its object to be, to lay an embargo on the vessels of the United States, and to prevent the transportation of any article whatever from the United States to any foreign port or *place; and [*61 therefore, such transportation is prohibited. To prevent evasions of this law, certain acts, which do not in themselves amount to a breach of the embargo, but which may lead to it, have been successively prohibited, under such penalties as the wisdom of congress has prescribed. Those acts become criminal, and subject the person to such punishment as the law inflicts. In ascertaining what they are, the court must search for the intent of the legislature, guided by those rules which the wisdom of ages has sanctioned.

But should this court conjecture that some other act, not expressly forbidden, and which is, in itself, the mere exercise of that power over property which all men possess, might also be a preliminary step to a violation of the law, and ought, therefore, to be punished, for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule, instead of applying one already made. It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court, to apply the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous.

The fact made out in the present case is this: The Paulina, a registered vessel, lying in the common anchorage ground of Warwick bay, in the district of Rhode Island, about two hundred fathoms from the shore, received her cargo from the May Flower, a small vessel of fifteen tons burden, accustomed to ply between Providence and Newport. The lading of the Paulina was continued, in open day, for several weeks, but not under the inspection of a revenue officer. When her cargo was nearly on board, she was seized and libelled as having violated the acts of congress which have been mentioned.

The question will, it is conceived, be the more clearly understood, if we consider the laws in the order in which they were passed, and inquire, first, whether the 3d section of the supplementary act has been violated. *In pursuing this inquiry, it is essential to examine how far lading a [*62 vessel, under the circumstances of the Paulina, was prohibited by the origi-

nal and supplementary acts, without taking into view any subsequent act of congress.

The original act, passed on the 22d of December 1807, lays an embargo on all vessels bound to foreign ports, and directs that no clearance be furnished to such vessel. The 2d section directs, that before a registered vessel shall receive a clearance for a port in the United States, a bond shall be given, with a condition that the cargo shall be relanded in some port of the United States, dangers of the seas excepted. This act contains no provision applicable to the lading of any vessel whatever, or to licensed vessels, nor does it inflict any forfeiture or penalty on vessels which should depart without a clearance.

The incompetency of this act to effect its object could not be long unobserved. It was soon perceived, that foreign trade might be carried on by licensed vessels, and that further regulations respecting registered vessels would also be necessary.

On the 9th of January 1808, the supplemental act was passed. The first section directs, that bonds shall be given on the part of vessels licensed for the coasting trade, conditioned not to proceed to any foreign port or place, and to reland the cargo in some port of the United States. The second section contains a proviso declaring that it shall be sufficient for the owners of vessels of the description of the May Flower, to give bond with a condition not to be employed in any foreign trade.

This review of the prohibitions contained in the original and supplementary embargo acts, was necessary to a complete understanding of the 3d section of the supplemental act which is the section supposed by the libel-
*63] lants to comprehend the present case. *That section is in these words: "And be it further enacted, that if any ship or vessel shall, during the continuance of the act to which this is a supplement, depart from any port of the United States, without a clearance or permit, of if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel any goods, wares or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares and merchandise shall be wholly forfeited," &c.

This section contemplates three distinct transactions. 1. A departure from any port of the United States, without a clearance or permit: 2. Contrary to the provisions of the original or supplementary acts, to proceed to a foreign port or place: or, 3. To trade with or put on board any other ship or vessel any goods, wares or merchandise. The offence last described is supposed to have been committed by the Paulina.

Nothing can be more apparent, than that the legislature could not have intended to prohibit any person from putting a cargo on board a vessel of any description. 1. The coasting trade was still lawful, and might be carried on by either registered or licensed vessels; consequently, any vessel might be laden for that purpose. 2. There is no direct prohibition to lade a vessel with any articles whatever. 3. There are provisions in subsequent laws on the same subject, which regulate the manner of lading vessels in order to entitle them to a clearance; which provisions are entirely incom-
*64] patible with the idea that all lading was prohibited. *With a view to this principle, the section must be construed.

The first inquiry which presents itself to the mind is this: Do the words "contrary to the provisions of this act or of the act to which this act is a supplement," limit and restrain both the succeeding members of the sentence, or only the first of them? Are they applicable only to "proceeding to a foreign port or place," or also to "trading with or putting on board any other ship or vessel any goods, wares or merchandise?"

If the sentence be construed literally and grammatically, the introductory words which have been stated, are attached to all the offences afterwards described. The departure without a clearance, under any circumstances, is an offence. The circumstances of the departure do not affect the case. But to render the facts afterwards enumerated criminal, they must be committed under circumstances described in the law. "If any ship or vessel shall, contrary to the provisions of this act, or of the act to which this is a supplement, proceed to any foreign port or place, or trade with, or put on board of any other ship or vessel," &c., "such ships or vessels, goods, wares and merchandise shall be wholly forfeited." The connection between the different parts of this sentence, is inseparable: there is nothing to disjoin them. The nominative to the verbs "proceed," "trade with," and "put on board," is the same. It is not repeated, but is to be found in the first part of the sentence, and must be taken in the same sense, and with the same qualifications. The relative "such," in that part of the sentence which inflicts the forfeiture, refers to the ship or vessel, which, contrary to the provisions, &c., shall have done any one of the acts described.

If this be the literal construction of the sentence, it is still more apparently its real meaning. If the words, "trade with, or put on board any other ship or vessel," be not limited by the words "contrary to the provisions of this act, or of the act to which this act is a supplement," they would not only prohibit a vessel from lading, but from unlading in a manner, which is frequent, and perfectly innocent. There are *many ports [*65
in the United States, whose situation requires that a sea vessel should stop at a considerable distance from the place for which she is destined, and convey part of her cargo in lighters or river craft, to the place of destination. Under such circumstances, to load or unload, would amount to a forfeiture. But such was not the intention of the legislature.

Most apparently, then, both the letter and the spirit of the law must be disregarded, or it must be admitted, that the "trading with, or putting on board," that is rendered culpable, must be such a trading with or putting on board, as is "contrary to the provisions" of the original or supplementary act.

The subsequent words of the section imposing a penalty of from $1000 to $20,000, on the offence, tend still further to illustrate and confirm this construction. They are "the master or commander of such ship or vessel, as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage, shall forfeit and pay," &c. The master or commander of the "ship or vessel" described in this part of the sentence, would seem to be the master or commander of any ship or vessel which had committed any one of the offences previously described. If this be true, it is difficult to resist the opinion, that the words "as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage" were considered by the legislature as applicable to all the voyages previously

prohibited. Consequently, the legislature, at the time, supposed themselves to be punishing foreign voyages only.

The Paulina having committed no offence by taking her cargo on board, unless she incurred the penalties of the law, by receiving it from the May Flower, the sentence will now be examined, with a view to this question. Is the employment in this way of a vessel whose business is confined to the rivers, bays and sounds within the jurisdiction of the United States, a forfeiture of the vessel and cargo?

*66] *The bond given by such vessel is that she will not be employed in any foreign trade. This exemption from the necessity of relanding the cargo, proves the intention of the legislature, that such craft might be employed in lading vessels. This employment is not contrary to the provisions of either the original or supplemental act. If, then, the May Flower had transshipped her cargo in the port in which she was laden, it is apparent, that no part of the law would have been violated.

The section under consideration inflicts forfeiture on any ship or vessel which shall depart from any port of the United States, without a clearance or permit. If by law this would produce a forfeiture of the cargo, when on board the Paulina, it is to be inquired, whether, under this libel, the fact of her having passed out of one port into another, without a clearance or permit is examinable? The libel charges the simple fact of transshipment, without alleging the only circumstance which could render such transshipment criminal. The question, then, of a departure from the port of Providence into that of Newport, is not brought before the court. It does indeed appear in the evidence, that, in consequence of an opinion among the revenue officers, as well as others, a clearance in such a case was not requisite; the May Flower carried a considerable part of her cargo to the Paulina, without having obtained permits. But the court cannot notice this fact, unless the prosecution had, in some degree, been founded upon it.

It is, then, the opinion of the majority of the court, that, as this case stands, the sentence cannot be sustained, under the 3d section of the act of January 1808. No opinion is given on the construction of that act, in a case of transshipment from a vessel which has actually passed from one district to another without a clearance.

*67] The libel also claims a forfeiture under the 50th section *of the collection law, and under the 2d section of the act commonly called the additional act. It has been very truly observed, that the collection law is in itself totally inapplicable to the case, and can only be relied on, for the purpose of explaining the 2d section of the additional act which refers to the collection law. The operative words of the 2d section are "No ship or vessel shall receive a clearance, unless the lading shall be made hereafter, under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures as are provided by law for the inspection of goods, wares and merchandise, imported into the United States, upon which duties are imposed."

Had the sentence terminated with the word "officers," it is admitted, that its only operation would have been to exclude from a right to a clearance a vessel laden in a different manner from that which the act prescribes. The doubt grows out of the residue of the sentence. This section does not, in terms, refer to the 50th section of the collection law. Whether, in strict

grammatical construction, the adjective "subject," agree with and refer to the words "lading," "inspection" or "officers," still, the "restrictions, regulations, penalties and forfeitures" which are inflicted, are those which are provided by law for the inspection of goods, not those which are provided by law for unlading them. The word inspection is the governing word which explains the meaning of the sentence; and the provisions for the inspection of goods contain restrictions, regulations, penalties and forfeitures; but they do not affect the cargo.

It is difficult to read the sentence, without being impressed with the opinion, that the sole penalty intended by the legislature was the denial of a clearance. This will strike any person as the principal object of the clause. What follows is expressed with some confusion, and would not seem to constitute the most essential part of the sentence. It cannot be believed, that the legislature *could intend to inflict so heavy a forfeiture, under such cloudy and ambiguous terms. The natural as well as usual [*68 course would be to inflict the forfeiture in direct and substantive terms, not by way of loose uncertain reference.

But if this section be construed as the libellants construe it, then if the value of $400 be put on board a vessel, not only the goods so put on board, but the vessel itself shall be forfeited. For what purpose, then, direct that she shall not receive a clearance? The legislature can scarcely be suspected of making a solemn regulation, which, in terms, forbids its officers to grant a clearance to a vessel, which vessel is, by the same sentence, confiscated. It is the decided opinion of the court, that no forfeiture is incurred under this section of the act.

The majority of the court is of opinion, that the sentence of the circuit court, condemning the cargo of the Paulina, is erroneous and ought to be reversed.

The court certified that there was probable cause of seizure.

The Chief Justice observed, that three of the judges who had heard the argument in the present case, and one who did not hear it, but who had heard the points argued in another case, concurred in this opinion, and that the other judges concurred in the result of the opinion.

Johnson, Justice, observed, that he dissented from the opinion just delivered by the Chief Justice, upon one ground only. He was of opinion, that the transshipment, if with intent to prosecute a foreign voyage, in violation of the embargo, subjected the goods to forfeiture. But as the evidence of that intent was doubtful, he was of opinion, that the cargo should be acquitted; and two other judges concurred with him in opinion.

Sentence reversed.

*Nathaniel Russell *v.* John I. Clarke's Executors and others. (*a*)

Guarantee.—Letter of credit.—Equity jurisdiction.—Discovery.—Responsive answer.—Parties.

The construction of a letter of credit, or of guaranty, must be the same in a court of equity, as in a court of law; and any facts which might be introduced into one court to explain the transaction, may be introduced into the other.

On the question of fraud also, the remedy at law is complete.

Where the only ground of equitable jurisdiction is the discovery of facts, solely within the knowledge of the defendant, and the latter, by his answer, discloses no such facts, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.[1]

To charge one person with the debt of another, the undertaking must be clear and explicit.

It is the duty of him who gives credit to another, upon the responsibility or undertaking of a third person, immediately to give notice to the latter, of the extent of his engagements.[2]

A fraudulent recommendation will subject the person giving it, to the damages sustained by the person trusting to it.

An answer, responsive to the bill, is evidence in favor of the defendant.

A misrepresentation of the solidity of a mercantile house, made under a mistake of the fact without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentation.[3]

A merchant who indorses the bills of another, upon the faith of the guarantee of a third, cannot (upon the insolvency of the principal debtor and of the guarantor) resort to a trust-fund created by the principal debtor, for the indemnity of the guarantor, for the amount which the guarantor should pay.

But the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself.

When a guarantor is insolvent, a court of equity will not decree the money (raised for his indemnity), to be paid to him, without security that the debt to the principal creditor should be satisfied.

This court will not make a final decree upon the merits of the case, unless all persons who are essentially interested, are made parties to the suit, although some of those persons are not within the jurisdiction of the court.

Error to the Circuit Court for the district of Rhode Island, in a suit in equity, brought by Russell, against Clarke, in his lifetime, as surviving partner of the firm of Clarke & Nightingale, to recover from him the amount of sundry bills of exchange, drawn by one Jonathan Russell, for the use of Robert Murray & Co., whose agent he was, upon James B. Murray, in London, and indorsed by the complainant, Nathaniel Russell, upon the faith

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(*a*) February 17th, 1812. Absent, Washington, Justice. For a former decision in this case, see 3 Dall. 415.

[1] Foster *v.* Swasey, 2 W. & M. 217. The court will deny relief, when the remedy at law is plain, adequate and complete, though the question was not raised by the pleadings, nor suggested by the counsel in the argument. Hipp *v.* Babin, 19 How. 278.

[2] Edmonston *v.* Drake, 5 Pet. 624; Douglass *v.* Reynolds, 7 Id. 113; Lee *v.* Dick, 10 Id. 482; Adams *v.* Jones, 12 Id. 207; Cremer *v.* Higginson, 1 Mason 324; Russell *v.* Perkins, Id. 368; Dobbins *v.* Bradley, 4 Cr. C. C. 298; Burns *v.* Semmes, Id. 702; Henderson *v.* Reilly, 1 McArthur, 25. But the rule requiring notice by the person to whom a guarantee is addressed, of his acceptance thereof, and intention to act under it, only applies, where the instrument is, in legal effect, merely an offer or proposal; in which case, notice of acceptance is requisite to constitute that mutual assent, without which there can be no contract. Davis *v.* Wells, 104 U. S. 159.

[3] Lord *v.* Goddart, 13 How. 198; Tappan *v.* Darling, 3 Mason 101. And see Sawyer *v.* Prichett, 19 Wall. 146; Huber *v.* Wilson, 23 Penn. St. 178.

of two letters written to him by Clarke & Nightingale, in the following words:

"Providence, 20th January 1796.

"Nathaniel Russell, Esq.

"Dear Sir:—Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice, and other articles of your produce, in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friends. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence, as a house on whose integrity and punctuality the utmost dependence may be placed. They will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we have for these gentlemen, induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit. We are, with sentiments of esteem, dear sir, your most obedient servants,

CLARKE & NIGHTINGALE."

*"Providence, 21st January 1796. [*70

"Nathaniel Russell, Esq.

"Dear Sir:—We wrote you yesterday, a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also, that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands, in rice, on the best terms you can. If you are not in cash for the sales of the china and nankeens, perhaps, you may be able to raise the money from the bank, until due; or purchase the rice upon a credit, till such time as you are to be in cash for them. The truth is, we expect rice will rise, and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price. Our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject. We are, dear sir, your most obedient servants,

CLARKE & NIGHTINGALE."

The bill stated, that in February 1796, Jonathan Russell arrived in Charleston, from New York, bringing a letter of credit from the house of Joseph & William Russell, of Providence, with whom the complainant had only a slight acquaintance, but believed them to be in good credit. That Jonathan Russell informed the complainant, that when he left New York, he was authorized by Robert Murray & Co. to say, that they would forward to him, at Charleston, letters of guaranty from their friends, Clarke & Nightingale, of Providence, addressed to the complainant, and that he expected soon to receive them.

That he soon afterwards presented to the complainant, the before-mentioned letters of Clarke & Nightingale, of the 20th and 21st of January 1796, and that confiding in the responsibility and integrity of Clarke & Nightingale, and in the purity and simplicity of their views, he indorsed *the bills in question, amounting in the whole to 3886*l.* 10s. 8*d.* [*71 sterling.

That Clarke & Nightingale knew that the house of Robert Murray &

Co. began business without capital, under their patronage, and were supported by their credit, and that in the year 1795, it was found requisite, in New York and Boston, where the house of Robert Murray & Co. chiefly did business, that their bills of exchange, in order to their being negotiated in those places, should have the indorsement of Clarke & Nightingale, and even then, it was necessary they should be drawn for very small sums.

That the advances and responsibilities of the house of Clarke & Nightingale for that of Robert Murray & Co. were originally predicated chiefly upon their personal honor and integrity, and afterwards continued, upon the assurances of Robert Murray & Co., that in case of disastrous events, they should be secured by a priority of indemnity. And that upon like assurances, Clarke & Nightingale agreed to aid Robert Murray & Co. with funds and credit, to enable them to carry on the Charleston speculation which had been concerted between them; and had agreed to give them a letter of credit and guarantee to the complainant; and if the letters sent, did not in legal construction, amount to such (which the complainant did not admit), it must have arisen either from the defendant, Clarke, accidentally penning the letters in terms that did not quite come up to the idea intended by himself (in which case it would be contrary to equity and good conscience, that he should be permitted to avail himself of such accident to the injury of the complainant), or from the terms being artfully and fraudulently contrived by the defendant, Clarke, to give to the complainant the impression he intended, and yet by secret reservation to leave a door open for his own escape.

That the deceased partner of the defendant (Nightingale), in his lifetime, confessed, that the house of Clarke & Nightingale was bound by their letters to indemnify the complainant; and that Clarke had offered to compromise.

The bill further stated, that the recommendations of the house of Robert Murray & Co., given by Clarke & Nightingale, were fallacious
*72] *and unwarranted, covinous and deceitful, and were made in consequence of a concerted plan, to put Robert Murray & Co. into possession of large property, upon credit, to give the chance, in the first instance, of great profits to that house, in case the speculation should be successful, and finally, whether successful or not, to bring to the hands of Clarke & Nightingale large reimbursements from the proceeds of property so to be acquired; and that, accordingly, shortly after it was known in America, that the house of Robert Murray & Co. must fail, the defendant, Clarke, availed himself of the private stipulations before alluded to, by obtaining from that house, the greater part of their property, including the proceeds of the rice purchased upon the credit of the complainant's indorsements.

That J. B. Murray, who was named a trustee, being a citizen of New York, could not be compelled to appear in the circuit court, at Rhode Island, and therefore, was not made a party.

The complainant exhibited copies of five deeds from Robert Murray & Co., assigning their property to the defendant, Clarke, viz: one dated 23d March 1798; one 24th March 1798; two dated 22d of March 1799; and one 31st of May 1800; and called for the originals.

The bill averred, that the house of Robert Murray & Co. had been duly declared bankrupt, and discharged; that the assignees under the commission were resident in New York, and could not be made parties to this bill;

and that, in fact, there was nothing left to assign to them—the previous assignments to the defendant, having transferred the whole.

That Joseph and William Russell assigned away all their property, so that the complainant could not enforce against them, the judgment at law, which he had obtained upon their letter of credit.

That in the deed of the 24th of March 1798, among the uses to which the assigned property was to be applied, was the following, viz: "Also for the sum or sums, which the said Clarke & Nightingale have paid, or are liable to pay, on a suit commenced against them, by Nathaniel Russell, of Charleston, South Carolina, for *amount of certain bills of exchange, there [*73 drawn in his favor by Jonathan Russell, of New York, for the amount of three thousand, nine hundred and ninety-eight pounds, seven shillings, and two pence sterling, or thereabouts." And in a subsequent part of the same deed, another use declared was, "to retain, and pay to Joseph and William Russell, the amount that shall be recovered and paid from them to Nathaniel Russell, of Charleston, in South Carolina, upon account of a letter of credit to him, given by the said Joseph and William Russell, in favor of Jonathan Russell," &c.

The complainant further stated, that although he was unable to compel the payment from Joseph and William Russell, by reason of their having assigned away all their effects, yet William, who had survived Joseph, refused to assent, or afford any aid in converting those funds to the relief of the complainant; and the defendant had the use of the property for an indefinite time; and refused to account therefor to the complainant.

He further charged, that Clarke & Nightingale were dormant partners with Robert Murray & Co. in the Charleston speculation; that Robert Murray & Co. were, at the time of the recommendation from the complainant, deeply involved in debts, which they had not the means of discharging, that their credit was fictitious, and the fiction created and kept up by Clarke & Nightingale, who were privy to their transactions, and who knew that the representation they made was false and fraudulent.

The bill sought a discovery of the funds of Robert Murray & Co. in the hands of the defendant, Clarke, and of the trusts upon which he held them, and the manner in which he had applied them, or any part of them; and prayed that the intention of the parties as to the guarantee, might be enforced; that the proceeds of the rice purchased by means of the complainant's indorsements might be applied to his relief; that the defendant, Clarke, might be compelled to execute the trust reposed in him, and to apply to his indemnification, the funds set apart for the indemnification of Clarke & Nightingale, and of Joseph and William Russell; and that he might have such other relief, as his case might require, and be entitled to.

*The deed of assignment of the 23d of March 1798, transferred [*74 all the property and effects of the firm of Robert Murray & Co., in the United States, to the defendant, Clarke, and J. B. Murray, to pay the balances due them, and to such other creditors, as Robert Murray & Co. should nominate, within twelve months; reserving to them also, the power to appoint new trustees instead of Clarke and J. B. Murray, if they should think proper. This assignment was made expressly subject to certain prior liens on certain parts of the property, which were particularly set forth; one of which was an assignment to Loomis & Tillinghast, of a policy on certain

goods laden on board the ship Jefferson, and a policy on goods on board the ship Butler; and four promissory notes of Mott & Lawrence, amounting to $6460, the proceeds of which were to be applied, first to indemnify and secure Loomis & Tillinghast, for a debt due to them, and for responsibilities they had, or were about to incur, and out of the surplus, to pay to Joseph & William Russell, of Providence, all such moneys as they should be liable to pay, as guarantors to the defendant. This assignment was afterwards transferred by Loomis & Tillinghast, to Clarke, in consideration of $60,000 of Robert Murray & Co's. notes, indorsed by Loomis & Tillinghast, given up to them by Clarke.

The deed of the 24th of March 1798, contained an express power in Robert Murray & Co. to revoke or alter the directions and appointments therein contained, and to make other appointments and give other directions, within twelve months from that date. In pursuance of which power, they did, by an indenture tripartite, dated the 21st of March 1799, between Robert Murray & Co., of the first part, the defendant Clarke and J. B. Murray, of the second part, and the defendant and J. B. Murray and other creditors, of the third part, revoke and annul the deed of the 24th of March 1798; and substituted no other trust for the indemnification of the defendant, Clarke, against his liability to the complainant.

The deed of the 22d of March 1799, which declared the new trusts, under which the defendant, Clarke, and J. B. Murray should hold the assigned property, directed them to pay "to William Russell, as surviving *partner of the firm of Joseph & William Russell, the amount that shall be paid by them on a judgment recovered against them by Nathaniel Russell, of Charleston, in South Carolina, for the amount of 3998*l.* 7*s.* 2*d.* sterling, in bills of exchange guarantied by him by the said Joseph & William Russell, in favor of the drawer, Jonathan Russell. And the said parties of the first part do hereby order and direct the said parties of the second part, to allow and pay, in manner before mentioned, to the parties of the third part, in addition to the claims herein before admitted, all charges of suit and other expenses paid upon the said several claims, together with interest due thereon, payable in like manner with the claims as herein before recited." This deed also contained a power of revocation and of making new appointments of trust.

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On the 31st of May 1800 (the day before the bankrupt law of the United States was to go into operation), Robert Murray & Co. made their final declaration of trust, under the power reserved in their former deeds; and expressing an intention to alter and add to the trusts formerly declared, but without expressing any intention of revoking any of them, they designated five successive classes of creditors to be paid, in the order in which they were named; but neither of those classes included an indemnity to the defendant, Clarke, or to William Russell, against their liability to the complainant.

The defendant Clarke, in his answer, admitted his letters of the 20th and 21st of January 1796, to the complainant, but did not admit, that the complainant, at that time, considered them as letters of credit or guaranty, or that he indorsed the bills upon the faith of those letters. He averred, that they were intended only as letters of introduction and recommendation, and not as letters of credit or of guaranty, and that the house of Robert Murray & Co. was then in good credit. He denied, that the house of Clarke

& Nightingale had any interest in the purchases made in Charleston by Jonathan Russell. He did not admit that any bills of Robert Murray & Co., with the indorsement of Clarke & Nightingale, were negotiated in New York. He denied, that he had any reason to suspect that the credit of the *house of Robert Murray & Co. was fictitious and not real; he denied, [*76 that Clarke & Nightingale attempted to give them a false credit to deceive the public or any person. He averred, that he, as well as the house of Clarke & Nightingale, had full faith and confidence in the responsibility and solvency, the honor and integrity of the house of Robert Murray & Co., and had no agreement or understanding with them for their indemnity or security, in case of any disastrous event, of which he had no apprehension. He denied, that Clarke & Nightingale ever made any agreement to aid Robert Murray & Co. in raising funds for the speculation in Carolina produce; and that they ever asked from Clarke & Nightingale any letter of guaranty to go or be sent to Charleston; he denied, that they ever promised such letter of guaranty, or gave Robert Murray & Co. any authority to instruct their agent to assure any person that such letter of guaranty should be furnished by them. He denied, that the letters of 20th and 21st of January were designed, or written in artful and ambiguous terms, with intent to deceive. He did not admit, that his partner, Nightingale, acknowledged that they were letters of guaranty, or that the house of Clarke & Nightingale were bound thereby to indemnify the complainants.

He averred, that Clarke & Nightingale never asked, and Robert Murray & Co. never offered, any security for their responsibilities, until after the failure of Robert Murray & Co. was publicly known in the United States. He admitted the deeds and assignments to himself and J. B. Murray, as set forth in the complainants' bill, and admitted the receipt of large sums of money, a part of which had been applied, and part remained to be applied to the objects of the trust. He stated, that since the execution of the deeds of assignment to him and J. B. Murray, Robert Murray had been discharged as a bankrupt, under the law of the United States; and the assignees under that commission had brought suit in equity in New York against this defendant and J. B. Murray, and Robert Murray & Co., claiming an account of the assigned property, and praying that it might be transferred to them; which suit was still pending.

He declared his belief that the assigned property would be sufficient to discharge all the appropriations made by the deeds of trust, and also the whole claim due to the complainant, but denied that it was liable in his hands therefor.

*William Russell, in his answer, admitted the guarantee and judg- [*77 ment, and the insolvency of the house of Joseph & William Russell. He stated, that he had no knowledge that Robert Murray & Co. ever conveyed any property to the defendant, Clarke, and J. B. Murray, in trust to indemnify him, but if there were any such conveyance, he was willing that the complainant should have the benefit thereof.

There was evidence that bills of exchange for $5500 sterling, drawn in eighteen sets, by Robert Murray & Co., and indorsed by Clarke & Nightingale, were sold in Boston, in December 1795, and January 1796, and derived credit chiefly from their indorsement. There was also evidence to

prove that the house of Robert Murray & Co. were in good credit, until after January 1796.

The decree in the court below, was rendered, by consent, against the complainant, who brought his writ of error.

Dexter, for the plaintiff in error, contended: 1. That the letters themselves, under the circumstances of the case, imposed a liability upon Clarke & Nightingale to indemnify the plaintiff: and 2. That the defendant, Clarke, was liable by reason of the funds which he held in trust for the plaintiff's indemnification.

I. In support of the first point, he contended: 1st, that the letters themselves created an absolute responsibility; 2d, that if they did not of themselves create an absolute responsibility, yet they contained a direct affirmation of a fact which the defendant must show to be true, or must prove that he was himself deceived; and 3d, that the evidence shows that the affirmation, contained in the defendant's letters, was not true; and that he was guilty of such negligence and falsehood, as will render him liable to indemnify the plaintiff.

*78] 1. The defendant is absolutely bound by these letters. *They contain an unqualified assertion of a fact—the responsibility and integrity of Robert Murray & Co. In other cases, if a man will assert positively a fact, and request another person to act upon the faith of such assertion, he is bound to make good his assertion, or to compensate the injury which he has sustained who placed confidence in such assertion. Thus, if a person covenant that he has good title, he is bound to make it good, or to repair the damage sustained by his defect of title. This is the case of a covenant under seal. So, in a policy of insurance, the positive assertion of a fact is a warranty, and he who makes it is bound to prove it to be true. This is a case not under seal.

In the present case, it is more reasonable that Clarke & Nightingale should sustain the loss, because they voluntered the affirmation, and with a view to induce the plaintiff to give credit to Robert Murray & Co. Words spoken upon inquiry made for information will not bind, if he who spoke them was himself deceived. But the present case is not like that, it was not a sudden answer made on inquiry; it was a deliberate affirmation, in writing, made to one who they knew would place confidence in their representation, of a fact which they had the means of knowing, and which they ought to have known, before they asserted it in such a manner. It was not a letter of friendship, but of business. It requested the plaintiff "to render them every assistance in his power;" that is, to aid them with his credit.

If a man receive services upon request, he is bound to remunerate them. Is there in reason, justice or law, any difference between services rendered, and responsibilities incurred? In the present case, Clarke & Nightingale not only requested the plaintiff to lend his credit to Robert Murray & Co., but told him, he might be assured of their complying fully with any contract or engagement they might enter into with him. If the words had been "we assure you," &c., there could have been no doubt of their responsibility.

*79] But when they say "you may be assured," &c., it is evident, they meant the same thing. It was *their assurance, whether expressed

in the one way or the other; and it was their assurance upon which the plaintiff acted.

2. But if these words are so artfully selected, that they would not, in a court of law, bind the defendant, yet if they were calculated to deceive, and intended to induce the plaintiff to give credit to Robert Murray & Co.—if they were such as, between merchants, were understood to guaranty the credit of the persons recommended—they will have that effect in equity. Clarke & Nightingale ought to have been assured of the fact of the solidity of the house of Robert Murray & Co., before they stated it so positively. They ought to have inquired of them the state of their affairs. It is not sufficient for them to say, that they did not know but the fact was so. If they were not certain, they ought to have stated the simple truth—that it was a young house; had been conducting business for some time; and sustained a good character. That they themselves had given them credit to a considerable amount, and that they were still their debtors. If Clarke & Nightingale had written thus, as they ought to have done, the plaintiff would not have given them credit; he would have continued to hold the rice, until he had security; and would not have given it up, but upon the faith of letters which, in his opinion, would bind Clarke & Nightingale to indemnify him.

They must have known that they were not justified in stating the facts as they did. There were facts within their knowledge, which ought to have excited their suspicions of the credit of Robert Murray & Co.; particularly, the fact that their bills could not be sold, without the indorsement of Clarke & Nightingale, and then only in small sums. The knowledge of the great losses of Robert Murray & Co., by captures, in 1794, and the fact that they began business without capital, ought to have made Clarke & Nightingale more careful. That Clarke & Nightingale trusted them, is not evidence, that they believed them solid. They had a personal confidence that Robert Murray & Co. would secure them by assignments, in case of difficulty, as in fact, they did.

*II. As to the trust. It is objected that the assignments are to the defendant Clarke and J. B. Murray jointly, and that the latter is not made a defendant to this bill. But he was not within the jurisdiction of the court, and by the act of congress he could not be made a defendant, unless he had been found in Rhode Island. By the practice of courts of equity, they will not dismiss a bill for want of parties who cannot be served with process. *Darwent* v. *Walton*, 2 Atk. 510. [*80

Another reason for charging Clarke alone, is, that he has received by far the greater part of the funds of Robert Murray & Co., and it is a principle in equity, that each trustee shall answer only for the effects which he himself received. Digest of Chancery Cases 182; *Fellows* v. *Mitchel*, 1 P. Wms. 81; *Leigh* v. *Barry*, 3 Atk. 583.

But there is a stronger ground for charging Clarke alone. He received from Loomis & Tillinghast, an assignment of funds which they held in trust, to pay to Joseph & William Russell all such moneys as they should be liable to pay as guarantors to the plaintiff. The defendant, Clarke, received a transfer of this assignment from Loomis & Tillinghast, with full notice of the trust, and is thereby bound to execute it. It was a trust substantially for the benefit of the plaintiff. There were no funds of Joseph & William Russell, or of either of them, to which he could resort to satisfy his judg-

ment against them. If he had recovered the money from them, they might have resorted to this fund; and equity, which avoids circuity of action, will make it liable directly to the plaintiff.

C. Lee suggested, that there was no allegation in the bill to which these facts are pertinent.

Dexter.—The defendant is charged with having received such assignments as make him liable as trustee to the plaintiff. These facts appear in the exhibits, which are referred to in the bill and make part of it. The bill prays for general relief; and under such a prayer, the court will give such relief as the facts of the case will warrant.

*81] *C. Lee*, contrà.—This case presents two questions, 1. Whether the plaintiff's demand shall be satisfied out of the funds of Clarke & Nightingale; and 2. Whether it shall be satisfied out of the funds of Robert Murray & Co.

I. Are Clarke & Nightingale liable out of their own estate? If so, it can only be upon the letters of the 20th and 21st of January 1796, either because they create a liability at law, or because they contain a fraudulent misrepresentation. If the letters do not create a liability at law, a court of equity will not extend them beyond their legal import. If they do create a liability at law, a court of equity has no jurisdiction.

None of the parties considered them as letters of guaranty, until it was suggested by Jonathan Russell, in his letter to Nathaniel Russell, of the 11th of July 1796. The plaintiff himself, although he wrote six letters to the defendant, after he indorsed the bills, and before notice of their dishonor, yet never once mentioned that he had indorsed such bills upon the credit of Clarke & Nightingale. This negligence to give them notice that he had done so, is a complete discharge to them, upon the same principles, as the want of notice discharges the drawer of a bill of exchange.

The bill states certain facts from which slight inferences are drawn, that Clarke & Nightingale intended to guaranty the plaintiff's indorsement of the bills; but the answer of Clarke expressly denies all those inferences, and all intention of becoming responsible, and all private assurances of indemnity from Robert Murray & Co. Although no external proof can be added to the letters, or adduced to explain them, yet the answer of the defendant, who is called upon to answer as to his intention, is evidence. It is made evidence, by the plaintiff having called for it in his bill.

*82] *The opinion of this court, upon the construction of the letters in this case, as reported in 3 Dall. 424, although not conclusive, because it was not upon the point on which the court decided the cause, yet will be respected. The Chief Justice there states, that the majority of the court inclined to the opinion, that the letters did not, of themselves, import an undertaking or guarantee. To support this opinion, Mr. Lee referred to the cases cited in 3 Dall. 420-21.

But it is said, that the defendant is liable by reason of the misrepresentation. If so, it is a clear case at law, and not in equity. But the allegation is not supported by the evidence. The representation was true. Robert Murray & Co. were a house of integrity and punctuality, and were in good credit. In order to charge the party at law (and *à fortiori*, in equity), the

representation must be false. *Palsey* v. *Freeman*, 2 T. R. 51 ; 2 Esp. 92. But here, the evidence proves the representation to be true ; and if it had been false, it would have been wholly a case at law.

II. As to the ground of trust. The plaintiff relies upon three trust funds : 1. The indemnity to Clarke & Nightingale ; 2. The indemnity to Joseph & William Russell ; 3. The trust fund in the hands of Loomis & Tillinghast.

1. The indemnity to Clarke & Nightingale was only against the suit at law then depending, which has been since abandoned by the plaintiff ; and the fund withdrawn, and the deed revoked under the power of revocation which it contained.

2. The indemnity to Joseph & William Russell was only for what they should pay. They never did, and never will pay anything. It was a provision for their benefit, not for that of the plaintiff. Equality is equity. If the plaintiff claims a priority of payment, he must show a strict right. The indemnity is upon the condition of a release, which J. & W. Russell have never given. But the deeds under which this indemnity is *claimed, were revoked by those of March 1799, and May 1800. [*83

3. As to the trust deed to Loomis & Tillinghast. The evidence respecting it is not admissible. It appears only in a copy of the examination of one of the partners of the house of Robert Murray & Co., before the commissioners of bankrupt, certified by the clerk and judge of the district court, which is not competent evidence. Nothing in the bill alludes to this deed, so that Clarke had no opportunity of answering respecting it. Besides, it appears, that the amount of indemnity claimed by Loomis & Tillinghast, which was to be first satisfied, before the trust could arise in favor of Joseph & William Russell, was for Robert Murray & Co.'s notes to the amount of $60,000, indorsed by Loomis & Tillinghast, and the property pledged to them does not appear to exceed $28,000. Clarke delivered up to Loomis & Tillinghast the notes for $60,000, and received the property amounting to $28,000 only. Clarke had a right to stand in the shoes of Loomis & Tillinghast and claim the $60,000, in preference to J. & W. Russell, so that, in fact, there was no fund assigned for the benefit of the latter. There was no surplus, after satisfying the claim of Loomis & Tillinghast.

J. B. Murray ought to be a party. The plaintiff has no right to call upon one of the trustees only to answer for the whole fund, when he has received only a part. If the jurisdiction of the circuit court of the United States is so limited, that it cannot compel the appearance of all the parties, let the plaintiff apply to the state court. The case of *Darwent* v. *Walter*, 5 T. R. 500, applies to the state courts, but not to courts of limited jurisdiction, as the circuit courts of the United States are. The assignees of the bankrupt, Murray, ought also to be made parties, for they have an interest in the residuum. The plaintiff also ought to have obtained a judgment and *fieri facias* against Robert Murray & Co., before he could call for a discovery of their effects. *Angell* v. *Draper*, 1 Vern. 399 ; *Shirley* v. *Watts*, 3 Atk. 200. *The want of proper parties, may be objected at the hearing. *Jones* v. *Jones*, 3 Atk. 111 ; *Darwent* v. *Walton*, 2 Ibid. 510. [*84

Jones, on the same side.—1. As to the law of the case. This court, as a court of equity, has no jurisdiction upon any ground stated in the bill. It

states that the letters amount to a guarantee, but that the plaintiff has failed in three suits at law. If there be a remedy at law, and no fraud, nor defect of evidence, it is no case in equity. Nor is there any equitable jurisdiction, on the ground of construction of the letters. They must have the same construction in equity as at law. The confession that the plaintiff has no legal remedy, is a confession that the defendant is not bound by the contract. Mitford 111, 189. Nor does the ground of fraud alone, give an equitable jurisdiction. A court of law is as competent as a court of equity, to decide a case of fraud. But it is said, there is a different remedy in a court of equity. This is true, in some cases. When the fraud is on the part of the complainant, a court of equity will refuse its aid; when on the part of the defendant, it may set aside a deed obtained by fraud; but it will give no remedy in damages for a fraud; it will give no indemnity for a deceit by a third party. Where these are the object of the suit, the remedy is at law, where the damages are assessed by a jury. Prec. in Ch. 147. It is true, that mistake and accident are grounds of equitable jurisdiction; but the mistake or accident must be specifically stated; the accident must be manifest, and the evidence clear. The court will then correct the instrument, and make it what it ought to have been. *Hankle* v. *Royal Exchange Assurance Co.*, 1 Ves. 318–19; *Burt* v. *Barlow*, 3 Bro. C. C. 451; *Doran* v. *Ross*, 1 Ves. jr. 59; *Payne* v. *Collier*, Ibid. 171; *Smith* v. *Maitland*, Ibid. 364.

2. As to the construction of the letters, *per se*, and the effect of the evidence in regard to them. They do not import a contract on their face. A letter *85] of credit is well understood among merchants. It *must include a request to advance money. No declaration that a man is trustworthy, is sufficient. The words of the letters are to be taken in their usual signification. "You may be assured," means only you may be certain; it is only an affirmation of a fact. It contains no promise. It is immaterial how false or fraudulent the affirmation may be; it is but an affirmation, and does not constitute a contract.

No action will lie against a man upon his mere affirmation that he will give his daughter a portion. *Winn* v. *Talbot*, 1 Vin. 261. There must be fraud, accompanied by actual damage, to support an action on the case, for a deceit, against a stranger to the contract. *Pasley* v. *Freeman*, 3 T. R. 51; *Haycraft* v. *Creasy*, 2 East 92. It is not law, that the defendant is liable, if he did not use due diligence to ascertain the truth. But the evidence shows that the representation was fairly and honesty made, and therefore, whether true or false, is wholly immaterial. If the plaintiff was deceived, it must have been either by his own mistake of the purport of the letters, or by the assertions of Jonathan Russell. Robert Murray & Co., in their letters to the plaintiff, call them letters of introduction and recommendation, not letters of credit or guaranty. There is no evidence to connect the representations, or assertions of Jonathan Russell, with Clarke & Nightingale. He was not their agent, nor can they be responsible for anything he may have said.

There is no evidence of *mala fides*, but strong evidence of the contrary. When one merchant speaks of the credit or integrity of another, he speaks only as to general reputation. In the present case, this general reputation is fully proved. The burden of proof lies on the plaintiff, to show some act or information to the contrary, which came to the knowledge of the defendant.

Fraud is never to be presumed. As to the captures in 1793 or 1794, it does not appear, that the vessels and cargoes were not insured. As those losses had happened several years before the letters of recommendation, and as the house of Robert Murray & Co., for aught that appears, had stood unshaken thereby, those losses themselves seem to be the best evidence of the stability of that house.

2. As to the trust. This is a ground of complaint totally *distinct from the question of liability under the contract. The complainant [*86 seems to rely upon some specific lien on the rice itself, or its proceeds. But when he let the rice go out of his hands, upon being satisfied of the solidity of the house of Robert Murray & Co., he could not recall it—he lost all claim to a specific lien.

The evidence respecting the assignment to Loomis & Tillinghast, is not such as this court can notice. There is only a certificate of the clerk of the district court, that it is a copy of a paper filed in that court by Robert Murray, upon his examination under a commission of bankruptcy. It is not proved by the oath of any person who had seen the original, nor is it mentioned in the bill, nor confessed in the answer. The plaintiff can make no title to a specific lien on this fund. The other trusts in favor of Clarke & Nightingale, and of Joseph and William Russell, were expressly revoked by the subsequent deeds; and the plaintiff does not claim as a general creditor.

The plaintiff must, in his bill, show a title; an interest, and a right to call upon the defendants. There must be some privity between them; and all persons interested in the trusts, must be made parties. Mitford 31, 136, 144, 220; *Burt* v. *Dennet*, 2 Bro. C. C. 225. If there are no allegations in the prior part of the bill, to justify the interrogatories in the subsequent part, the defendant is not bound to answer them. The plaintiff had no right to call for a discovery of general assets; he was confined to the funds alleged in his bill. This is fatal, as to the trust of Loomis & Tillinghast; and another objection is, that suits are now pending in New York against the present defendants and others, calling for an account of these very funds.

If the courts of the United States have not power to call all parties before them, it is a good objection to their proceeding in the case. The plaintiff should have applied to the state courts, which have power. It is true, that each trustee is only liable for what he received, but that is no reason why the co-trustee should not be made a party.

**Dexter* and *P. B. Key*, in reply.—It is true, that there ought to [*87 be before the court, all the parties who may be necessary to enable the court to do complete justice; but the books also add the proviso, that they be within the jurisdiction of the court. Under the agreement to bring this cause up to this court for a final decision, without an argument in the court below, it was not expected, that it would now be delayed by the allegation of the want of proper parties.

1. As to the liability of the defendant upon the letters. This case differs essentially from that of *Haycraft* v. *Creasy*, in 2 East 92. In that case, it appeared, that the defendant himself was grossly duped and deceived, and his assertion was founded upon his belief only. If this had not been the case, he would have been liable. There is no difference in morality

between the assertion of a falsehood, and an affirmation, without any knowledge on the subject, with intent to induce the plaintiff to give credit. We have called upon the defendant to show that he was himself deceived. This he has not done, but has shown facts tending to excite his suspicions, and which ought to have put him more upon his guard. It is doubtful, whether the case of *Haycraft* v. *Creasy*, be law. It was decided by two doubting judges, against the clear and decided opinion of the chief justice, supported by great strength of argument. The opinion of GROSE is clearly untenable.

In the case of *Pasley* v. *Freeman*, 3 T. R. 51, the only doubt was, whether the only remedy was not in equity, and whether it could be supported upon the strict principles of the common law. But that doubt was overruled, and a legal remedy established. But it is not decided, that there is no relief in equity. Courts of chancery, do give relief in some cases, where relief may also be had at law. Thus, when a case of equitable jurisdiction is blended with a case at law ; or where the remedy at law is not complete ; or where a court of equity once gets jurisdiction of the case, upon proper grounds, although there may be a remedy at law, the court of equity, will retain its
*88] jurisdiction. Although this cause has been several times argued, *yet this is the first time the question has been made, whether the defendant, Clarke, is not liable upon the ground of misrepresentation.

The plaintiff was not bound to give Clarke & Nightingale notice that he had indorsed the bills of Robert Murray & Co. It would have been indelicate, both with regard to them and to Clarke & Nightingale. It was time enough to give notice, when the bills were dishonored.

The conveyance of *cestui que trust* will be respected in a court of equity. W. Russell, by his answer, has assigned the trust fund to the plaintiff.

The supposed objections to the trust of Loomis & Tillinghast do not exist. The bill calls upon the defendant to set forth all the assignments and trust funds he holds from Robert Murray & Co., and to produce the original deeds, of which copies are produced by the plaintiff, and to declare on what trusts he holds the property assigned. The bill charges him with holding funds in trust for the plaintiff. The recital, in one of the deeds produced, leads to the trust of Loomis & Tillinghast, which they assigned to the defendant, who had notice of the trust, and without the knowledge of William Russell. The defendant knew to what the recital alluded ; he knew of the trust in favor of Joseph & W. Russell, and ought to have stated it. The notes of Robert Murray & Co., with the indorsement of Loomis & Tillinghast, which the defendant gave up to them, in lieu of the property assigned to them by Robert Murray & Co., were of no value. They were notes which Robert Murray & Co. had given to Clarke, in payment, and which they had paid by the assignment of other property, so as to relieve Loomis & Tillinghast from their indorsement ; so that, in truth, the whole funds which Robert Murray & Co. had assigned to Loomis & Tillinghast for their indemnity, and for the indemnity of Joseph & W. Russell, were applicable to the relief of the latter ; and ought to be applied to the indemnification of the plaintiff.

The nature of the speculation itself indicated that the proceeds of the sales of the rice were to constitute the fund out of which the bills were to be paid, which were drawn to pay for its purchase. The parties upon

the *bills naturally looked to that fund as their principal security. This was known to the defendant Clarke; and with that knowledge, he obtained possession of the proceeds of this very rice, for the purchase of which the plaintiff indorsed the bills. The defendant did not, as a stranger, get them innocently into his hands, but obtained those funds, in consequence of his own misrepresentation as to the stability and integrity of the house of Robert Murray & Co. It is unconscientious, for him to retain those funds, under such circumstances.

March 5th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the following opinion:—

This is a suit in chancery instituted for the purpose of obtaining from the defendants, payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co., and indorsed by Nathaniel Russell; which bills were protested for non-payment, and have since been taken up by the indorser. The plaintiff contends that the house of Clarke & Nightingale had rendered itself responsible for these bills, by two letters addressed to him, one of the 20th and the other of the 21st of January 1796, on the faith of which his indorsements, as he says, were made. The letters are in these words: (See the preceding statement of the case.)

The bill alleges that these letters bind Clarke & Nightingale to pay to Nathaniel Russell any sum for which he might credit Robert Murray & Co., either because, 1st. They do, in law, amount to a guarantee: or that, 2d. They were written with a fraudulent intent to be understood as a guarantee: or that, 3d. They contain a misrepresentation of the solidity and character of the house of Robert Murray & Co.

Soon after the protest of these bills for non-payment, Robert Murray & Co. failed and became bankrupts. *Previous to their bankruptcy, they [*90
assigned a great proportion of their effects, including the cargoes for the purchase of which these bills were drawn, to John I. Clarke and John B. Murray, in trust for Clarke & Nightingale, and for sundry other creditors and purposes mentioned in several trust deeds which are recited in the bill, add which appear in the record. The plaintiff claims to be paid his debt out of this fund.

The answer of John I. Clarke was filed, and a certain William Russell, a partner of the house of Joseph & William Russell, who gave a letter of credit and guaranty to the drawer of the bills indorsed by the plaintiff, Nathaniel Russell, was made a party defendant. Against Joseph & William Russell, a judgment had been obtained by Nathaniel Russell, for the amount of the bills indorsed by him, but they had become insolvent, and no part of this judgment had been discharged.

Many depositions having been taken, and sundry exhibits filed, a decree of dismissal, without argument, and *pro formâ*, was rendered in the circuit court for the district of Rhode Island, and the cause comes into this court by appeal from that decree.

It is contended by the defendants, that the letters which have been recited create no liability on the part of Clarke & Nightingale, but are to be considered merely as letters of introduction. Whatever may be the construction of the letters, they insist, that the plaintiff, if entitled to recover, has complete remedy at law, and that a court of chancery can take no juris-

diction of the cause. It is believed to be unquestionable, that a suit in chancery could not be sustained on these letters, against Clarke & Nightingale, unless some additional circumstance rendered an application to this court necessary.

The plaintiff contends that such application is necessary, because there are a great variety of facts belonging to the transaction which could not be introduced into a court of law, or which would not avail him in that court,
*91] but which are proper for the consideration of a court of equity. *Because some of these facts rest within the knowledge of the defendants. And because he cannot, at law, subject the trust fund to his claim.

So far as respects the question, whether these letters constitute a contract of guaranty, there can be no doubt, but that the construction in a court of law or a court of equity must be precisely the same, and that any explanatory fact which could be admitted in the one court, would be received in the other. On the question of fraud, the remedy at law is also complete, and no case is recollected, where a court of equity has afforded relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud.

It is true, that if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused, by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.

It is also true, that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law. In the case under consideration, the answer confesses nothing. So far from furnishing any evidence in support of the plaintiff's claim, it denies, in the most full and explicit terms,
*92] the whole equity of the bill. *This ground of jurisdiction, therefore, is totally withdrawn from the case.

It remains to inquire, whether the plaintiff can be let in to claim on any part of the trust fund: and this depends principally on his claim being within any one of the trusts declared.

The first trust deed, which was executed by Robert Murray & Co., on the 23d day of March 1798, is declared to be in trust to apply the moneys arising from the trust property "in payment and satisfaction of the debts and balances which shall appear to be found to be due and owing from the said parties of the first part (Robert Murray & Co.), to them the said John I. Clarke and John B. Murray (the trustees), and to such other of the creditors" of the said Robert Murray & Co. as they should, by any instrument of writing, within twelve months, appoint. It may be doubted, whether this

declaration of trust would be applicable to a collateral undertaking, not, at the time, carried into judgment.

In the second deed, one of the trusts declared is, to repay Clarke & Nightingale for any sums they may pay or be liable to pay, under a suit at the time depending against them. That suit was dismissed. Without deciding whether Russell could avail himself of this trust, having failed in the particular action then depending, the court will proceed to inquire how far Clarke & Nightingale were liable to the plaintiff for the debt due to him from Robert Murray & Co.

The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clarke & Nightingale indicate *no intention to take any responsibility on themselves, but say that Mr. Russell may be assured [*93 Robert Murray & Co. will comply fully with their engagements. In their letter of the 21st, they speak of the letter of the preceding day as a letter of recommendation, and add "we have now to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co., on the responsibility of Clarke & Nightingale, or simply as a strong manifestation of the friendship of Clarke & Nightingale for Murray & Co., and of their solicitude that N. Russell should aid their operations so far as his own view of his interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clarke & Nightingale?

It is certain, that merchants are in the habit of recommending correspondents to each other, without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation. These letters are strong, but they contain no intimation of any intention of Clarke & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen, induces us to wish you will render them every service in your power, at the same time, we flatter ourselves, this correspondence will prove a mutual benefit." Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements. The court cannot consider these letters as constituting a contract by which Clarke & Nightingale undertook *to render themselves liable for the engagements of [*94 Robert Murray & Co., to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

It remains to inquire, whether these letters contain such a misrepresen-

tation of the circumstances and character of the house of Robert Murray & Co., as to render them accountable to the plaintiff for the injury he has sustained by trusting that company.

The question how far merchants are responsible for the character they give each other, is one of much delicacy, and of great importance to the commercial world. That a fraudulent recommendation (and a recommendation, known at the time, to be untrue, would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted. The case of *Pasley* v. *Freeman*, reported in 3 Term Rep., recognises and establishes this principle. Indeed, if an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognisable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed.

But this does not appear to the court to be the case described. It is proved, incontestibly, that when the letters, on which this suit depends, were written, Robert Murray & Co. were in high credit, and were carrying on business to a great extent, which was generally deemed profitable. The bill charges particular knowledge in Clarke & Nightingale, that this apparent prosperity was not real. But this, as well as every other allegation of fraud, is explicitly denied by the answer; and the answer, being responsive to the bill, is evidence. Had the plaintiff been able to exhibit proofs which would have rendered this fact doubtful, it might have been proper to have directed an issue for the purpose of trying it: but he has exhibited no such proofs.

*95] In writing the letters, then, recited in the bill, Clarke & *Nightingale stand acquitted of the imputation of fraud.

But it is contended by the plaintiff, that the representation they made of the circumstances of Robert Murray & Co. was, at the time, untrue; and that this misrepresentation, whether made ignorantly or knowingly, was equally injurious to Nathaniel Russell, and equally charges them with the loss he has sustained, by trusting to their assurances. The fact, that Robert Murray & Co. were not, in January 1796, in solvent circumstances, is not clearly made out: but the cause does not rest entirely on this fact. The principle, that a mistake in such a fact as the real internal solidity of a mercantile house, whose external appearance is unsuspicious, shall subject the person, representing their solidity to another, to the loss sustained by that other, in trusting to this representation, is not admitted.

Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds of the person he recommends; of his apparent, not of his real solidity. In such a case, it is certainly incautious and indiscreet, to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted, that, in such a case, fraud may be presumed, on slighter evidence than would be required, in a case where a letter was written with more circumspection. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to

be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from that knowledge only of the circumstances of other merchants, which may be acquired by observing *their course of business, their punctuality and their general credit. [*96

This principle appears to have been fully considered in the case of *Haycraft* v. *Creasy*, reported in 2 East, in which case, all the authorities were reviewed. It does not appear, that a single decision has been ever made, asserting the liability of the writer of such a letter. The case of *Haycraft* v. *Creasy* denies his liability; and that case appears to this court to have been decided in conformity with all previous adjudications.

It is, therefore, the opinion of the court, that Clarke & Nightingale, having believed, and had reason to believe, so far as is shown by the evidence in this cause, that the representation they made to the plaintiff, of the character and circumstances of Robert Murray & Co., was true, are not liable to the plaintiff, in consequence of that representation, for the credit he gave to that company.

A claim is also set up to the funds in the hands of Clarke & Nightingale, founded on the circumstance that they consist, in part, of the rice purchased with the bills indorsed by the plaintiff. But as no specific lien is alleged to have existed, and as the particular fraud, alleged to have been committed to acquire those funds, is not proved, this claim is unsustainable.

The plaintiff, then, cannot be considered as a trust creditor, in consequence of any claim, he can assert against Clarke & Nightingale.

The second deed, which is dated on the 24th day of March 1798, is also in trust "to pay to Joseph and William Russell, the amount that shall be recovered and paid from them to Nathaniel Russell," &c., "upon account of a letter of credit," &c., "and for which the said Nathaniel Russell hath recovered a judgment against the said Joseph & William Russell." No part of this judgment has ever been paid, and Joseph & William Russell are insolvent. The state of things, then, has perhaps not yet occurred in which Joseph & William Russell could demand the execution *of the trust; and the court, though with some hesitation, feels constrained [*97 to decide, that, under the terms of this trust, Nathaniel Russell, claiming through Joseph & William Russell, cannot demand its execution directly to himself.

It also appears, that in September 1796, Robert Murray & Co. assigned to Loomis & Tillinghast, certain personalities in trust. This assignment was surrendered to Clarke & Nightingale, in consideration of notes to a large amount, in which Loomis & Tillinghast were bound for Robert Murray & Co. It appears, that Clarke & Nightingale are otherwise secured with respect to these notes; at least, there is reason to believe that they are secure. Clarke & Nightingale, having taken this assignment with notice of the trust, take it clothed with the trust. They are trustees for the same uses and to the same extent with Loomis & Tillinghast.

A paper appears in the cause, which purports to be the assignment to Loomis & Tillinghast. The assignment is in trust, first, to repay themselves any sums which they may pay on account of certain undertakings made by them for Robert Murray & Co., and secondly, in trust "to pay to Joseph & William Russell, all such moneys as they shall be liable to pay, as

guarantors as aforesaid, to Nathaniel Russell upon bills," &c., reciting the bills for which this suit is instituted.

It is settled in this court, that the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself. This trust being to pay Joseph & William Russell, a sum they are liable to pay to Nathaniel Russell, and being created in such terms, that the money is certainly payable to them, the purposes of equity will be best effected, by decreeing it, in a case like the present, to be paid directly to Nathaniel Russell. Indeed, a court ought not to decree a payment to Joseph & William Russell, without security, that the debt to Nathaniel Russell should be satisfied.

*98] *But it is not shown, by any legal evidence, that this paper is the assignment which was made in trust to Loomis & Tillinghast, and transferred by them to Clarke & Nightingale. Its verity is not admitted by the defendants, nor proved by the plaintiff. Nor are the circumstances under which the transfer was made, nor the present circumstances of the trust, sufficiently before the court, to enable it to decide with certainty, whether the prior trust to Loomis & Tillinghast is satisfied, or otherwise so secured, that the trust fund may now be applied to the debt of Joseph & William Russell.

Could these defects be supplied, the court would still be unable to decree in favor of the plaintiff, for want of proper parties. The incapacity imposed on the circuit courts to proceed against any person residing within the United States, but not within the district, for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps, in cases where the real merits of the cause may be determined, without essentially affecting the interest of absent persons, it may be the duty of the court to decree, as between the parties before them. But in this case, the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause, until they are parties. They may contest the validity of all the deeds under which both parties claim, and assert in themselves, for the benefit of the creditors generally, a right to the whole fund. Certainly, this court ought not, on light grounds, and without due precaution, to change the hands in which this fund is placed, until any claim of the assignees to it may be decided.

Should this difficulty be obviated, by suspending the effect of the decree, until the validity of the trust deeds should be decided, or by directing security to be given, another presents itself, which cannot be removed. The assignees have a right to contest the claim of Nathaniel Russell, and may

*99] either deny its original validity, or *show that it has been paid. They are, then, essential parties, and the court ought not to decree in favor of the plaintiff, without them. It is possible, that they may consent to make themselves parties in this cause, and as a court may, instead of dismissing a bill brought to a hearing, without proper parties, give leave to make new parties, the court will, in this case, set aside the decree of the circuit court, dismissing this bill, and remand the cause to the circuit court, with leave to make new parties.

The Catharine.

The Schooner Catharine *v.* United States. (*a*)

Dismissal of appeal.

If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed.

This case was dismissed, because the counsel for the appellant had not furnished the court with a statement of the points of the case, agreeable to the general rule on that subject.

It was afterwards reinstated, by consent of parties.

Bingham and others *v.* Morris and others.

Motion to file and dismiss.

The rule to dismiss a writ of error, for not filing the transcript of the record, within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss.

February 18th, 1812. *Meredith* moved the court to dismiss this appeal, because the transcript of the record was not filed within the first six days of the term, agreeably to the general rule. (3 Cr. 239.) The transcript was filed on the 13th day of the term, and before the motion to dismiss.

The Court (Washington, Justice, absent) said, that they did not consider the rule as applying to any case where the transcript shall have been filed, before the motion for dismissal.

Motion overruled.

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*The Active. (*b*) [*100

The Sloop Active *v.* United States.

Violation of embargo.—Forfeiture of licensed vessel.

The departure of a vessel from the wharf of a port, and proceeding a mile and a half therefrom, with intent to go to sea, is not a departure from the port, within the meaning of the 3d section of the supplementary embargo act of January 9th, 1808, if the vessel had not actually gone out of the port, before seizure.

A licensed fishing vessel is liable to forfeiture (under the 32d section of the act of the 18th of February 1793, for enrolling and licensing vessels), for sailing, laden with goods, with intent to carry them to another place, without a license therefor, although the goods are wholly of domestic growth and manufacture and not liable to any duty.[1]

But such cargo is not liable to forfeiture, unless it belong to the master, owner or a mariner of the vessel.

The Active, 1 Paine 247, reversed, in part.

This was an appeal from the sentence of the Circuit Court of the district of Connecticut, which affirmed that of the district court, condemning the sloop Active and cargo.

(*a*) February 13th, 1812. Absent, Washington, Justice.
(*b*) February 19th, 1812. Present, all the judges.

[1] The Nymph, 1 Ware 257; s. c. 1 Sumn. 516.

The Active.

The libel stated, that the sloop Active was an American vessel, duly enrolled and licensed for the cod-fishery, on the 5th of July 1808, and had given the bond required to be given by such vessels under the several acts of congress laying and enforcing the embargo; and had a permit to depart and be employed in the cod-fishery. That in the night between the 4th and 5th of July, 1808, at the port of New London, there was secretly and unlawfully laden on board her, a cargo consisting of barrels of beef, fish, butter, &c., without the knowledge and not under the inspection of a revenue officer, with intent unlawfully to proceed with the vessel and cargo to some place without the port, harbor and district of New London. That the vessel so laden, left her place at the wharf in the port of New London, in the night, without the knowledge of any custom-house officer, without a license or permit, and without any custom-house papers, and departed therefrom and out of the said port, and proceeded on her said intended unlawful voyage to some place to the custom-house officers unknown. That the cargo was worth more than $600. That the vessel was unlawfully employed in trade other than that for which she was licensed.

The facts of the case appeared to be as stated in the libel, except that the vessel was seized in the act of leaving the port, but before she had gone out of the port; and that Gates, the owner of the greater part of the cargo, was neither master, owner nor mariner of the vessel.

*101] **Pitkin* and *Dana*, for the appellants.—Three questions arise in this cause. 1. Whether the vessel and cargo were forfeited by being laden contrary to the 2d section of the act of 25th April 1808 (2 U. S. Stat. 499), which declares, that "no vessel shall receive a clearance, unless the lading shall be made hereafter under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of goods, wares and merchandise imported," &c. 2. Whether she departed from a port of the United States, without a clearance or permit, contrary to the 3d section of the act of the 9th of January 1808. (2 U. S. Stat. 453.) 3. Whether she was employed in any other trade than that for which she was licensed, contrary to the 32d section of the act of February 18th, 1793, for enrolling and licensing vessels. (1 U. S. Stat. 316.)

1. Upon the first question, nothing will be added to the arguments urged in the case of *The Paulina* (*ante*, p. 55). The only penalty, under that act, for lading without the inspection of a revenue officer, is the denial of a clearance. There was no law then in force to punish the intent to violate the embargo. The act of January 9th, 1809 (2 U. S. Stat. 506), first made it penal to lade a vessel with that intent.

The libel does not charge the intent to be to export the cargo to any foreign place, which was the evil intended to be guarded against by all those laws. It was not unlawful, to transport domestic goods from one district to another in the United States. She had given bond according to the provisions of the act of January 9th, 1808 (2 U. S. Stat. 453), not to proceed *102] to any foreign port or place. *The 5th section of the act of January 9th, 1809 (commonly called the enforcing act), first made the vessel liable to forfeiture, for lading without a permit. This is a legislative con-

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fession that the law was not so before. It sanctions our construction of the act of the 25th of April 1808.

2. It appears from the evidence, that the vessel was seized within the port, about a mile and an half from the wharf. She did not "depart from" the port, and is, therefore, not liable to forfeiture under the 3d section of the act of January 9th, 1808.

3. Was the Active engaged in any trade (other than that for which she was licensed) within the meaning of the enrolling act? By the 32d section of that act (1 U. S. Stat. 316), it is declared, "that if any licensed vessel shall be employed in any other trade than that for which she is licensed, such vessel, with her tackle, apparel and furniture, and the cargo found on board her, shall be forfeited." The object of this provision evidently was to prevent smuggling, and other frauds upon the revenue. This is evident from various expressions and provisions in other parts of the act.

Thus, the 33d section provides, that if the cargo belong to a person other than the master, owner or mariners of the vessel so trading, and if the duties on the cargo have been paid or secured according to law, such cargo shall not be forfeited. The reason is, that the revenue cannot be defrauded, if the duties have been paid. If, then, this vessel had been laden with foreign goods, and the duties had been paid, they would not have been forfeited; *à fortiori*, would they be exempt from forfeiture, being American produce and not liable to any duty.

So, in the 4th section of the same act (p. 306), bond is to be given to pay to the United States $1000, *in case it shall appear that the vessel has been employed in any trade, whereby the revenue of the United States has been defrauded, during the time the license was in force; and the master is to take an oath that she shall not be employed in any trade whereby the revenue may be defrauded. By the 5th section, it is declared, that no license shall be in force for carrying on any other business or employment than that for which the vessel is specially licensed; and by the 6th section, every vessel found trading between district and district, or between different places in the same district, without being enrolled and licensed, if laden with goods, the growth or manufacture of the United States only (distilled spirits excepted), or in ballast, shall pay foreign fees and tonnage, but if she has any articles of foreign growth or manufacture, or distilled spirits, the vessel and cargo shall be forfeited. [*103

The license which the sloop Active had for the cod-fishery, not being in force for the coasting trade, she was found trading between different places in the same district, without a license, and therefore, was within the 6th section of the act; and being laden only with domestic produce, was only liable to pay foreign fees and tonnage.

By the 8th section, if a vessel, enrolled and licensed, shall proceed on a foreign voyage, without giving up her enrolment and license, and being registered, such vessel, and the goods so imported therein, shall be liable to forfeiture. Under this section, the vessel must actually make the foreign voyage, and import goods, before she can be forfeited. The 12th section authorizes a change of the master, and requires the new master, or the owner, to make oath that the vessel shall not, while the license continues in force, be employed in any manner whereby the revenue may be defrauded. By the 21st section, a licensed fishing vessel, trading to a foreign port, without a

license or permit therefor, is only liable to forfeiture, in case she be found within three leagues of the coast, with foreign goods on board to the value of $500. Domestic goods found on *board are not liable to forfeiture. *104] It cannot, therefore, be supposed that the legislature intended to render such a vessel liable to forfeiture, for carrying domestic goods, upon which no duties were payable, from one part of a port to another.

The act of taking on board certain domestic goods, and carrying them from one part of the port to another, is not such a trade as was contemplated in the 32d section of the act. Such a construction would be contrary to the spirit of the whole act. All that can be said is, that she took in the goods with intent to trade; but this is not trading. Such an intent is not punishable.

Dallas, Attorney of the United States for the District of Pennsylvania, and *Pinkney*, Attorney-General of the United States, for the appellees.—The parties engaged in this transaction were conscious that it was an unlawful business. This vessel was confined by law to the cod-fishery: she could not lawfully carry on the coasting trade. She was laden in the night, and was towing out of the harbor, when she was seized. Gates, who claims the cargo, appears to be master for that voyage; at least, he had the use of the vessel, and was on board, and there was no other master. 1. The first inquiry is, whether this vessel is liable to forfeiture under the embargo law? and 2. Whether she is liable, under the enrolling and licensing act?

1. She departed from a port of the United States without a clearance or permit, contrary to the act of January 9th, 1808, § 3 (2 U. S. Stat. 453). To depart from a port, does not mean to go out of the port. She departed from the port, when she set sail to leave the port—when she broke ground. This is the construction always given to policies, when the insurance is from (not at and from) a certain port.

*2. The protection of the revenue was not the only object of the *105] prohibition to use the license for another purpose than that for which it was given. It was material to know in what kind of trade every vessel was engaged. All the sections which have been cited show that it was the intention of the legislature, to prohibit the vessel from engaging in any other employment than that for which she was licensed, although such employment should not in any manner affect the revenue. It is a plain and express prohibition, under the penalty of forfeiture of vessel and cargo; and it is unnecessary to inquire into the motives of the legislature. She was engaged in the business of carrying goods from one place to another; and this was an employment or trade for which she had no license. She was as much engaged in trade, at the inception, as she would have been at the consummation of the voyage. It was not necessary that she should have finished the voyage, or have been engaged in buying and selling.

February 26th, 1812. MARSHALL, Chief Justice, delivered the opinion of the court, as follows:(*a*)—The sloop Active, a vessel licensed for the fishing trade, was laden, in the night of the 4th of July, in the year 1808, in the port of New London, and was seized by the revenue officer, after having left the wharf, without a clearance, under circumstances which justify a belief

(*a*) Judge TODD was absent, in consequence of indisposition.

that she was about to proceed on a foreign voyage, in violation of the acts laying an embargo. The vessel and cargo were libelled as having been forfeited under the laws of the United States, and were both condemned in the district court, which sentence was affirmed in the circuit court.

This sentence is supported on the part of the United States, under the 3d section of the supplementary act to the act laying an embargo, and the 32d section of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries.

*This court is of opinion, that however criminal the intentions of those on board the Active might have been, neither the vessel nor cargo [*106 were forfeited, under the 3d section of the "act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," because she appears to have been seized in port; and a departure from port, without a clearance, was necessary to consummate the offence.

The case is undoubtedly within the words of the 32d section of the enrolling and licensing act. The Active was a licensed vessel employed in a trade other than that for which she was licensed.

The argument that this act was intended merely to secure the revenue, and that its provisions do not contemplate a vessel laden with domestic produce not subject to duty, has been urged with great force, and certainly derives much strength from the various sections of the act which have been quoted. But the words of the 32d section are explicit, and although other preceding sections furnish much reason for believing that a forfeiture in a case where the revenue could not be defrauded, might not be contemplated by the legislature, yet they are not so expressed as to control the 32d section. The Active and her cargo, therefore, must be considered as forfeited, except so far as they come within the 33d section. That section is in these words: "Provided, nevertheless, and be it further enacted, that in all cases where the whole or any part of the lading, or cargo on board, any ship or vessel, shall belong, *bonâ fide*, to any person or persons other than the master, owner or mariners of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, anything therein contained to the contrary notwithstanding."

"In this case, the libel states, that ——— Billings and —— Morgan were owners of the vessel, and a certain —— Gates, owner of the cargo. A claim is filed by Billings and Morgan for the vessel and part of *the cargo, and by Gates, for the residue of the cargo. It appears, then, both [*107 from the libel and claim, that a part of the cargo did "belong, *bonâ fide*, to a person other than the master, owner or mariners of the ship or vessel." This part of the cargo comes completely within that part of the description which relates to the ownership of the property. But the goods on board being liable to no duty, the duties could not have been previously paid or secured.

The court considers this section as manifesting a clear intention in the legislature to exempt from forfeiture a cargo not belonging to the owner, master or mariners, provided that cargo was not liable to duties. Whether this condition was produced by a previous payment of duties, or by a perfect exemption from duties, must be immaterial. Duties cannot be paid or

secured, according to law, on goods not liable, by law, to duty. The legislature must be understood, when saying "upon which the duties have been previously paid or secured according to law," to mean, "upon which the duties, if any, have been previously paid," &c.

It is the opinion of the court, that the sentence of the circuit court be reversed as to so much of the cargo of the sloop Active as is claimed as the property of ——— Gates, and be affirmed as to the vessel and the residue of the cargo. And it is directed, to be certified, that there was probable cause of seizure.

The Clarissa Claiborne. (*a*)

Hawthorn, Claimant of the Brig Clarissa Claiborne, *v.* United States.

Evidence on appeal in admiralty.

This court will grant a commission to take new evidence to be used here, in a case of admiralty jurisdiction.

This was an appeal from the sentence of the District Court at New Orleans, condemning the brig Clarissa Claiborne, for violating a law of the United States.

*108] *Hare* moved for a *certiorari*, upon a suggestion of diminution of the record, in not sending up the depositions of the witnesses.

Marshall, Ch. J.—What prevents you from producing the witnesses here, or taking their depositions *de novo?*

Hare suggested a doubt, whether cases for violation of the embargo, are cases of admiralty, or of prize jurisdiction.

However, on a subsequent day he moved for, and obtained a commission to take the depositions of witnesses at New Orleans, to be used on the trial in this court, at the next term.

A like commission was granted in the case of *Williams* v. *Armroyd*, at this term.

United States *v.* John Goodwin.

Appellate jurisdiction.

No writ of error lies to the supreme court of the United States, to reverse the judgment of a circuit court in a civil action, which has been carried up to the circuit court from the district court, by writ of error.[1]

This was an action of debt, brought originally in the District Court for the district of Pennsylvania, by the United States, against John Goodwin, for $15,000, as a penalty for not entering goods agreeable to the prime cost

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(*a*) February 20th, 1812. Present, all the judges.

[1] United States *v.* Gordon, *post*, p. 287; United States *v.* Barker, 2 Wheat. 395; Sarchet *v.* United States, 12 Pet. 143. But afterwards remedied by statute, see R. S. § 691.

at the place of exportation, with intent to defraud the revenue. The judgment of the district court, which was in favor of the United States, was, upon a writ of error, reversed in the circuit court; and thereupon, the United States sued out the present writ of error to this court.

A doubt having been suggested, whether this court could take jurisdiction by writ of error, in a civil action, which had been carried up by writ of error, from the district court to the circuit court, that question was submitted to this court, without argument.

*At a subsequent day, viz., March 10th, 1812 (all the judges being present), WASHINGTON, J., delivered the opinion of the court, as follows:—This case stands upon a writ of error to the circuit court for the district of Pennsylvania. By the record, it appears, that an action of debt was brought, in the name of the United States, against the defendant in error, in the district court of Pennsylvania; in which judgment was rendered for the United States. On a writ of error to the circuit court for that district, that judgment was reversed; and upon like process, the cause has been brought into this court for re-examination. A rule has been obtained by the defendant in error, upon the United States, to show cause why the writ of error should not be dismissed; and the ground of the rule is, that, as the cause was not removed from the district into the circuit court, by appeal, but by writ of error, there is no provision in any of the laws of the United States, giving jurisdiction to this court, to re-examine the judgment of the circuit court, upon a writ of error or otherwise. This question can only be decided by an attentive consideration of the different acts of congress on this subject. [*109

The 21st section of the judicial law of 1789, declares, that from final decrees in a district court, in cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds $300, an appeal shall be allowed to the circuit court. The 22d section provides, that final decrees and judgments, in civil actions, in a district court, where the matter in dispute exceeds the value of $50, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, upon a writ of error. This section then proceeds to declare, that, upon a like process (that is to say, upon a writ of error), may final judgments and decrees, in civil actions and suits in equity, in a circuit court, brought there by original process, or removed there from the state courts, or by appeal from a district court, where the value exceeds $2000, exclusive of costs, be re-examined and reversed or affirmed in the supreme court.

*The 2d section of the act of the 3d of March 1803, so far changes the above sections of the act of 1799, that whereas, the latter allows an appeal from the district to the circuit court, only in admiralty and maritime cases, where the value in dispute, exclusive of costs, exceeds $300, the former provides an appeal from all final judgments or decrees in a district court, where the matter in dispute, exclusive of costs, exceeds $50, and also an appeal to the supreme court, from all final decrees and judgments in a circuit court, in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the value, exclusive of costs, exceeds $2000. But this law makes no provision for the appellate jurisdiction of the supreme court in any other cases than those above mentioned. Consequently, we [*110

must refer to the sections of the act of 1789, before noticed (which are still in force, except so far as they are inconsistent with the provisions of the act of 1803), to see in what cases, other than those provided for by the act of 1803, the supreme court can review the decisions of the circuit courts. It has been shown, that all final judgments or decrees in civil actions and suits in equity, in a circuit court, brought there by original process, or removed from the state courts, or by appeal from a district court, may be re-examined in the supreme court, upon a writ of error. But no case can, under this act, be removed from a district court, by appeal, except it be of admiralty and maritime jurisdiction; and consequently, under the literal construction of this law, no other cases could be carried from the circuit court to the supreme court.

The question then, is, whether the word appeal, in the 22d section, is to be understood technically, or merely as descriptive of the appellate jurisdiction of the superior court, without regard to the particular mode by which a cause is transmitted to that jurisdiction? This question appears to have been considered by the supreme court so early as the year 1796, in the case of *Wiscart* v. *D'Auchy*. Chief Justice ELLSWORTH, in delivering the opinion of the court in that case, expresses himself, as follows:—"The act of 1789, speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil-law process, and removes a cause entirely, subjecting the
*111] law and fact to a review and retrial. *A writ of error is a common-law process, and removes for re-examination, nothing but the law. This statute observes this distinction. In admiralty and maritime causes, an appeal is allowed from the district to the circuit court, if the matter in dispute exceeds $300, and yet decrees and judgments in civil actions may be removed by writ of error, from the district to the circuit court, though the value barely exceeds $50." In another part of this opinion, the judge adds, "that as to the appellate jurisdiction of the supreme court, the 22d section says, and upon a like process, that is, upon a writ of error, shall final judgments and decrees in civil actions, viz., cases not criminal, and suits in equity, &c. Among the causes which may be brought to the supreme court, by writ of error, are cases which had been removed, to the circuit court, by appeal from a district court, which can only be cases of admiralty and maritime jurisdiction."

The objection made to this interpretation of the word appeal, that judgments in civil actions at common law, commenced in a district court, could be re-examined only in a circuit court, if well founded in itself, could not, with any propriety, be addressed to courts, after the legislative meaning of the term is ascertained. The technical distinction between a writ of error and an appeal, and between the different cases to which they were applicable, was clearly marked in the act of 13th February 1801, which was afterwards repealed by the act of the 8th of March 1802. The former act, after providing for the removal of all final judgments or decrees, above the value of $50, from a district to a circuit court, by appeal, and by a like proceeding for a removal to the supreme court, of those cases only, which were of equity, of admiralty and maritime jurisdiction, and of prize or no prize, proceeded to provide for civil actions at common law, originating in a district court, by declaring that final judgments, in such cases, if of a certain value,

might be removed, at once, from the district to the supreme court, by writ of error. So that, as the law stood at that time, a party, in cases at common law, had an election to carry his case, where it exceeded $2000, by writ of error, from the district to the circuit court, under the 22d section of the act of 1789, but without the privilege of proceeding *farther, or to proceed with his cause, at once, to the supreme court, passing by the circuit court. But it appears not to have been the policy of the legislature, at that time, to subject the decisions of the district court, in civil cases at common law, to more than one re-examination in an appellate court. [*112

Writ of error dismissed.

Whelan *v.* United States.

Jurisdiction of the admiralty.

Cases of seizure upon waters navigable from the sea, by vessels of more than ten tons burden, for breach of the laws of the United States, are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury.

This cause standing so late on the docket that it was not likely to be called for trial at this term, *Dallas*, for the United States, suggested the propriety of assigning a particular day for the hearing, as it was a case of importance, and involved a question of jurisdiction, viz., whether a seizure of a vessel, on waters navigable from the sea for vessels of ten and more tons burden, for breach of a law of the United States, was to be tried by a jury. This question was said to be important, because the judge of the district of Pennsylvania had refused to try any cases of that kind, until the question was finally settled by this court.

The Court accordingly assigned a day for hearing that question, but intimated an opinion that it was already decided in the cases of *The Vengeance*, 3 Dall. 297; *The Betsey and Charlotte*, 4 Cr. 443; and *Yeaton* v. *United States*, 5 Ibid. 281.

E. Tilghman, for the appellant, after looking into those cases, abandoned the question as to jurisdiction, considering the cases cited as conclusive against him.

February 20th, 1812. The Court (all the judges being present) said, that the question had been certainly settled in this court, upon full argument.

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*The Eliza. (*a*) [*113

United States *v.* The Brig Eliza.

Seizure for violation of embargo.

A vessel which has proceeded to a foreign port, contrary to the embargo act of January 9th, 1808, is liable to be seized, upon her return, although that act gives a penalty of double her value, in case she should not be seized.

This was an appeal from the sentence of the Circuit Court for the district of Delaware, which affirmed that of the district court, which dismissed the

(*a*) February 22d, 1812. Present, all the judges.

libel, and ordered the vessel to be restored. She had been seized by the collector of the district of Delaware, for having "proceeded to a foreign port or place" (viz., to Havana), contrary to the 3d section of the act of January 9th, 1808 (2 U. S. Stat. 453), "supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States;" and for having exported from the United States sundry goods, &c., contrary to the 4th section of the act of March 12th, 1808, "in addition to the act, entitled an act supplementary to the act, entitled an act laying an embargo," &c. (2 U. S. Stat. 474.)

By the 3d section of the act of January 9th, 1808, it is enacted, that if any vessel shall, contrary to the provisions of that act, or of the act to which that is a supplement, proceed to a foreign port or place, such vessel shall be wholly forfeited, "and if the same shall not be seized, the owner or owners, agent, freighter or factors of any such ship or vessel, shall, for every such offence, forfeit and pay a sum equal to double the value of the ship or vessel and cargo, and shall never thereafter be allowed a credit for duties," &c., "and the master or commander of such ship or vessel, and all other persons who shall knowingly be concerned in such prohibited foreign voyage, shall each respectively forfeit and pay a sum not exceeding twenty thousand, nor less than one thousand dollars, for every such offence, whether the vessel be seized and condemned or not."

By the 4th section of the act of March 12th, 1808, it is enacted, "that it
*114] shall not be lawful to export from the *United States, in any manner whatever, any goods, wares or merchandise of foreign or domestic growth or manufacture, and if any goods, wares or merchandise shall, during the continuance of the act, entitled an act laying an embargo," &c., "and of the act supplementary," &c., "contrary to the prohibitions of this act, be exported from the United States, either by land or water, the vessel," &c., "in which the same shall have been exported, shall, together with the tackle, apparel," &c., "be forfeited, and the owner or owners of such goods," &c., "and every other person knowingly concerned in such prohibited exportation, shall each respectively forfeit and pay a sum not exceeding ten thousand dollars, for every such offence."

Joseph R. Ingersoll, for the appellees (the claimants of the vessel), contended, that as the vessel was once out of the jurisdiction of the United States, after the offence committed, the United States could only sue for the penalty of the double value, and could not seize the vessel itself. That the offence was complete, before the return of the vessel, and while she was absent, she could not be seized; that the words "if the same shall not be seized, mean, if the same cannot be seized. That as the vessel could not be seized, before her return, and as the offence was complete, before her return, the case had happened in which the United States were entitled to sue for the double value; and as the forfeiture of the vessel and the penalty of double value were not concurrent and cumulative remedies, the United States could only resort to the latter. The right to seize the vessel was lost by her escape, and could not be revived, upon her return. If the United States had brought suit for the penalty, before the return of the vessel, they might have supported it, although the vessel should have returned before judgment. Their right of action was complete.

Dallas, contrà.—There is no limitation of time for the seizure; the vessel has actually been seized, and thereby the United States have relinquished their claim to the double value. If the vessel could be seized, it is probable, the United States *could not have recovered the double value; and in an action therefor, it would have been necessary for the United States [*115 to prove that the vessel could not have been seized. This could not be proved, while the vessel was lying in a port of the United States, liable to seizure.

March 5th, 1812. All the judges being present, MARSHALL, Ch. J., stated, that it was the opinion of the court, that the vessel was liable to seizure; but that a majority of the court was of opinion, that the offence was not complete, until the arrival of the vessel in a foreign port; but the facts of the case do not appear so as to enable the court to decide that point; the cause is, therefore, continued, for further proof.

UNITED STATES *v.* CROSBY.

Conflict of laws.

The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.[1]

THIS case is fully stated in the following opinion of this court, which was delivered by—

STORY, Justice, on the 24th of February, all the judges being present.

A writ of intrusion was brought by the United States against the defendant in error, to recover possession of an undivided part of certain land lying within the district of Maine. Upon the trial of the cause in the district court of that district, a special verdict was found by the jury, upon which the same court gave judgment in favor of the defendant in error. This judgment was afterwards affirmed in the circuit court of Massachusetts, and is now before the supreme court for a final decision.

By the special verdict, it appears, that the claim of the United States to the land in controversy is under one *Nathaniel Dowse, who derived [*116 his title, if any, from an instrument stated at large in the same verdict, and executed in his favor, by one John Nelson. The instrument is without a seal, and was executed at the Island of Grenada, in the West Indies, before a notary-public, according to the mode prescribed, by the existing laws, to pass real estate in that colony; and both parties were, at that time residents therein.

By the laws of Massachusetts, no estate of freehold in land can be conveyed, unless by a deed or conveyance under the hand and seal of the party; and to perfect the title as against strangers, it is further requisite, that the deed should be acknowledged before a proper magistrate, and recorded in the registry of deeds for the county where the land lies.

The question presented for consideration, is, whether the *lex loci contractûs* or the *lex loci rei sitæ* is to govern, in the disposal of real estates.

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[1] Clark *v.* Graham, 6 Wheat. 577; Kerr *v.* Moon, 9 Id. 565; Watts *v.* Waddle, 6 Pet. 389; Perry Manufacturing Co. *v.* Brown, 2 W. & M. 450; Root *v.* Brotherson, 4 McLean 230.

The court entertain no doubt on the subject; and are clearly of opinion, that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. The judgment of the circuit court must, therefore, be affirmed.

Judgment affirmed.

The Exchange. (*a*)

The Schooner Exchange *v.* McFaddon and others.

International law.—Exemption of foreign vessel of war from domestic jurisdiction.

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.[1]

The Exchange, 4 Hall's L. J. 231, reversed.

This being a cause in which the sovereign right claimed by Napoleon, the reigning Emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney-General, ordered to a hearing, in preference to other causes which stood before it on the docket.

*117] *It was an appeal from the sentence of the Circuit Court of the United States for the district of Pennsylvania, which reversed the sentence of the district court, and ordered the vessel to be restored to the libellants.

The case was this: On the 24th of August 1811, John McFaddon and William Greetham, of the state of Maryland, filed their libel in the district court of the United States, for the district of Pennsylvania, against the schooner Exchange, setting forth that they were her sole owners, on the 27th of October 1809, when she sailed from Baltimore, bound to St. Sebastian, in Spain. That while lawfully and peaceably pursuing her voyage, she was, on the 30th of December 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their master and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her, remained unchanged and in full force. They, therefore, prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

Upon this libel, the usual process was issued, returnable on the 30th of August 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On the 6th of

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(*a*) February 24th, 1812. Present, all the judges.

[1] The Santissima Trinidad, 7 Wheat. 283. s. p. L'Invincible, 1 Id. 238; The Pizarro, 10 N. Y. Leg. Obs. 97.

September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared. On the 13th of September, a like proclamation was made, but no appearance was entered.

On the 20th of September, *Mr. Dallas*, the attorney *of the United States for the district of Pennsylvania, appeared, and (at the instance [*118 of the executive department of the government of the United States, as it was understood) filed a suggestion, to the following effect:

Protesting that he did not know, and did not admit the truth of the allegations contained in the libel, he suggested and gave the court to understand and be informed, that inasmuch as there existed between the United States of America and Napoleon, Emperor of France and King of Italy, &c., a state of peace and amity, the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, might freely enter the ports and harbors of the said United States, and at pleasure depart therefrom, without seizure, arrest, detention or molestation. That a certain public vessel described, and known as the Balaou, or vessel, No. 5, belonging to his said Imperial and Royal Majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22d of July 1811. That having entered the said port from necessity, and not voluntarily, having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of his said Imperial and Royal Majesty, when, on the 24th of August 1811, she was seized, arrested and detained in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent on the high seas, as prize of war, or otherwise; but that if the said public vessel, belonging to his said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is alleged (which, nevertheless, *the said attorney did not [*119 admit), the property of the libellants in the said vessel was seized and divested, and the same became vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular state of the United States, according to the decrees and laws of France, in such case provided. And the said attorney submitting, whether, in consideration of the premises, the court would take cognisance of the cause, respectfully prayed, that the court would be pleased to order and decree, that the process of attachment, theretofore issued, be quashed; that the libel be dismissed with costs; and that the said public vessel, her tackle, &c., belonging to his said Imperial and Royal Majesty, be released, &c. And the said attorney brought into court, the original commission of the said Sieur Begon, &c.

On the 27th of September 1811, the libellants filed their answer to the suggestion of the district attorney, to which they excepted, because it did

not appear to be made for, or on behalf, or at the instance of the United States, or any other body politic or person. They averred, that the schooner was not a public vessel, belonging to his Imperial and Royal Majesty, but was the private property of the libellants. They denied that she was compelled, by stress of weather, to enter the port of Philadelphia, or that she came otherwise than voluntarily; and that the property of the libellants in the vessel never was divested, nor vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms.

The district-attorney produced the affidavits of the Sieur Begon, and the French consul, verifying the commission of the captain, and stating the fact, that the public vessels of the Emperor of France never carried with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers. In the commission, it was stated, that the vessel was armed at Bayonne.

*120] On the 4th of October 1811, the district judge dismissed *the libel with costs, upon the ground, that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel. From this sentence, the libellants appealed to the circuit court, where it was reversed, on the 28th of October 1811.[1] From this sentence of reversal, the district-attorney appealed to this court.

Dallas, Attorney of the United States for the district of Pennsylvania, contended, 1. That this is not a case of admiralty and maritime jurisdiction. 2. That the public character of the vessel is sufficiently proved; and 3. That being a public national vessel of France, she is not liable to the ordinary judicial process of this country.

1. It ought to appear upon the proceedings themselves, that this is a case of admiralty and maritime jurisdiction. In England, the jurisdiction of the court of admiralty comprehends three branches. 1. The criminal jurisdiction, for the punishment of offences committed upon the high seas, or submitted to its cognisance by the statute law. 2. The prize jurisdiction, as to captures as prize of war, on the high seas. 3. The instance court, which has jurisdiction of torts committed at sea, in which case, locality is essential; and of maritime contracts, which are also, perhaps, local.

The district courts of the United States have the same three branches *121] of jurisdiction, but the jurisdiction *must be shown in the proceedings, together with the authority to seize within our waters. Laws United States, 1 U. S. Stat. 76, 78, §§ 9, 11; Ibid. 607, § 91; 3 Dall. 6.

But the libel does not bring the case within either of those branches of jurisdiction. The libel simply states that while she was lawfully and peaceably pursuing her voyage, she was forcibly seized under the decrees of Napoleon, Emperor of the French. It does not allege any crime upon the high seas; it does not state the seizure to be as prize of war; it does not allege a tort committed upon the high seas, nor any maritime contract. The admiralty has no jurisdiction upon the mere possession of the vessel in our

[1] For the opinion of Judge WASHINGTON, reversing the sentence of the district court, see 4 Hall's L. J. 232.

harbors, unconnected with a tort on the high seas. Nor upon a tort committed here, or in a foreign country; nor upon a mere question of title. 2 Browne, Civ. & Adm. Law 110–17. There is not a single instance of admiralty jurisdiction exercised in this country, without possession, coupled with a maritime tort.

2. As to the proof of the public character of the vessel. The flag, the public commission, and the possession of the officer, have always been sufficient evidence, at sea or in port—and for fiscal or executive purposes. Why should it not be sufficient evidence in a judicial proceeding? No public vessel ever carries any other documents; no other proof of property in the sovereign is ever required. It is acknowledged in all our treaties. Even the common law requires only the best evidence which the nature of the case admits. In the case of *Mr. Pichon*, 4 Dall. 321, no other evidence of his public character was produced or required, than a letter from Talleyrand, the French minister for foreign affairs. Upon that evidence, he was discharged.

Harper, for the appellees, admitted that the commission, the flag, and the possession, were sufficient evidence of the public character of the vessel.

**Dallas.*—The principal question then is, whether a public national vessel of France, coming into the United States to repair, is liable to be arrested upon the claim of title by an individual? This vessel was seized by a sovereign, in virtue of his sovereign prerogative. In such a case, the claim of the individual merges in the right of the offended sovereign. The size of the vessel can make no difference. Upon principle, the Royal George, belonging to his Britannic majesty is as liable to this process, as the Balaou No. 5. Suppose, a British frigate lying at New York, and one of her seamen should escape and libel her for his wages—the same argument which will support this case would support that. [*122

This was one of the seizures under the Rambouillet decree. We do not justify that decree, but we say, that whenever the act is done by a sovereign, in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war, according to its importance.

It is proved, that she arrived in distress; that she had been sent on a distant mission with a military cargo. No assent to submit to the ordinary jurisdiction of the country, can be presumed, in such a case as that. She had committed no offence while here; she did not come to trade. There was no implied waiver of the peculiar immunities of a public vessel. The right of free passage was open to her, as it was to the public vessels of every other nation, except England, whose ships were expressly excluded by a particular statute.

But, put the question generally, can a vessel of war, for any cause, be attached at the suit of an individual. In doubtful cases, the argument *ab inconvenienti*, ought to have great weight. The jurisdiction now claimed would extend to all men, to all suits, to torts and to contracts; to every vessel seized in a foreign port and taken into the public service. Impressed seamen might libel a whole British squadron for their wages. The peace of our ports and harbors would be at the mercy of individuals. It would be impossible to carry it into practice. The sentence of the court could not

be executed. It is beautiful in theory, to exclaim "*fiat *justitia, ruat cælum*, but justice is to be administered with a due regard to the law of nations, and to the rights of other sovereigns. When an individual receives an injury from a foreign sovereign, he must complain to his own government, who will make it a matter of negotiation, and if justice be refused, may grant reprisals.

Our acts of congress never subject foreign public vessels to forfeiture. The non-intercourse act (as it is called) forfeits private, but not public British vessels; the public vessels are forbidden to come, if they do come, you order them to depart. If they refuse, and you are not strong enough to drive them away, you prohibit supplies to them; but you do not subject them to forfeiture.

We do not, however, deny the right of a nation to change the public law as to foreign nations, upon giving notice. We may forbid the entrance of their public ships, and punish the breach of this prohibition by forfeiture; nor do we deny the obligation of a foreign sovereign to conform to pre-existing laws, as to offences, and as to the acquisition of property; nor his liability for his private debts and contracts. Vattel 426, lib. 2, c. 18, § 340, 344, 346. So, if a sovereign descend from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So, if he charter a vessel, the cargo is liable for the freight.

But in the present case, he appears in his sovereign character; the commander of the national vessel exercises a part of his sovereign power; and in such a case, no consent to submit to the ordinary judicial tribunals of the country can be implied. Such implied consent must depend on the act, on the person, and on the subject.

Such consent is implied, where the municipal law, previously provides and changes the law of nations; where it regulates trade; where it defines and punishes crimes; and where it fixes the tenure of property, real or personal. But it cannot be implied, where the law of nations is unchanged; nor where the implication is destructive of the independence, the equality and dignity of the sovereign. Such a jurisdiction is not given by the con-
*124] stitution of the United States, nor *is it mentioned in the judiciary acts. If so important a jurisdiction was intended to be given, it would certainly have been mentioned and regulated by law. It cannot be derived from any practical construction of our laws. In 1794, the public vessels were not seized, but ordered away. The impost law (1 U. S. Stat. 651, § 31), excepts public vessels from the obligation to make report and entry. The act of March 3d, 1805, § 4 (2 U. S. Stat. 341), for the preservation of peace in our ports and harbors, gives authority to the president to prohibit the foreign armed vessels from entering our ports, and to order those to depart which may have entered, and if they refuse to depart, to prohibit all intercourse with them, and to drive them away; but not to seize them. Public vessels were excepted from the embargo, in 1807 and 1808. (2 U. S. Stat. 453, § 2; Ibid. § 1–3.)

The judicial construction of the law, by the courts in Pennsylvania, was, that a state could not be subjected to judicial process, unless by the words of the constitution of the United States: and many sound minds were of opinion, that even those did not give the jurisdiction; and when it was

finally decided in the supreme court of the United States that a suit might be maintained against a state in the federal courts, the states amended the constitution so as not to admit of that construction.

The case of *Nathan* v. *Commonwealth of Virginia*, 4 Dall. 77, was a foreign attachment against some military stores belonging to the state of Virginia: the object of which was to compel an appearance; and the court refused to compel the sheriff to return the writ; being of opinion, that Virginia, being a sovereign state, could not be compelled to appear in a court in Pennsylvania. The present process against the vessel is to compel an appearance. It is true, the master may give security; but to compel him to do so, is to bring the Emperor into court, and to subject him, in his sovereign character, to the jurisdiction of the courts of the United States.

The Cassius (in the case of *United States* v. *Judge Peters*, *3 Dall. 121, and *Ketland qui tam* v. *The Cassius*, 2 Ibid. 365) had violated a [*125 municipal law of the United States; yet, being a public vessel of France, the government of the United States directed the attorney-general to file a suggestion, stating the character of the vessel, which, it was supposed, would have taken the case out of the jurisdiction of the court. But the case went off upon another objection to the jurisdiction.

There is, then, no municipal law, nor any practical construction by the executive, the legislative or the judicial department of our government, which authorizes the jurisdiction now claimed; we can only have recourse to the law of nations, to try the validity of that claim. That law requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction, 2 Rutherforth 163-70. There is no express assent of a foreign sovereign to the jurisdiction over his prerogative. The distinction is between his private acts, and his acts as sovereign, and between his private and his public property. Vatt. lib. 2, p. 343, c. 14, § 213, 216; 2 Ruth. 536; Vatt. 707, lib. 4, c. 7, § 108; Martens 181; Ruth. 54; Galliani, lib. 1, c. 5.

The cases of implied assent are: 1. Trade, when his goods are liable for freight, or liable to his factor for advances, &c., or liable to pay duties: in all which cases, there is a specific lien on the goods. 2. In case he acquire property in the country, whether real or personal. 3. In case of offences against existing laws, such as entering, when prohibited, or breaking the peace, when in port. But the law of nations excludes the implication and presumption in every case where the sovereignty is concerned: as 1. In the case of an ambassador; 2. Of the sovereign himself; 3. The passing of his armies through the country, in which case, he retains all his rights of sovereignty and jurisdiction over his army; 4. In case of his navy passing through our waters. The British government, although it authorizes the search of private ships for their seamen, disclaims the right to search ships of war, even on the ocean, the place of common jurisdiction.

Bynkershoek, p. 39, c. 4, for the first time, asserts a *principle not [*126 recognised by any prior writer, viz., that the goods of the sovereign, however acquired, whether of a public or private nature, are liable to process to compel an appearance. But he does not cite one adjudged case, nor one writer upon the law of nations to support him. The only case he cites is from Huber, and that denies the jurisdiction. The *Exima* which he cites is only a kind of chronicle or journal, like the annual register. It is a book

of no authority. The case of the Queen of Spain's ship, arrested at Flushing, and the Queen of Bohemia's, in 1654, which were released by the states general, are against him. His book clearly shows that the practice of nations is against his doctrine. It is evident, that he alludes to a practice of citation in the states of Holland, or among the members of the Germanic body The general principle is against him. He is opposed by other writers, and supported by none. He is opposed by the practice of nations, and supported by no judicial decision.

If the courts of the United States should exercise such a jurisdiction, it will amount to a judicial declaration of war. There is already a case before this court, in which it will be called upon to decide whether St. Domingo be an independent nation ; and another, in which it is to determine, whether the crown of Spain belongs to Ferdinand VII. or Joseph Bonaparte. If this court is to exercise jurisdiction upon subjects of this nature, it will absorb all the functions of government, and leave nothing for the legislative or executive departments to perform.

Hare, contrà.—The position which we are to meet, is understood to be this : That the possession of property by a foreign sovereign, without the limits of his jurisdiction, and within the limits of the United States, precludes all inquiry into the title of the thing within his possession.

This principle, we say, is unfounded. The general rule is, that all sove-
*127] reignty is strictly local, and cannot *be exercised beyond the territorial limits. This flows from the nature of sovereignty, which being supreme power, cannot exist where it is not supreme. *Rose* v. *Himely*, 4 Cr. 279. There is no instance of its actual extra-territorial operation, except where, by fiction of law, it is supposed to be territorial ; or, at most, where it exclusively operates upon its own subjects. The household of an ambassador is supposed to be within the territorial jurisdiction of his sovereign. Vattel 448 ; Martens 228, 230. In other respects, the rights of an ambassador are his own rights, founded in considerations appertaining exclusively to the ambassadorial character. In the vessels belonging either to his nation or to himself, he may exercise on the high seas, a limited jurisdiction. The same principle operates here. The ship is considered as part of his territory. But in this case, his jurisdiction extends over his own subjects only. His armies abroad are also subject to his jurisdiction, but this is the result of positive compact, without which they cannot go abroad.

The general principle then being in our favor, our adversaries must show the exception. Whatever is within the extent of a country, is within the authority of its sovereign ; and if any dispute arises concerning the effects within the country, or passing through it, it must be decided by the judge of the place. Vatt. 446. Unless the case now before the court be an exception, this rule is universal. It grows out of the first principles of government, which, in giving security, assumes jurisdiction. The general authority over the property of foreigners is as absolute as over the property of subjects. The arguments in favor of the exception are drawn rather from inconvenience than from principle, but cannot be supported upon either ground.

*128] As it regards the private property of the sovereign, *why not assume jurisdiction ? Because, it is said, it would violate his dignity,

inasmuch as it is to be presumed, that he will never do wrong. Such a presumption, contrary to the fact, may be calculated to give him weight at home, but can be of no use abroad. It is not universally adopted, even at home. The king of England may be sued by *monstrans de droit*. States may prescribe the mode in which they shall be sued. This is a matter of internal regulation. Will you then respect a foreign sovereign more than his own subjects are bound to respect him?

If the sovereign of any free country should unlawfully seize the goods of one of his subjects, he would be liable in his private capacity like any other person. As regards the public property of a foreign sovereign, why should there be any distinction, where the only object of the suit is merely to ascertain the right? His public service may suffer, but will you respect that service, at the expense of the rights of your own citizens?

But it is said, if you arrest this vessel, you may arrest a fleet. This is true—and when a foreign fleet shall have been created by the plunder of our own citizens, let it be arrested. But the danger of such a case is remote and improbable. The libel must be supported by oath and probable cause. A judge would not hastily direct process against a fleet.

But consider the inconveniencies on the other side. Your own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured. Your government not redressing their wrongs, but giving a sanction to their spoliators. The argument of our opponents allows no remedy to the citizen, although dispossessed of his property, within the limits of our own territory. Although the ship should have been seized in the Delaware, and converted into a public armed vessel, we are supposed to have no redress. It does not appear upon the face of the present proceedings, that this was not the case.

*The argument of inconvenience is equally applicable to cases in which our own laws authorize process to issue. Thus, under the act [*129 of June 5th, 1794, § 3 (1 U. S. Stat. 383), if any ship shall be armed in any of the waters of the United States, with intent to be employed in the service of any foreign state, to cruise against the subjects of another foreign state, with whom the United States are at peace, such ship shall be forfeited. So also, in case a foreign armed ship should be found smuggling. In cases of *tort*, then, there is a remedy against the public armed ship of a foreign sovereign. It is obvious also, that there must be such remedy in cases of contract. As, in the case of material-men for repairs, bottomry and mortgage, wreck and pledges. If he may pledge, the pledge may be proceeded against. If, then, there are cases both of *tort* and contract, in which there is a remedy, why not in this? It is in vain to urge, against the right of proceeding, the inconveniences that may result from the mode.

On principle, then, there is no foundation for the exception. Nor is it warranted by authority. Vattel, lib. 2, § 83, says, "Many sovereigns have fiefs, and other properties, in the lands of another prince; they, therefore, possess them in the manner of other individuals." Thus, the kings of England did homage for the lands they held in France. Martens (p. 85, 182, book 5, § 9) says, that the supreme police extends over the property of a sovereign. The cases of *Glass v. Sloop Betsey*, 3 Dall. 6; *Rose v. Himely*, 4 Cr. 241; and *Hudson v. Guestier*, Ibid. 293; *The Cosmopolite*, 3 Rob. 269,

and the authority of Azuni 245, 246, affirm the right, in certain cases, of examining the legality of the prizes of foreign sovereigns.

Prizes are made for account of the sovereign. In England, they are distributed according to the prize act; but if made by a non-commissioned vessel, they are *droits* of the admiralty. *The possession of the captors is the possession of the sovereign. In these cases, therefore, the right of the sovereign to the thing in his possession is subjected to judicial investigation. Bynkershoek upon Ambassadors, 40–46, expressly states, that the property of the sovereign, public and private, is subject to the authority of the judge of the place. 2 Rutherforth 476, 382. The case of the *Swedish convoy* is also an authority to the same effect. The constitution of the United States, Art III., § 2, expressly gives the courts of the United States jurisdiction in cases between citizens and foreign states.

*130]

The cases cited on the other side refer only to suits brought directly against a sovereign, or to compel his appearance. But such cases are wholly inapplicable, because not brought in consequence of your jurisdiction over the thing within your territory, but to create a jurisdiction over the person which is without it.

In Massachusetts, suits between foreigners, by process of attachment, cannot be sustained; but the right to the thing in dispute, whether between foreigners or others, will be ascertained there.

You cannot draw to your jurisdiction those who owe you neither a local nor an absolute allegiance; but you may inquire into the validity of every claim to a thing within your jurisdiction. This doctrine is peculiarly applicable to sovereigns: In the case of *Olmstead* v. *Ritenhouse's execntors* (5 Cr. 115, under the name of *United States* v. *Judge Peters*), the state of Pennsylvania contended, that the district court had not jurisdiction, because she, as a sovereign state, claimed the money in the hands of the executors, and was really the party interested; but this court decided, that, as the state was not ostensibly a party, and as the thing was within the jurisdiction of the court, the district court should proceed to enforce its sentence; thereby clearly marking the distinction between a suit against a sovereign, and a process against a thing claimed by a sovereign.

*131]

*_Harper_, on the same side.—Two questions are raised in this case. 1. Whether this be a case of admiralty jurisdiction? and 2. Whether a judicial remedy can be given for a wrong done by a foreign sovereign?

1. The libel states the seizure to have been made "during the voyage;" and the answer to the claim denies that she was seized in port; it follows, therefore, that she must have been seized upon the high seas.

2. As to the general power to interfere in case of an illegal seizure made by a foreign sovereign. Sovereignty is absolute and universal. This is the general rule. But it is contended, that there is an exception in four cases: 1. As to the person of a foreign sovereign: 2. As to his ambassadors: 3. As to his armies: and 4. As to his property: which last is said to be an inference from the three former cases. But the three former cases are all founded upon consent, and the latter is not; consequently, there can be no analogy between them. Besides, these cases are not exceptions to the sove-

reignty, but merely exemptions from the ordinary judicial process, by consent of the sovereign. If a foreign sovereign comes secretly into the country, he is not protected from ordinary process; but when he comes openly, in his character as a sovereign, an assent is implied, and he comes with all the immunities incident to his dignity, according to the common understanding of the word. All the cases supposed to be against us are founded upon consent. Bynkershoek also places it upon the ground of consent, and he is supported by Barbeyrac and Galliani.

*The positive authorities against the exemption of the property of the sovereign from the ordinary judicial process, are Bynkershoek 25, Martens 182, and 2 Rutherforth 476. The constitution of the United States takes for granted the suability of the states, and merely provides the means of carrying the principle into effect. The exemption of the sovereign himself, his ambassador and his armies, depends upon particular reasons which do not apply to his property, nor to his ships of war. [*132

Pinkney, Attorney-General, in reply.—When wrongs are inflicted by one nation upon another, in tempestuous times, they cannot be redressed by the judicial department. Its power cannot extend beyond the territorial jurisdiction. However unjust a confiscation may be, a judicial condemnation closes the judicial eye upon its enormity. The right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.

The simple fact in this case is, that an individual is seeking, in the ordinary course of justice, redress against the act of a foreign sovereign. But the rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it.

An ambassador is unquestionably exempt from the ordinary jurisdiction; but if he commit violence, it may be lawfully repelled by the injured individual; so, if he commit public violence, he may be opposed by the nation. This right arises from the necessity of the case. But as to ordinary cases, he is to be referred to the tribunals of his own country. In cases where those tribunals cannot interfere to prevent the injury, the jurisdiction of the country, for that purpose, may interfere; but when the act is done, and prevention is too late, he must be referred to his own tribunals. We claim for this vessel, an immunity from the ordinary jurisdiction, as extensive as that of an ambassador, *or of the sovereign himself; but no further. If she attempt violence, she may be restrained. [*133

The constitution of the United States decides nothing; it only provides a tribunal, if a case can by possibility exist. The statutes of the United States, are in hostility to the idea of jurisdiction. Private vessels are made liable to confiscation, but public vessels are to be driven away. The remedy is by opposing sovereign to sovereign, not by subjecting him to the ordinary jurisdiction.

The jurisdiction over things and persons, is the same in substance. The arrest of the thing is to obtain jurisdiction over the person. A distinction is taken between civil and territorial jurisdiction, civil jurisdiction is referred to consent; it binds all who have consented. Territorial jurisdiction goes further; it operates upon those who have not assented—such as aliens;

but the alien must do something; he must come within the territory, whereby he submits to the jurisdiction; so if, he purchase property within the country, or send property into the territory, in ordinary cases, his assent is implied. But if the property of an alien be forcibly or fraudulently carried within the territory, no consent is implied, and consequently, there is no ground for jurisdiction.

If a foreign sovereign be found in the territory, he is not liable to the ordinary jurisdiction. Vattel places his exemption on the ground, that he did not intend to submit to it; Rutherforth, on the ground of the assent of the other sovereign.

The case of the ambassador is precisely in point—his immunities depend upon the implied assent. The reason is, that he may be independent. Grotius places it upon the conventional, and Rutherforth, upon the natural law of nations.

So, in the case of the passage of troops through a neutral territory, the permission to pass, implies a compact, that they should enjoy all necessary immunities. *From the nature of the case, they cannot be subject to the ordinary jurisdiction of the country, through which they pass. To suffer one of the soldiers to be arrested for a debt due to a citizen of that country, would be inconsistent with the permission to pass.

*134]

Sovereigns are equal. It is the duty of a sovereign, not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his own rights. He acknowledges no superior, but God alone. To his equals, he shows respect, but not submission.

We are asked, whence we infer the immunity of the public armed vessel of a sovereign? We answer, from the nature of sovereignty, and from the universal practice of nations, from the time of Tyre and Sidon.

This vessel is not the ordinary property of a sovereign. It is his national property—a public ship of war, duly commissioned. There is no difference in principle between such a vessel, and an army passing through the territory. She has the same rights. She has your permission to pass, and you are bound to give her all necessary immunities. You gave her an asylum as the property of a great and powerful nation, you must not suffer her to be thereby entrapped in the fangs of a municipal court. She was charged with public dispatches; she visited your ports *in itinere*. It was a deflexion merely, that she might more effectually perform her voyage. It was a mere passage through your jurisdiction. Her commander had an unquestionable right to exclusive jurisdiction over her crew. In the eye of the law of nations, she was at home, whether in your ports, or upon the high seas. The exemption from delay is more necessary than the exemption from final condemnation.

By the usage of states, no other evidence is required of the property of a sovereign, than his commission and flag. This is strong evidence, that such property is not subject to the ordinary jurisdiction of the country. Otherwise, other documents would be required and would be furnished. No others are required at sea, nor on shore. This usage of nations is universally known, and as the vessel sailed upon the faith of such a usage, *good faith requires that you should receive the flag and commission as evidence of the character of the vessel.

*135]

This court will not decide this case upon the authority of the slovenly

treatise of Bynkershoek, or the ravings of that sciolist Martens, but upon the broad principles of national law, and national independence. One would as soon consult Gibbons or Hobbs, for the doctrines of our holy religion, as Martens for the principles of the law of nations. Bynkershoek, upon this point, draws his authorities from Dutch courts, and Dutch jurists. Not one of his cases was adjudged, except that cited from Huber. And in one of the cases, the states-general requested that the vessel should be discharged, which had been arrested in Zealand, for a debt due from Spain, saying that they would write to the Queen of Spain, to pay her debts, or they would be obliged to issue letters of marque and reprisal; which was the proper course. The other cases were only abortive attempts to subject national property to the ordinary jurisdiction of the country.

The case of the *Swedish convoy* was upon the ground, that the convoy resisted by force the right of search. It was war *quoad hoc;* and the seizure was made as prize of war. But that case was never decided. In the case of *Glass* v. *The Sloop Betsey*, the privateer's commission was to capture the property of an enemy, but she had captured that of a friend. The court did not subject the privateer to their jurisdiction, but the prize which she had wrongfully made.

March 3d, 1812. All the judges being present, Marshall, Ch. J., delivered the opinion of the court, as follows:—This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States? The question has been considered with an earnest solicitude, that the decision may conform to those principles *of national and municipal law by which it ought to be regulated. In [*136 exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may,

in some instances, be tested by common usage, and by common opinion,
*137] growing out of that usage. *A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[1]

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory, with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation. Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and
*138] it is to avoid this subjection, *that the license has been obtained. The character to whom it is given, and the object for which it is granted equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be, because all sovereigns impliedly engage not to avail themseves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.[2]

2d. A second case, standing on the same principles with the first, is the

[1] By the law of nations, all independent powers stand upon an equality, as regards their rights and duties, whether relatively weak or powerful. Reid *v.* United States, Dev. Ct. Cl. 111; s. c. 3 Qu. L. J. 122.

[2] The chief executive of a foreign goverment, though he has ceased to be such, is not liable to suit, in this country, for an act done in the exercise of the sovereign power of such government. Hatch *v.* Baez, 7 Hun 596.

immunity which all civilized nations allow to foreign ministers. Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction, suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory: he is supposed to assent to it. This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction *which are admitted to [*139 attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be, because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining *the exclusive command and dis- [*140 position of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army? Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration, that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.[1]

We have seen, that a license to pass through a territory implies immunities not expressed, and it is material to inquire, why the license itself may not be presumed? It is obvious, that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act, not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these, that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper *conduct. It may, however, well be questioned, whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

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But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers, often, indeed, generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation, generally, or any particular ports, be closed against vessels of war, generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect, in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local juris-

[1] See Coleman *v.* Tennessee, 97 U. S. 515; Dow *v.* Johnson, 100 Id. 165.

diction which would be implied in a special license. If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the court, for distinguishing their case from that of vessels which enter by express assent.

*In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war? In this part of the subject, a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade. Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port, under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade, who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly, with much plausibility, if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted, that private ships entering without special license become subject to the local jurisdiction, it is demanded, on what authority an exception is made in favor of ships of war? [*142

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily, and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.[1] Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, *applies with full force to the exemption of ships of war in this. [*143

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed, that his sovereign

[1] If a vessel, engaged in a lawful voyage, be compelled by stress of weather, or other inevitable cause, to enter the harbor of a friendly nation, for temporary shelter, the enjoyment of such shelter being incident to the right of navigation, carries with it, over the vessel, and personal relations of those on board, the rights of the ocean, so far as to extend over it, for the time being, the protection of the laws of its own country. The Enterprize, Dec. Joint Com. 187; The Creole, Id. 241.

means to subject him to the authority of the prince to whom he is sent ; the latter, in receiving the minister, consents to admit him on the footing of independency ; and thus, there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege, to the extent in which it must have been understood to be asked.

To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory ; that this consent may be implied or expressed ; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act.

*144] *When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But in all respects different, is the situation of a public armed ship. She constitutes a part of the military force of her nation ; acts under the immediate and direct command of the sovereign ; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place ; but certainly, in practice, nations have

not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained, that the property of a foreign sovereign is not distinguishable by any legal exemption from the *property of an ordinary individual, and has [*145 quoted several cases, in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing, for a debt due from the King of Spain. In that case, the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships, would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered *as exempted by the consent of that power from [*146 its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed, as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion, which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that

the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar. In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title by which the Emperor holds this vessel. Every person, it is alleged, who is entitled to property
*147] brought within the jurisdiction of our courts, has a *right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is, therefore, said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognised by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court, in the case of the Exchange be reversed, and that of the district court, dismissing the libel, be affirmed.

Archibald Freeland *v.* Heron, Lenox & Company.

Account stated.

An account-current, sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and casts the burden of proof upon him who received and kept it without objection.[1]

This cause having been argued by *Winder*, for the appellant, and *P. B. Key*, for the appellees—

All the judges being present, Duval, Justice, delivered the opinion of
*148] the court as follows:—*This case comes up by appeal from the decree of the Circuit Court for the District of Virginia. The record presents the following state of facts:

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[1] Toland *v.* Sprague, 12 Pet. 300; Wiggins *v.* Barkham, 10 Wall. 129; Lockwood *v.* Thorne, 11 N. Y. 170; Sergeant *v.* Ewing, 30 Penn. St. 75; s. c. 36 Id. 156.

Freeland v. Heron.

A bill in equity was filed by Heron, Lenox & Company against Archibald Freeland, the appellant, in the circuit court, in the month of December 1798. It stated, that the company consisted of Nathaniel Heron, a subject of Great Britain, Samuel Lenox, also a subject of Great Britain, and James Freeland and William Gillin. That articles of copartnership between the said company and Archibald Freeland, of Virginia, were entered into, on the 15th of February 1789, to commence on the first day of April following, and to continue for five years, unless sooner dissolved by mutual consent. It was stipulated by the articles, that the business of the copartnership should be managed and carried on, in the town of Manchester, in Virginia, by Archibald Freeland, under the firm of James Freeland. That there should be no advance put on the goods furnished, but the charges and commission in Britain, and that all bounties, discounts and abatements which might be received, should be credited. The complainants, in their bill, further stated, that Archibald Freeland had the sole management of the affairs of the company, and the care and custody of the books and funds. That during the existence of the copartnership, Heron, Lenox & Company remitted to James & A. Freeland goods, wares and merchandise, to the amount of several thousand pounds sterling, and had received some payments, but that a considerable balance remained due to them on account of those remittances: that J. & A. Freeland had been frequently called on to account and pay the balance due. That the firm of J. & A. Freeland had been long since dissolved, by mutual consent; and that A. Freeland, retaining all the books and effects of the company, had refused to account and pay the balance due; and they prayed relief.

To this bill, A. Freeland filed his answer, admitting the copartnership as stated, and that the business of the concern had been conducted by him, at Manchester, until the 10th day of April 1795, when, by contract, the whole of the property of the copartnery was vested in *him, for his own use and benefit, upon the conditions therein expressed: and he insisted that upon a fair settlement of the accounts between the complainants and him, agreeable to the custom of merchants in London, as stipulated by the said contract, he owed nothing. [*149

It further appeared, that shipments of merchandise by Heron, Lenox & Company were made, from time to time, during the first four years of the concern, amounting in the whole to more than 19,000*l.* sterling, and that remittances were made by A. Freeland, in bills of exchange and country produce, during the same period, to a large amount; and that in the year 1793, the partnership was dissolved by mutual consent. A. Freeland continued to settle and liquidate the accounts of the firm, at Manchester; and in September 1796, wrote a letter to Freeland and Gillin, of which the following is an extract: "Your claim will be among the first of my debts that is paid—for the indulgence I have met with, I have to thank you, and mean to exert myself in order to pay off the whole as early as possible."

During the pendency of this suit in the circuit court, a cross-bill was filed by A. Freeland against Heron, Lenox & Company for discovery, which they answered, by denying the allegations in the bill, without disclosing the evidence sought for. No exception, however was taken to the answer.

An order passed, directing an account to be stated by a commissioner

appointed for the purpose, who reported that there was due from A. Freeland to Heron, Lenox & Company a balance of 1160*l.* 17*s.* 10*d.* sterling; to which report, various exceptions were taken by the defendant. On the 14th of December 1809, the cause came on to be heard in the circuit court, upon the bill, answer and exhibits, and the report of the commissioner, when it was adjudged, ordered and decreed, that the defendant, A. Freeland, pay to the plaintiffs, Heron, Lenox & Co., the sum reported to be due by the commissioner, at certain specified periods, with interest from the first day of
*150] June 1798, and costs: and the cross-bill was *dismissed, with costs. From which decree, the defendant appealed.

The exceptions taken to the report of the commissioner, in the court below, have been urged on the part of the appellant in this court, and may be comprised under the following heads:

1. That he has not given the defendant credit for all the bounties, drawbacks and duties which were allowed to the complainants on the purchase and shipment of the goods in England, which he ought to have allowed, agreeable to the contract of copartnership.

2. That the commissioner adopted a mode of calculating interest contrary to the agreement of the parties in April 1795, and prejudicial to the defendant.

3. That he allowed the complainants a commission on the sales of produce shipped directly to Cadiz, Lisbon and other places, where the property was consigned directly to persons residing in those several places; by them sold, and who charged the ordinary commission, and who remitted the proceeds to the complainants, in London.

4. That he has not given credit to the defendant for twenty-five hogsheads of tobacco. There was another exception, but as it was abandoned in the argument by the counsel, it will not be noticed.

The appellant claims a credit of 764*l.* 10*s.* 5*d.* sterling, on account of bounties, drawbacks and discounts: he has been allowed upwards of £300 sterling, and the appellees deny that he is entitled to more credit than is
*151] given, averring that more has not been received by *them. Each insists that the *onus probandi* ought to be thrown on his adversary.

It is proper to observe, that it appears by the record, that Heron, Lenox & Company furnished A. Freeland with an account-current, annually, for the first four years of their transactions, and that no objection was made to them. This circumstance, combined with the promise contained in A. Freeland's letter of September 1796, to pay the whole balance due, affords room for the application of a rule of the chancery court, and of merchants, to decide the controversy: it is this—When one merchant sends an account-current to another, residing in a different country, between whom there are mutual dealings, and he keeps it two years, without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least, so far as to cast the *onus probandi* on him.

With respect to the first, third and fourth exceptions, the record does not furnish the evidence necessary to enable the court to form a correct decision from the facts. The positive assertions of the appellant are denied by the appellees; and in proof, both are equally defective. The same rule is applicable to the third exception. After an acquiescence of several years, the account is considered as binding upon him, as he has failed to falsify

the allegations of the appellees, that the shipments of produce to Cadiz, Lisbon and Bordeaux were made pursuant to their orders and under their superintendence.

He has failed also to prove that he is entitled to the credit insisted on in his fourth exception. To be entitled to the credit, it is incumbent on him to prove that the twenty-five hogsheads are exclusive of the eighty hogsheads of tobacco shipped in the Mercury. The record affords no testimony whatever.

With respect to the second exception, it is considered by this court, that the circuit court erred in sustaining the report of the commissioner as to the manner of stating the account between the parties. The commissioner adoped the mode established in Virginia, and which it is believed prevails generally throughout the United States: but by the written agreement of the parties, in April 1795, it is stipulated, that the interest shall be charged agreeably to the custom and manner of settling accounts in London. In all other respects, the opinion of the circuit court is affirmed.

*It is, therefore, the opinion of this court, that the decree of the circuit court with respect to the second exception be reversed, [*152 and that the cause be remanded to the circuit court, in order that an account may be taken pursuant to the written agreement of the parties, agreeable to the custom and manner of settling accounts in London.

Welch *v.* Mandeville. (*a*)

Error.—Discontinuance.—Dominus litis.

The refusal of the court below to reinstate a cause, which has been legally dismissed, is no ground for a writ of error.

The nominal plaintiff may dismiss a suit, brought in his name, by a creditor, who has not an assignment of the cause of action.

Welch *v.* Mandeville, 1 Cr. C. C. 489, affirmed.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

An action of covenant was brought in that court, in the name of James Welsh, the plaintiff, but really for the use and by the sole order of Allen Prior, against Mandeville & Jameson, upon a contract for the sale of land to them by Welch. At the second term after an office-judgment had been entered against Welch, at the rules, the defendant Mandeville, who alone had been taken, produced to the clerk a release, under the seal of Welch, and an order from him to dismiss the suit; whereupon, the clerk made an entry on the minutes of the court, that the action was dismissed by agreement of the parties.

Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the court to reinstate it, and grounded his motion upon his own affidavit, and the papers mentioned therein. The affidavit stated, that in the autumn of 1789, Prior brought to the attorney three bills of exchange, drawn by Welch upon Mandeville & Jameson, for $2500 each, and an account, in the handwriting of Mandeville, acknowledging a balance

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(*a*) March 2d, 1812. Present, all the judges.

due to Welch, on the 31st of January 1798, of $8707.09, to be paid in the times and manner therein stated. Prior, at the same time, stated, that Welch was indebted to him, and that he had taken those bills in payment, which Mandeville & Jameson refused to accept, saying, that Welch
*153] *had deceived them in the sale of the lands. Prior left the papers with his attorney, and requested him to take the best measures to obtain the money from Mandeville & Jameson; whereupon, he brought two suits in the county court of Fairfax, in Virginia, the one was a suit at law, in the name of Welch against Mandeville & Jameson, founded upon their acknowledgment of the balance of account; the other was a chancery attachment, in the name of Prior, against Welch, as an absent debtor, and charging Mandeville & Jameson as garnishees.

Upon the trial of the suit at law, the defendants produced the original contract respecting the sale of land, whereupon, the attorney for Welch suffered a nonsuit, and having obtained an office copy of the contract, brought the present suit thereon, for the use of Prior, in the name of Welch, but without his directions, which was known to Mandeville. There had been no decision in the chancery attachment. The attorney never had any communication with Welch, upon the subject of this suit; but he had reason to believe that Welch knew of the suits in Fairfax county, and did not interfere with them. The attorney corresponded solely with Prior, on the subject of this suit, who had directed the application of the money, when recovered. That the attorney did not know of the release and order to dismiss the suit, until after the entry was made on the minutes, and that the suit had been dismissed, without his consent, or that of Prior, who had been at all the expense of the suit. That he had been informed, that Welch was in the prison-bounds, and that when Prior put the papers into his hands, he informed him, that it was his only prospect of receiving payment of the debt due to him by Welch.

Whereupon, the defendant Mandeville produced the affidavit of Welch, stating that he drew the bills in favor of Prior, merely for him to get them accepted, and negotiate them for account of Welch and as his agent. That Prior never gave value for them, and instead of being the creditor of Welch, was his debtor; and that he (Welch) never made a transfer or assignment of the contract with Mandeville & Jameson to Prior, or any other person.
*154] *The defendant Mandeville also produced a paper purporting to be the answer of Welch to the chancery attachment in Fairfax county (but which had not then been filed in the suit), which contained the substance of his affidavit; and also a letter written by Welch to Mandeville & Jameson, and sent by Prior at the time he presented the bills, corroborating the fact that Prior was only his agent in that business.

In this state of the case, the court below continued the motion to reinstate the cause, until the next term, to give an opportunity to Prior to produce evidence of an assignment of the contract, and of his right to bring suit upon it; at which term, he produced his own affidavit, stating that Welch was indebted to him upwards of $14,000, and that Welch gave him the three drafts on Mandeville & Jameson, for his (Prior's) own use and benefit, for and on account of a tract of land sold to Welch, and which Welch sold to another person. He produced also certain other documents, tending to corroborate his affidavit.

But the court below refused to reinstate the cause, and ordered it to be dismissed, according to the agreement of the parties; to which refusal, Allen Prior took a bill of exceptions, which the court signed.

Upon the opening of the case, MARSHALL, Ch. J., inquired, whether the question, whether a refusal to reinstate a cause, be ground of error, had not been decided by this court?

E. J. Lee, for plaintiff in error, said, that it had not been directly decided. The clause of the act of congress which gives this court appellate jurisdiction of causes decided in the circuit court for the district of Columbia (2 U. S. Stat. 106, § 8), differs from that clause of the general judiciary which gives this court its appellate jurisdiction in other cases. The expression of the former clause is "any final judgment, order or decree;" but the expression in the general law (1 U. S. Stat. 84, § 22), is "final judgments and decrees." The word order must mean something different from a judgment or a decree. It seems peculiarly applicable to a final order *dismissing a suit. This [*155
peculiar phraseology was relied upon to give jurisdiction to this court in the case of *Custiss* v. *Georgetown Turnpike Company*. (6 Cr. 233.)

Swann, contrà.—This case is within the principle of the cases already decided by this court—such as the refusal of the court below to grant a new trial, or to continue a cause. To reinstate a cause, after it has been once legally decided, is a matter of mere discretion.

E. J. Lee, in reply.—If the clerk had dismissed it at the rules, and the plaintiff had applied to the court, at the next succeeding term, to reinstate it, and the court had refused, it would not have been an exercise of discretion, but denial of right. It would have been error in law. *Newell* v. *Pidgeon*, 1 Str. 235.

C. Lee, on the same side.—There is a difference between dismissing a cause without trial, and refusing a new trial. It cannot be possible, that the court may dismiss every suit upon the docket, and yet the injured parties have no remedy; which would be the case, if the dismissal of a suit be matter of discretion which this court cannot control.

March 5th, 1812. All the judges being present, MARSHALL, Ch. J.—The majority of the court is of opinion, that the motion to reinstate the cause, was an application to the discretion of the court, and its refusal is not a ground for a writ of error.

After the court had delivered this opinion, it became a question, whether the writ of error should be dismissed, or the judgment affirmed.

After consideration of the case again, on the 7th of March, *MAR- [*156
SHALL, Ch. J., stated it to be the opinion of the court, that the judgment of the court below should be affirmed. The writ of error is to the judgment generally. The refusal to reinstate the cause being no error in law, the court can see no error in the principal judgment.

Judgment affirmed.

Marsteller and others *v.* McClean. (*a*)

Statute of limitations.

In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary, to show that all the plaintiffs were under a disability to sue.
Marsteller *v.* McClean, 1 Cr. C. C. 579, affirmed.

Error to the Circuit Court for the district of Columbia. This was an action of trespass for mesne profits, after a recovery in ejectment by the present plaintiffs against the present defendant, who pleaded the statute of limitations, to which the plaintiffs replied, in substance, that Christiana, the wife of one of the plaintiffs, and Elizabeth, the wife of another of the plaintiffs, in whose rights they sue, "were *femes covert*, when the cause of action accrued, and have ever since continued *femes covert;*" and "that Kitty Hunter," one of the plaintiffs, "was a *feme covert*," and that the other plaintiffs, in whose right the suit was brought, were infants, at the time the cause of action accrued, and also at the commencement of the action. To this replication, there was a general demurrer and joinder, on which the court below rendered judgment for the defendant.

C. Simms and *R. I. Taylor*, for the defendant in error, contended, 1. That the replication was bad, because it did not show that all the plaintiffs were entitled to sue, notwithstanding the statute of limitations. It did not state that Kitty Hunter continued a *feme covert*, until less than five *157] years next before the commencement of the *suit. If her disability of coverture was removed, five years before bringing the action, she was barred by the statute; and the replication, being joint, if bad as to one, is bad as to all.

2. That upon a demurrer the court will give judgment against that party who commits the first fault in pleading. The declaration states all the material allegations under a "whereas"—a *quod cum*. It is all recital, which is fatal, upon a general demurrer, or upon a motion in arrest of judgment.

The courts of Virginia follow the practice of the king's bench in England, where this exception has been always held good. *Amyon* v. *Shore*, 1 Str. 621; *Hord* v. *Dishman*, 2 Hen. & Munf., 595; *Moore's Adm'r* v. *Dauney*, 3 Ibid. 134; *Lomax* v. *Ford*, Ibid. 271; *Sym* v. *Griffith*, 4 Ibid. 277.

E. J. Lee, contrà.—The objection to the declaration is only an objection to form. The statute of *jeofails*, in Virginia, does not justify the cases cited from the court of appeals. Upon a demurrer to the replication, the defendant cannot take advantage of an error in the declaration.

As to the objection that the replication does not state that Kitty Hunter continued a *feme sole*, it is sufficient for us, if we show that some of the plaintiffs are not barred by the statute. Those who were under a disability are not to be prejudiced by the negligence of those who were not disabled. Joint-tenants cannot sue severally, they must join. 1 Tidd Prac. 7; *Cabel* v. *Vaughan*, 1 Saund. 294, note 4; 2 W. Bl. 1077. If the plea is bad as to some of the plaintiffs, it is bad as to all. 2 Saund. 49, 50; 1 Ibid. 28.

(*a*) March 2d, 1812. Present, all the judges.

Taylor, in reply.—The case of *Perry* v. *Jackson*, 4 T. R. 516, was the first in which it was decided that the statute runs against all the joint plaintiffs, if any of them were free from disability. In that case, it was replied, to the plea of limitations, that one of the plaintiffs was beyond seas, and the replication was adjudged bad.

**E. J. Lee.*—The declaration states that some of the plaintiffs are infants, the plea was no bar to those plaintiffs. In the case of *Perry* v. *Jackson*, the plaintiffs were partners in trade. It was a voluntary association ; but here the plaintiffs are joined by act of law. [*158

March 13th, 1812. All the judges being present, STORY, J., delivered the opinion of the court, as follows :—The plaintiffs in error brought an action of trespass *quare clausum fregit ;* to which the defendant in error pleaded the statute of limitations. The replication, in substance, states, that at the time when the cause of action accrued, Christiana, wife of one of the plaintiffs, and Elizabeth, wife of another of the plaintiffs, "were *femes covert*, and ever since have continued *femes covert*," and "that Kitty Hunter," one of the plaintiffs, "was a *feme covert ;*" and that the other plaintiffs, in whose right the suit was brought, at the time when the action accrued, and also at the commencement of the suit, were infants. To this replication, there is a general demurrer and joinder, on which the court below gave judgment for the defendant.

It is contended by the defendant, that this replication is insufficient, inasmuch as it does not allege that Kitty Hunter continued a *feme covert* until within five years, the time prescribed by the statute of limitations for the pursuit of this remedy. And it is further contended, that, even if the replication be good, yet the plaintiffs ought not to recover, because the declaration charges the trespass by way of recital—"for that *whereas*, the defendant, with force and arms," &c., and not by positive and direct allegations as the law requires. On this last exception, the court do not intend to give any opinion ; but unless the point were fully settled by authority, they would feel little inclination to sustain an objection which would seem directed more to the form than the merits of the action.

The objection to the replication deserves more consideration. It is certainly a rule of pleading, that a replication should of, itself, contain a full and complete answer to the bar, and that a joint plea which is bad, affects with its consequences all the parties joining in it. *In the present case, it may be true, that Kitty Hunter was a *feme covert* at the time when the action accrued ; and yet it may be equally true, that five years have elapsed since the disability was removed. It was, therefore, incumbent on the plaintiffs, not barely to show a coverture, but, by a proper averment, to show its continuance to a time within which it would have been a perfect avoidance of the bar. The objection then would have been fatal, in a several action brought by Kitty Hunter. [*159

But it is said, that though the replication be bad as to one of the plaintiffs, yet it can only bar her ; that the infancy or coverture of the other plaintiffs entitles them to a recovery in this action, for the injury done to them ; and that, as parceners and tenants in common are compellable to join in actions of this nature, it would be hard to affect them with the disability of a co-tenant. It seems, however, to be a settled rule, that all the plaintiffs

in a suit must be competent to sue, otherwise the action cannot be supported: and the case of *Perry* v. *Jackson*, cited from 4 Term Reports 516, decides, that a plea of the statute of limitations, which is good as to one partner, bars them both in a joint action. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.

It is, therefore, the opinion of the court, that as this answer to the objection fails, the replication must be adjudged insufficient, and of course, the bar must prevail.

Judgment affirmed.

Welch *v.* Lindo. (*a*)

Promissory notes.

The mere possession of a promissory note, by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee.

An indorsement "without recourse," is not evidence of money had and received by the indorser, to the use of the indorsee.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

*160] *Welch brought an action of *assumpsit* against Lindo, upon his indorsement of a promissory note. The declaration contained two counts. The 1st count stated, that one John Kercheval, on the 25th of August 1796, made and delivered a promissory note to Lindo, payable to his order, on demand, for $246, for value received. That Lindo, on the 24th of January 1800, indorsed it to Welch (the plaintiff), in these words, viz: "Pay the within to James Welch, or order, without any recourse whatever on A. Lindo." That on the 30th of April 1800, Welch assigned the note to a certain William Hodgsett, by writing on the back thereof, the following words, viz: "I assign the within to William Hodgsett," and signed his name thereto, and delivered it to Hodgsett. That Kercheval failed to pay the money to Hodgsett, on demand, whereupon, Hodgsett, as assignee of the note, brought suit against Kercheval, the maker thereof, in the circuit court of Woodford county, in the state of Kentucky; in which suit Kercheval pleaded that he had paid the debt to Lindo; upon which plea, issue was joined, and the jury found a general verdict thereupon, for the defendant, Kercheval, upon which the court rendered a judgment, which still remains in full force; by reason of which premises, the plaintiff (Welch) became liable to pay to Hodgsett the $246, with interest, from the time the suit was brought (viz., the 11th of June 1803), until the 2d of November 1804, the time when he paid the same to Hodgsett, and the costs of that suit, amounting to $11.72, and did pay the same; of all which premises, the defendant had notice, and by reason whereof, he became liable to pay the said $246, with interest on the same, and the said $11.72, being the costs as aforesaid; and being so liable, the defendant, in consideration thereof, afterwards, &c., undertook, &c., to pay the same sum to the plaintiff, &c. The 2d count was for money had and received to the plaintiff's use.

(*a*) March 2d, 1812. Present, all the judges.

Upon the issue of *non assumpsit*, there was a verdict in the court below, for the plaintiff, on the first count, and for the defendent, on the second count, but the judgment on the first count was arrested, and judgment was entered for the defendant.

*Upon the trial, the plaintiff took a bill of exceptions, which [*161 stated, that he offered in evidence, a duly authenticated copy of the record of the circuit court of Woodford county, in the suit of Hodgsett against Kercheval, which was inserted in the bill of exceptions; and produced the original promissory note, with its indorsements, and proved the handwriting of the defendant, Lindo, to his indorsement, and offered no other evidence; whereupon, the defendant's counsel, prayed the court to instruct the jury, that the evidence, so offered and produced, was not of itself competent to enable the plaintiff to maintain his action; and the court decided, that it was not competent to enable the plaintiff to recover upon the second count, but the judges were divided in opinion, whether the same was competent to support the first count; and therefore, refused to give the instruction as prayed. To the opinion, that the evidence was not competent to support the action upon the count for money had and received, the plaintiff excepted. The motion in arrest of judgment, was grounded upon the general insufficiency of the first count.

E. J. Lee, for plaintiff in error.—1. There was sufficient evidence *primâ facie*, to support the count for money had and received. The indorsement of the note was evidence of money had and received, and the record showed, that the consideration for which it was received had failed: and where a man pays money upon a consideration which fails, he may recover it back by the action for money had and received. 1 Esp. N. P. 3, 4; Doug. 696; Chitty 190, 123–5; 3 Cranch 318; 2 Burr. 1226; *Green* v. *Hart*, 1 Johns. 590; *Russel* v. *Ball*, 2 Ibid. 52; 2 Burr. 1005, 1008, 1010, 1011.

2. The first count shows a good cause of action. It was not necessary to aver fraud; but if it was, the want of such an averment is cured by the verdict; for a verdict helps everything which is necessary to be proved upon the trial, and without proof of which, no verdict ought to have been given for the plaintiff. Carth. 389; 10 Mod. 300; 2 Vin. Abr. 396, W, a, and *b*.

**Swann* and *Jones*, contrà.—1. The evidence was insufficient, [*162 even if it had been a common indorsement. The note having been assigned by the plaintiff, to Hodgsett, it did not appear but that the right of action was still in the latter; but Lindo, having expressly stipulated in his indorsement, that he would not be liable, cannot be made liable by an implied *assumpsit*.

2. The first count was bad, because, 1st. it did not aver any consideration for the indorsement: 2d. The defendant expressly excluded his liability: 3d. No fraud is averred: and 4th. There was no averment of a re-assignment of the note.

E. J. Lee, in reply.—The possession of the note by the plaintiff, was evidence, that he had repaid the money to Hodgsett. A re-assignment of the note would have made Welch a remote assignee, and he could not have

maintained a suit at law against Lindo. Lindo, by implication, warranted that the money was due from Kercheval, as every vendor warrants his title. The record between Hodgsett and Kercheval, shows fraud in Lindo.

March 9th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the following opinion of the court :—This was an action brought by the plaintiff against the defendant, in the circuit court for the county of Alexandria. The declaration contained two counts. The first was special, and the second for money had and received, by the defendant to the plaintiff's use.

At the trial of the cause, the plaintiff gave in evidence, the record of the proceedings in a court in the state of Kentucky, in a cause in which William Hodgsett, assignee of James Welch, who was assignee of Abraham Lindo, was plaintiff, and John Kercheval was defendant. This suit was instituted on a promissory note. The defendant pleaded payment to Lindo. Issue *163] *was joined on this plea, and a verdict was found for the defendant. The plaintiff also produced the original note, with the indorsements thereon, the last of which was an assignment made by him to Hodgsett. On the prayer of the defendant, the court decided, that this evidence was not, in itself, sufficient to support the action on the second count, and to this opinion, the counsel for the plaintiff excepted.

The testimony offered by the plaintiff, was certainly incompetent, of itself, to prove that the defendant had received money to his use. The mere possession of a note, which he had assigned to another, could not, while that assignment remained, be evidence that the note was his property. Some re-assignment or receipt from the last assignee was necessary, while the indorsements remained to prove that the title against the prior indorser was in him, and that he had paid a sum of money which gave him a claim on that indorser. And if the record of the state of Kentucky could prove that Lindo had received the money due upon the note, it would not prove that he had received it to the use of the plaintiff. Nor, under this indorsement, which is an assignment of the note, without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid. There is, then, no error, in the direction given by the circuit court.

On the first count, there was a verdict for the plaintiff, but judgment was arrested, because that count was insufficient in law. This count states, that a promissory note was made by John Kercheval, payable to Abraham Lindo ; that Lindo indorsed that note to the plaintiff, in these words, "pay the within to James Welch, or order, without any recourse whatever on A. Lindo ;" that the plaintiff indorsed the said note to William Hodgsett, who instituted a suit thereon, in which the said Kercheval pleaded, that he had paid the debt to Abraham Lindo. A verdict was found for the defendant, *164] on which a judgment *was rendered, which remains in full force. By these proceedings, the plaintiff became liable to pay the said Hodgsett the amount of the said note and costs of suit, which he had actually paid. The declaration then proceeds to state, that, by reason of the premises, the defendant, Abraham Lindo, became liable to pay the plaintiff, the amount of the said note and costs of suit, and, being so liable, he assumed, &c.

Under the mere assignment from Lindo to Welch, it is clear, that this suit is not sustainable; because it is a part of the contract, that Lindo shall not be liable under his indorsement. The count is also defective, in not stating that the indorsement was made on a valuable consideration, and also in not averring that Lindo had actually received the money for which the note was given. These are substantial faults, which are not cured by a verdict. The declaration presents a case in which there was no liability on the part of the defendant, to the plaintiff, which can sustain the *assumpsit* found by the verdict. There is no error, and the judgment is affirmed.

Judgment affirmed.

State of New Jersey *v.* Wilson.

Constitutional law.—Obligation of contracts.

A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act—such repealing act being void, under that clause of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts.[1]

State *v.* Wilson, 1 Pennington 300, reversed.

This case was submitted to this court, upon a statement of facts, without argument.

March 3d, 1812. All the judges being present, Marshall, Ch. J., delivered the opinion of the court, as follows:—This is a writ of error to a judgment rendered in the court of last resort in the state of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the constitution of the United States. *The case appears to be this: [*165

The remnant of the tribe of Delaware Indians, previous to the 20th February 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose, a convention was held, in February 1758, between the Indians, and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed; release their claim to all others; and to appoint certain chiefs to treat with commissioners on the part of the government, for the final extinguishment of their whole claim.

On the 9th of August 1758, the Indian deputies met the commissioners, and delivered to them a proposition reduced to writing: the basis of which was, that the government should purchase a tract of land on which they might reside, in consideration of which they would release their claim to all other lands in New Jersey, south of the river Rariton. This proposition appears to have been assented to by the commissioners; and the legislature, on the 12th of August 1758, passed an act to give effect to this agreement.

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[1] S. P. State Bank *v.* Knoop, 16 How. 369; Ohio Life Ins. and Trust Co. *v.* Debolt, Id. 416; Dodge *v.* Woolsey, 18 Id. 331; Mechanics' and Traders' Bank *v.* Debolt, Id. 380; Mechanics' and Traders' Bank *v.* Thomas, Id. 384; Jefferson Branch Bank *v.* Skelly, 1 Black 436; Franklin Branch Bank *v.* Ohio, Id. 374; Wright *v.* Sill, 2 Id. 544; McGee *v.* Mathis, 4 Wall. 143; Home of the Friendless *v.* Rouse, 8 Id. 430.

This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid, shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding." In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them, until some time in the year 1801, when, having become desirous of *166] migrating from *the state of New Jersey, and of joining their brethren at Stockbridge, in the state of New York, they applied for, and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that state. This act contains no expression in any manner respecting the privilege of exemption from taxation, which was annexed to those lands by the act under which they were purchased and settled on the Indians. In 1803, the commissioners under the last-recited act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October 1804, the legislature passed an act repealing that section of the act of August 1758, which exempts the lands therein mentioned from taxes: the lands were then assessed, and the taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts, in the manner prescribed by the laws of New Jersey, and in the highest court of the state, the validity of the repealing act was affirmed, and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the act of 1804 violate the constitution of the United States.

The constitution of the United States declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the case of *Fletcher* v. *Peck*, it was decided in this court, on solemn argument and much deliberation, that this provision of the constitution extends to contracts to which a state is a party, as well as to contracts between individuals. The question then is narrowed to the inquiry whether, in the case stated, a contract existed? and whether that contract is violated by the act of 1804?

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipu- *167] lated, the *consideration agreed upon, which is a tract of land, with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract, clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage, that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted, but that the state of New Jersey might have insisted on a surrender of this privilege, as the sole condition on which a sale of the

property should be allowed. But this condition has not been insisted on; the land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians; he stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

Judgment of the Court.—This cause came on to be heard, on the transcript of the record of the writ of error of the state of New Jersey, and was argued by counsel on the part of the plaintiffs in error: on consideration whereof, it is the opinion of the court, that there is error in the judgment of the said court of errors, in this, that the judgment of the said court is founded on an act passed by the legislature of the state of New Jersey, in December 1804, entitled "an act to repeal part of an act respecting lands purchased for the Indians;" which act, in the opinion of this court, is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of a contract, and is, on that account, void. It is, therefore, considered by the court, that the said judgment be reversed and annulled, and that the cause be remanded to the said court of errors, that judgment may be rendered therein, annulling the assessment in the proceedings mentioned, so far as the same may respect the land in the said proceedings also mentioned.

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*King v. Riddle. (a) [*168

Statute of limitations.—Insolvent discharge.

A recital in a deed is good evidence to take a case out of the statute of limitations.
A discharge under the insolvent law of the district of Colnmbia, is no bar to an action.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

Riddle brought an action of *assumpsit* in the court below, against King. The declaration contained a general count for money paid, laid out and expended by the plaintiff for the use of the defendant; and a special count which stated that the defendant, in the year 1798, being taken in execution upon a judgment of the county court of Fairfax, at the suit of Fosters & May, gave a prison-bounds bond, with sureties, which bond he forfeited, and judgment was obtained against his sureties. That the plaintiff (who was not bound in the bond) did, afterwards, at the request of the defendant, advance, settle and pay the one-sixth part of the judgment, amounting to $350.52; and that the defendant, in consideration thereof, undertook, &c.

The defendant pleaded *non assumpsit* and *non assumpsit infra quinque annos*, &c., upon which, issues were joined; and upon the trial, the defendant took a bill of exception to the refusal of the court to instruct the jury, that the evidence was not sufficient in law to enable the plaintiff to recover in this action. The evidence stated in the bill of exception was as follows:

1. A paper, signed and sealed by the defendant, on the 15th of July

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(a) March 3d, 1812. Present, all the judges.

1804, reciting that the plaintiff and others had become his sureties for a large debt due to Mr. John Foster, and having become accountable, had paid the debt, and he, the defendant, being desirous to secure them so far as he could, assigned to Thomas Vowell, one of his sureties, certain bonds, in trust to collect the money and distribute it equally among them.

2. The testimony of the said Thomas Vowell, that he had never received anything upon those bonds.

*169] *3. The testimony of John McDonald, that some time in the summer of 1799, he heard the defendant say, he owed the plaintiff a sum of money, but he did not state the amount, nor upon what account he owed it.

4. An abstract of the judgment against the sureties, amounting to $2103.12 : and—

5. A receipt at the bottom thereof, signed by Fosters & May, dated September 18th, 1799, as follows : "The above sum of $2103.12 has been discharged by the negotiable notes of John Harper, William Harper, Thomas Vowell, jr., Samuel Harper and Joshua Riddle, at thirty days, and the cash of Charles Harper, which notes, when paid, will stand in full payment of the above judgment and costs." All the above-named persons, except Joshua Riddle, the plaintiff, were bound in the bond.

The writ in the present suit was issued on the 1st of July 1809. The defendant offered in evidence a copy of his certificate of discharge from imprisonment, dated August 12th, 1805, under the act of congress for the relief of insolvent debtors within the District of Columbia. (2 U. S. Stat. 237.) The verdict and judgment being against the defendant, he brought his writ of error.

E. J. Lee, for the plaintiff in error, contended,

1. That the plaintiff's evidence did not maintain his action. If he had any cause of action, it was upon the sealed instrument. There was no evidence of the request of the defendant to the plaintiff to pay the money, and he was under no legal obligation to pay it. He was not a party to the judgment on the prison-bounds bond. The receipt states the judgment to be paid by the notes of the plaintiff and others ; but it does not appear that the plaintiff has ever paid this note.

*170] *2. There is no evidence to take the case out of the statute of limitations, except the testimony of McDonald, which is too vague and indefinite.

3. The defendant having been discharged under the insolvent act, no suit can be maintained against him, without showing that he has acquired new property since his discharge.

Swann, contrà.—1. The plaintiff was no party to the sealed instrument: he is only named in the recital. It contained no contract on the part of the defendant to pay the plaintiff. But it is evidence from which the jury might infer that the plaintiff had paid the money at his request. It is true, there was no positive evidence that the note had been paid, but there are circumstances from which the jury might infer it.

2. The recital in the instrument acknowledging the debt, was on the 15th of July 1804, and the suit was brought upon the 1st of July 1809, so that five years had not elapsed.

3. The discharge under the insolvent law, only discharges the person it is no bar to an action.

March 4th, 1812. All the judges (except DUVAL J.) being present, MARSHALL, Ch. J., delivered the opinion of the court to the following effect:— In this case, the whole evidence is spread upon the record by the bill of exceptions, and the court below refused to instruct the jury (as requested by that defendant), that it was not sufficient in law to enable the plaintiff to recover in this action. If the court ought to have given this instruction, their refusal is certainly error.

The evidence shows that a note was given, or money paid by the plaintiff for the use of the defendant; but *it is objected, that it was not [*171
paid at the request of the defendant. If the plaintiff was not bound to pay it, and if it was paid, without the request of the defendant, it is certain that the plaintiff is not entitled to recover. But the court thinks that the recital in the deed of assignment is evidence from which the jury might infer a request.

The court is also of opinion, that the recital in the deed is sufficient to take the case out of the statute of limitations. Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion, that the cases on that point have gone too far, yet this is not a casual or incautious expression: the deed admits the debt to be due on the 15th of July 1804, and five years had not afterwards elapsed, before the suit was brought.

Then it is objected, that there is no evidence of the payment of the money by the plaintiff; but the court thinks that the recital of the deed is evidence from which the jury might infer the payment.

There was no error respecting the discharge under the insolvent act. It was only a discharge of the person, and could not affect the judgment.

Judgment affirmed.

DAVY'S Executors *v.* FAW. (*a*)

Arbitrament and award.

An award will not be set aside, in equity, on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission have injured the complainant.

When the price of land, and not the question of title, is submitted, the submission and award need not be by deed.

Faw *v.* Davy, 1 Cr. C. C. 440, affirmed.

THIS case seems to be sufficiently stated in the following opinion, delivered by MARSHALL, Ch. J., on the 9th of March. (All the judges being present.)

This is an appeal from a decree of the Circuit Court for the county of Alexandria, sitting in chancery, by which that court set aside an award made between the parties, and directed an account. *The bill impeaches [*172
the award, because: 1. The arbiters exceeded their power: 2. They

(*a*) March 3d, 1812. Present, all the judges.

made no award with respect to a part of the matter submitted to them: 3. They were partial, and proceeded to make their award, without hearing the party against whom it was made.

The arbitration-bond binds the parties to submit to the award, order and arbitrament of Francis Peyton, Theophilus Harris and Thomas Herbert, or any two of them, respecting a controversy of several accounts and contracts existing between them. A judgment at law has been obtained for the amount of the award; for relief against which, and against the award itself, this suit was instituted.

By the plaintiffs in error, it is contended, that excess of power in arbiters is a defence at law, and is, therefore, not examinable in this court. That the injured party may avail himself of this defence in a court of law, where the excess of power is apparent on the face of the award, is not controverted. But in this case, it is not shown by the award itself, and the defendant insists, that he was not at liberty, in a court of law, to avail himself of evidence *dehors* the award; and in support of this opinion the case of *Wills* v. *Maccarmick*, 2 Wils. 149, has been much relied upon. Without deciding that question, the court will proceed to inquire, whether the defendant in error has succeeded in proving, that, in this case, the arbiters have, in fact, exceeded their power?

It appears, that Abraham Faw sold to David Davy a lot of ground, the purchase-money for which was payable in four years, in four equal annual payments. Davy conveyed to Faw, about the same time, a lot which he had purchased from Elisha C. Dick, and which he held on the condition of making certain improvements. Davy becoming insolvent, it was agreed, that his contract *with Faw should be annulled, that the bonds he had *173] given Faw for the purchase of the lot should be returned to him, and that he should surrender the bond for a title, which Faw had executed. It had been stipulated, that, in the event of his failing to pay the purchase-money, and of the contract being avoided, the money actually paid by Davy to Faw should be considered as rent, so far as rent was allowed. There had been some other dealings between the parties, and there had been a small piece of ground rented to Davy, on which he had put some inconsiderable improvements.

In this state of things, they agreed to submit their affairs to arbitration, and the bond was executed which has been stated. The arbiters awarded that Faw should pay Davy 314*l.* 4*s.* 11*d.*, and it is proved, that in making up the account between the parties, they debited Faw with 300*l.*, for the lot which had been conveyed to him by Davy. Faw contends that this was not a contract subsisting between the parties, and consequently, is not included within the terms of the submission.

Faw alleges in his bill, that this whole transaction was closed; that the lot conveyed to him by Davy formed no part of the consideration given for the lot he had sold, but was conveyed to him, because Davy considered the rent reserved on that lot and the conditions of improvement, which were inserted in the deed, as equivalent to its full value. These allegations are denied in the answer; and the defendant avers, that the price of the lot purchased by him was 500*l.*; that he conveyed the lot he had purchased from Dick at 100*l.*, and gave his bonds for 400*l.*, the residue of the purchase-money; that,

when this contract was annulled, he became entitled to his lot, or to its value, and that this was one of the subjects submitted to the referees.

In addition to this testimony, furnished by the answer, the defendant has produced the testimony of a witness who was present when the arbitration was agreed upon, and the bond executed. He says, that the lot purchased by the defendant from the plaintiff, and that which had been conveyed by the defendant to the plaintiff, as well as other accounts between the parties, formed the subjects of conversation.

Francis Peyton, one of the arbiters, declares, that he considered all the transactions between Faw and Davy as submitted to them; [*174 that Faw himself laid before them the bond he had given to Davy for a conveyance of the lot he had sold, and that he always understood from Mr. Faw, during the arbitration, that he was willing to pay 100*l.* for the lot conveyed to him by Davy. Peyton adds, that the mode adopted by the arbiters for arranging that part of the subject, was understood by them to be the one which was most agreeable to Mr. Faw. The court is of opinion, that the plaintiff in the court below has failed in showing that the arbiters have exceeded their powers.

2. A second objection to this award is, that the arbiters have not settled the accounts between the parties, for flour stored by Faw for Davy, which accounts were clearly within the submission. The defendant has not shown that he is injured by this omission, and it is, therefore, unnecessary to decide whether, had he been injured, a court of equity could or could not have afforded relief.

3. A third ground, on which the application for relief is placed, is the partiality and improper conduct of the arbiters. That judges chosen by the parties themselves, as well as those who are constituted by law, ought to be exempt from all imputation of partiality or corruption ; that their conduct ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard, and themselves the means of understanding the subjects they are to decide, are propositions not to be controverted. But corrupt motives are not lightly to be ascribed to the arbiter, nor is partiality to be attributed to him, on account of difference of opinion with respect to the decision he has made.

The charge made in this case, that the parties were not sufficiently heard, is not supported, and is contradicted by the testimony in the cause. The general *charge of partiality is also contradicted, and is expressly [*175 denied by the arbiters, who have been made defendants, and by the deposition of Francis Peyton who did not sign the award.

Some particular facts have been proved, by which this charge, it is supposed by the counsel for the defendant in error, may be supported. McKinsey Talbot deposes, that, after the arbiters had separated, Thomas Herbert, who was one of them, said, that David Davy ought to buy his winter's meat for him, without making any charge on account of the particular service he had rendered him in the said arbitration. That such language is unbecoming in a judge will not be denied ; and if the circumstances leading to these expressions, and the manner in which they were uttered, had been stated in the record, and there had been reason to believe, that the words were spoken seriously, they would have furnished objections to the award, not easily to be removed. But nothing is stated, which could give these expressions a

serious aspect. They appear not to have been delivered confidentially; and as it is difficult to conceive, that a man, who could be chosen as an arbiter, would thus wantonly and unnecessarily expose the depravity of his own conduct, the court must consider these words, as spoken in sport, with indiscreet levity, but not as seriously indicative of an opinion that he had made an unjust award.

The same witness, in another deposition, states that he was present at a meeting of the arbiters, and heard Thomas Herbert say, that they had the hands of Abraham Faw so fast tied, that he could not, for his life, get them loose. It is impossible to consider these expressions in an arbiter, without some disapprobation. But what led to the employment of them, does not appear; nor is the court informed of the temper in which they were employed. It is worthy of remark, that Thomas Herbert does not appear to have had an opportunity of cross-examining this witness, and that this *176] deposition was *taken, before the arbiters were made parties to the cause.

There is some testimony respecting some altercations or jealousies between Faw and some of the arbiters, at a corporation election, but they were too trivial to be worthy of notice; and as they occurred about the time of the submission, and before the arbiters proceeded on the business, it is supposed, that they would have induced Faw, had he thought them of any importance, to make some effort to prevent an award.

Upon a view of the whole case, the court is of opinion, that the plaintiff in the court below has not shown sufficient matter to set aside the judgment at law, and doth, therefore, direct that the decree of the circuit court be reversed and annulled.

March 13th. After the decision of the cause, *C. Lee*, for the defendant in error, cited Kyd on Awards, to show that where the dispute is about land, the submission and award must be by deed.

Marshall, Ch. J.—That is, where the title is in question. But here the title was conveyed; the dispute was only as to the price. The question of title was not submitted.

Livingston, J.—Although that point was not made in the argument, yet it was considered by the court.

Judgment reversed.

Hughes *v.* Moore. (*a*)

Discontinuance.—Statute of frauds.—Oyer.

A plaintiff may, before verdict, discontinue a count in his declaration, and waive the issues joined thereon.

A promise to pay a sum of money, as a compensation to the plaintiff, for the injury done him by the misconduct of the defendant, in obtaining a patent in his own name, for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land, within the statute of frauds, and must be in writing.

Oyer of a deed, set forth in the first count, does not make that deed part of the record, so as to apply it to other counts in the declaration.

Error to the Circuit Court for the district of Columbia, sitting in Alexandria. This was a special action of *assumpsit*, brought by Moore against Hughes. The declaration, after several amendments, contained four counts.

*1. The first count stated, that whereas, on the 16th of June 1797, it was agreed between the plaintiff and one John Darby, by a writing under their hands and seals, now here shown to the court, in substance, as follows: "Whereas, Cleon Moore had located, in his own name, 9922 acres of land, in Kentucky, by a treasury warrant No. 19,100," "and the said Cleon Moore, hath sold all his right, title and interest of and in the same, to John Darby, for the consideration of 300*l.* and warrants that no person or persons claiming under John Tebbs, now deceased, or under him, the said Cleon Moore, shall interrupt him, the said John Darby, in his said claim to the said lands, but as to all other claims, he is to run the risk, and on their account, will never require, that the said Cleon Moore, or any other person or persons, shall refund the said 300*l.*, or any part thereof, but if there should be as much land secured by the said location, as will bring 200*l.* or upwards, the said John Darby, is to pay the said Cleon Moore 700*l.* in money, over and above the said 300*l.*, so that he may receive altogether, 1000*l.*; otherwise, the said Cleon Moore is only to have the said consideration of 300*l.*" At the bottom of which writing was a receipt in these words: "Received of John Darby, the sum of 300*l.*, the full consideration for the first-mentioned location, in the foregoing agreement, or of his right, title and interest of and in the same—Cleon Moore," and a seal. And whereas, on the same day, a memorandum in writing, and under the seals of the plaintiff and the said Darby, was added and indorsed on the said agreement as part thereof as follows: "Memorandum: If a patent or patents have already issued for the first within-mentioned location, the said Moore doth agree to assign the same, to the within-named John Darby, of his heirs and assigns; or if not issued, that they issue in the name of the said Cleon Moore, and he is to assign them to the said John Darby, his heirs and assigns; and if in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, they shall say the said lands will sell for 2000*l.*, or upwards, the said John Darby doth bind himself, his heirs and assigns, to pay unto the said Cleon Moore, his executors, *administrators and assigns, the sum of 700*l.*, as herein mentioned. [*177 [*178

(*a*) March 4th, 1812. Present, all the judges.

"And whereas, the said defendant, afterwards, on the 5th of October 1799, well knowing the contract and covenants aforesaid, between the said Cleon Moore and John Darby, and more especially, well knowing that a patent or grant had not then been issued for the tract of 9922 acres, located in the name of the said Cleon Moore, and well knowing that the patent for that land ought, and could only be issued unto the said Cleon Moore, and well knowing that the said Cleon Moore was entitled to the sum of 700*l.*, lawful money of Virginia, of the value of $2333.33, provided, in the opinion of any two respectable men in the neighborhood of the said lands, to be mutually chosen, they should say, the said lands would sell for 2000*l.* or upwards, lawful money of Virginia; and whereas, the defendant, well knowing that the said lands were really and truly worth, on the day and year last mentioned, a much greater sum than 2000*l.*, and well knowing that it would materially injure the plaintiff in his contract aforesaid, and would materially benefit the said John Darby and himself, the said defendant, he, the said defendant, on the said 5th day of October, &c., assigned the plat and certificate of survey made of the said 9922 acres, and a warrant numbered 19,605, in the name of the plaintiff, unto himself, the said defendant and the said John Darby, without any lawful authority so to do, from the said Cleon Moore, by making and subscribing the said assignment of the said survey, in the name of him, the said Cleon Moore, by him, the said James Hughes, as attorney in fact for the said Cleon Moore, which assignment imported a desire of him the said Cleon, that patents might issue in the names of the said Darby and Hughes, intending thereby to defraud and injure the said Cleon Moore, and to benefit himself and the said John Darby, in respect to the premises aforesaid. And whereas, the said James Hughes, by means of the herein-before mentioned assignment, had caused and done to the plaintiff, an injury to the value of a great sum of money, to wit, the value of $4000, which he was disposed to compensate; the said James Hughes in consideration thereof, afterwards, viz., on the 17th of March 1806, came to
*179] an agreement with *the said Cleon Moore, whereby the said Cleon Moore promised that he would quit all claim to the said tract of land, and discharge the said James Hughes of and concerning all damages for, and by reason of his actings and doings aforesaid, in assigning the survey in manner aforesaid; and he the said James Hughes promised to the said Cleon Moore, that he would pay to him the sum of 700*l.*, when he should be thereafter required; and the plaintiff avers, that he has been always ready to keep, and has always kept his promise aforesaid; in consideration of which premises, the defendant became liable to pay to him, the said sum of 700*l.* &c., and being so liable, the defendant in consideration thereof, undertook," &c.

2. The second count stated, "that whereas, on the 5th of October 1799, the plaintiff was owner and proprietor of a certain plat and certificate of survey of 9922 acres of land, in Mason county, in the state of Kentucky, dated the 28th of November 1796, of the value of $20,000, and whereas, the defendant, well knowing the premises, afterwards, viz., on the 5th of October 1799, without any lawful authority from the plaintiff, and with a view to benefit himself and a certain John Darby, and to injure the plaintiff in this particular, assigned the last-mentioned plat and certificate of survey unto him, the said defendant and the said John Darby, by subscribing the

name of the said Cleon Moore, by the said James Hughes, as attorney in fact for the said Cleon Moore; and in consequence of the said unauthorized assignment, a grant of the said tract of land was afterwards made to the defendant and the said Darby, by the Commonwealth of Kentucky, styling them assignees of the plaintiff. And whereas, the defendant, by the assignment aforesaid, had caused and done to the plaintiff an injury and loss to the value of a great sum of money, viz., to the value of $4000, which he was willing to repair and compensate; in consideration thereof, the said defendant, afterwards, viz., on the 7th of March 1806, at the county of Alexandria, &c., promised to pay to the plaintiff, the sum of 700*l.* lawful money of Virginia, as compensation for the said injury and loss of the said land assigned as aforesaid. The said plaintiff, at the same time, agreed to the said terms, and to accept of the said compensation in full of *all claims and demands for the said land, and for the injury aforesaid. And the [*180 plaintiff avers, that he has always kept his promise aforesaid, and has been at all times ready and willing to do everything on his part to be done; and afterwards, viz., on, &c., at, &c., offered to perform the agreement on his part, and the defendant then and there refused to perform, &c., whereby the defendant became liable, &c., and being so liable, promised to pay," &c.

3. The 3d count stated, that whereas, the plaintiff, by virtue of a certain land-warrant issued, &c., on the 26th of September 1783, duly located by entry, on the 7th of December 1783, and duly executed by actually survey, duly made on the 28th of November 1796, a plat and certificate whereof had been duly made and delivered according to law, was entitled to have a grant from the commonwealth of Kentucky, by patent to be founded on the said survey, and to be completed and issued to him, of 9922 acres of land in the county of Mason, &c., bounded, &c. And whereas, the defendant had, on the 5th of October 1799 (the plaintiff, being so entitled to have the land patented to him aforesaid, and the defendant well knowing the premises), for his own gain and advantage, and to the great wrong and damage of the plaintiff, without any lawful authority to that effect from the plaintiff, and without his knowledge or consent, but under color and pretence of being attorney in fact for the plaintiff, wrongfully, injuriously and wilfully made and executed, in the name of the plaintiff, a certain indorsement in writing, upon the back of the said plat and certificate of survey, purporting to be an assignment by the plaintiff, of the said plat and certificate, to one John Darby and the said James Hughes, for value received, and purporting to express a desire of the plaintiff, that patents might issue in their names, and purporting to be subscribed with the name of the plaintiff, by the said James Hughes, his attorney in fact. And whereas, the said James, afterwards, viz., on the 5th of April 1800 (the plaintiff being entitled to have the said land patented to him as aforesaid), without any authority to that effect from the plaintiff, and without his knowledge or consent, by means of the said pretended assignment, and under color of the same, for his own gain and advantage, and to the great wrong *and damage of the plaintiff, wrongfully, injuriously and wilfully caused and pro- [*181 cured the land so located and surveyed for the plaintiff as aforesaid, and bounded as aforesaid, to be granted by the commonwealth of Kentucky to them the said John Darby and James Hughes, by patent, bearing date, &c., founded on the said warrant and survey, and on the said pretended assign-

ment of the plat and certificate, and signed by James Garrard, the governor, and sealed with the seal of the said commonwealth of Kentucky, and in all respects, finally completed and issued to them, the said Darby and Hughes, and entered of record in the land-office of Kentucky aforesaid. And the plaintiff says, that the said land was patented to the said Darby and Hughes, by the procurement and pretences of the said James, as aforesaid, without the plaintiff's having ever in any manner authorized, contracted or consented, that the same should be patented in the name of any other person or persons whatsoever, other than himself. And the plaintiff produceth here in court, a copy of the said patent, &c.

"And whereas, afterwards, on the 13th of March 1806, at Alexandria, &c., a conversation was had, and propositions for an accord and satisfaction, were moved between the said James and the plaintiff, concerning a compensation for the loss, and liquidation of the damages sustained by the plaintiff, by reason of the misconduct and wrongdoing of the said James in the premises, and of the vesting them, the said Darby and Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James on his part, in consideration of the premises, and of the just claims of the plaintiff for compensation and damages as aforesaid, that the said James should pay to the plaintiff in satisfaction of the same, 700*l.* Virginia currency, equal to $2333\frac{1}{3}$, currency of the United States, to be paid in four equal quarterly instalments, the first in three months, &c., each instalment to be secured by a bond of the said James; and the plaintiff agreed to accept the said 700*l.* by instalments as aforesaid, in full satisfaction of his just claims as aforesaid, and upon the said instalments being secured by the bonds of the said James, as aforesaid, to release and quit
*182] claim to the said James, all the plaintiff's *claims and demands whatsoever, for compensation, redress or damages arising from the wrongdoing and misconduct of the said James, in the premises, and from the vesting the said Darby and Hughes with the legal title to the said land as aforesaid." The count then stated, that the defendant promised to fulfil the agreement on his part, and the plaintiff on his part. That the plaintiff is, and always was, ready and willing to perform his part, if the defendant would perform his. That he afterwards required the defendant to perform his part, and offered to accept, and would have accepted of the defendant, the 700*l.*, in instalments as aforesaid, and secured by bonds as aforesaid, in full satisfaction of all the claims and demands of the plaintiff for compensation, redress and damages as aforesaid, and did then and there offer to perfect and execute, and would have perfected and executed to the said James, a good and sufficient quit-claim and release to him, of all the plaintiff's claims and demands for compensation, redress or damages arising from the misconduct and wrongdoing of the said James, in the premises, and from the vesting of the said Darby and Hughes, with the legal title to the said land as aforesaid, if he, the said James, would have secured by his bonds duly executed, the said 700*l.*, &c. But the defendant refused to perform his part of the agreement, &c.

4. The 4th count stated "that whereas, on the 5th of October 1799, the defendant, without any lawful authority to that effect, but for his own gain and advantage, and to the great wrong and damage of the plaintiff, with intent to prevent the land hereinafter mentioned, from being patented to the plaintiff, and to cause and procure the same to be patented to the defendant

and one John Darby, wrongfully, injuriously and wilfully made and executed, in the name of the plaintiff, a certain other indorsement in writing, upon a certain other plat and certificate of survey, duly made for the plaintiff, on the 28th of November 1796, the said survey having been so made, in due execution of a certain other warrant duly issued in favor of the plaintiff, from the land-office of Virginia, on the 26th of September 1783, &c., and in pursuance of a location and entry, &c., which last-mentioned indorsement purported to be an assignment, &c., from the plaintiff to the said John *Darby and the defendant, for value received, &c., purporting to be [*183
subscribed, &c. And whereas, the defendant had, on the 5th of April 1800, in further pursuance of his said intent to prevent the land from being patented to the plaintiff, and to cause it to be patented to the said Darby and the defendant, wrongfully, and without authority, and under color of being attorney in fact for the plaintiff, caused the land to be patented to the said Darby and the defendant, &c.; and the plaintiff produceth here a copy of the patent, warrant, survey, &c. And the plaintiff avers, that he never authorized the defendant to make the said assignment, and that the defendant knew he had no such authority; that it was made without the plaintiff's knowledge or consent; that the plaintiff was, until the issuing of the patent to Darby and the defendant, entitled to have the land patented to himself; by which wrongdoing of the defendant, the plaintiff had suffered great wrong and injury, and was entitled to be compensated in damages by the defendant, and to be indemnified for being prevented from having the land patented to him, and for the same being patented to Darby and the defendant. And whereas, afterwards, on the 13th of March 1806, a conversation was had and propositions for a compromise were moved between the plaintiff and defendant, touching the compensation and indemnification of the plaintiff, and the defendant then and there agreed, in consideration of the just claims of the plaintiff to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that the defendant would pay to the plaintiff another sum of 700*l.*, Virginia currency, of the value, &c., which the plaintiff agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid; and the defendant in consideration of his said agreement, assumed and promised to the plaintiff that he, the defendant, would perform his part of the agreement. And the plaintiff, in consideration of that promise, agreed to accept the 700*l.*, in satisfaction, &c., as aforesaid, and upon payment of the same, or upon its being secured to be paid in four instalments, &c., that he, the plaintiff, would quit-claim and release to the defendant, all the plaintiff's claims and demands *and [*184
rights whatsoever to compensation for being prevented from having the land patented to him, and for and on account of the same being patented to the said Darby and the defendant; and the plaintiff says, that he was and hath ever since been willing and ready to perform, &c., and requested the defendant to perform, &c., and offered to accept, &c., the 700*l.*, &c., in full satisfaction, &c., and offered to quit-claim, &c., all the plaintiff's claims for compensation, &c., if the defendant would pay, &c., but he refused, &c.

1. The defendant, having prayed *oyer* of the agreement and the memorandum, of which a *profert* was made in the first count, pleaded *non assump-*

sit to that count, and so in like manner to each of the other counts separately ; upon all of which pleas, issues were joined.

2. The defendant (without again praying *oyer*), for further plea to each of the counts, severally, said, that the promise alleged to be made by the defendant to the plaintiff, or any memorandum thereof, was not in writing, signed by the defendant or any other person by him thereunto lawfully authorized, and this he is ready to verify, &c.

3. The defendant also, without again praying *oyer*, for further plea to each of the counts, severally, said, " that after making the agreement and memorandum between the plaintiff and the said John Darby, in the declaration mentioned, viz., on the 29th of August 1799, Alexander D. Orr and John Graham, two respectable men residing in the neighborhood of the lands, in the said agreement mentioned, were mutually chosen by the plaintiff and the said John Darby, to say and determine whether the said lands would sell for 2000*l.*, or upwards, and the said Alexander D. Orr and John Graham, afterwards, viz., on the 29th of August 1799, did say and determine, that the plaintiff's claim to a survey of 9922 acres, in the county of Washington, being the land in the said agreement and memorandum mentioned, would not sell for 2000*l.*, Virginia money, and this he is ready to verify," &c.

*185] *4. The Defendant also, without again praying *oyer*, pleaded separately to each count, " that there was not as much land secured by the said location in the agreement mentioned, as would bring 2000*l.* or upwards, and this he is ready to verify, &c.

The plaintiff demurred generally to the second plea to all the counts, and to the 3d and 4th pleas to the 2d, 3d and 4th counts. To the 3d and 4th pleas to the 1st count, there was a general replication and issue.

The count below adjudged all the demurrers in favor of the plaintiff. The plaintiff then entered a *nolle prosequi* upon the first count of his declaration, and waived all the issues joined thereon. Upon the issues of *non assumpsit* to the 2d, 3d and 4th counts, there was a verdict and judgment for the plaintiff.

After the jury had retired to consider of their verdict, they returned into court and requested the court to determine whether a verdict for the plaintiff would give to the defendant all the right and interest of the plaintiff and his heirs, in the patent of land in the declaration mentioned, and the court instructed them, that if the plaintiff should recover a judgment in this case, he would be thereby barred in equity from setting aside the patent issued to the defendant and the said John Darby in the declaration mentioned. To this instruction, the defendant excepted ; and brought his writ of error.

Swann and *C. Simms*, for the plaintiff in error, contended, 1. That the plaintiff had no right to discontinue as to the first count, and waive the issues on that count, without the leave of the court, or the assent of the defendant. 2. That the statute of frauds was a good bar to every count in the declara-

*186] tion, and 3. That if it was not, the court erred in instructing *the jury, that a recovery in this suit would bar the plaintiff in equity from setting aside the patent.

1. The plaintiff had no right to discontinue as to the first count, after

issue. Cro. Jac. 35, 316. The *oyer* being once prayed and granted, the agreement and memorandum were spread upon the record, and the defendant had a right to avail himself of it in all his pleas. The defendant had a right to show that the title of the plaintiff to those lands was never worth 2000*l.* and therefore, he was never entitled to anything more than the 300*l.* which Darby had paid him; consequently, the obtaining a patent in the name of Darby and Hughes, could be no injury to the plaintiff, and if the plaintiff did promise to pay the 700*l.*, it was a promise without consideration. This was the real substantial defence in the cause. In order to entitle the plaintiff to recover, he must not only prove that the defendant did a wrong action, but that it did an injury to the plaintiff. 1 Bac. Abr. 50; 6 Mod. 46.

2. As to the plea of the statute of frauds. By the act of assembly of Virginia (P. P. 15), which is like that of Kentucky, it is enacted, that no action shall be brought, whereby to charge any person upon any contract for the sale of lands, tenements or hereditaments, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

The contract set forth in each count of the declaration is a contract for the sale of land. It is a contract whereby the plaintiff was to part with all his title to the land; and it is immaterial, whether that title was legal or equitable. The first count states expressly, that the plaintiff "promised to quit all claim to the tract of land," and the defendant promised to pay 700*l.* The 2d count also states, that the defendant was to pay the 700*l.*, as compensation for the injury and loss of the land; and the plaintiff agreed to accept it "in full of all *claims and demands for the said land, and for the injury aforesaid." The 3d count says, that a conversation was had [*187 concerning a compensation for the loss, and a liquidation of the damages, sustained by the plaintiff, by reason of the misconduct and wrongdoing of the defendant, and of the vesting them, the said Darby and Hughes, with the legal title to the said land, and it was agreed, in consideration of the premises, that the defendant should pay to the plaintiff 700*l.*, in full satisfaction of the plaintiffs claims as aforesaid, and the plaintiff agreed, upon such payment being made, to quit-claim to the defendant all the plaintiff's claims for compensation, &c., arising from the wrongdoing and misconduct of the defendant in the premises, "and from the vesting the said Darby and Hughes with the legal title to the said land." The 4th count states that the defendant agreed, in consideration of the just claims of the plaintiff to be compensated for the damage and injury arising from the misconduct of the defendant in the premises, and in consideration of the defendant's having procured a patent to be issued to him and Darby for the land, that he, the defendant, would pay the plaintiff another sum of 700*l.* &c. Thus, the quit-claim of the plaintiff's title to the land is the consideration of every promise in the declaration; and if the plaintiff had no title, or if no title was to pass from the plaintiff, by the contract, it was *nudum pactum.*

3. If this was not a contract for the sale of the plaintiff's title to the land, a judgment for him in this suit could not have barred the plaintiff from setting aside the patent in equity. There seems to have been an inconsistency in the opinions of the court below. If the agreement extinguished the plaintiff's equitable title, then it was an agreement for the sale of land, and ought

to have been in writing. If it did not extinguish the plaintiff's equitable title, then it could not bar him from setting aside the patent.

Jones and *C. Lee*, contrà.—This was a case of naked *tort;* there is no *188] evidence *of any authority from Moore to Hughes to make this transfer, but it was done by the latter, with a full knowledge that it was contrary to the plaintiff's intention. It was of itself an injury to the plaintiff for which he was entitled to redress. It was actionable *per se.*

But suppose, that a judgment for the plaintiff in this case should prevent him from setting aside the patent, yet it does not follow, that it is a case within the statute of frauds. Contracts executed are not within that statute. If there be a verbal agreement for the sale of land, and the vendor executes his part of the agreement, by conveying to the purchaser the legal title; which he accepts, and receives the possession and the title papers, it is not necessary, that the vendor should have a promise in writing from the purchaser, in order to compel him to pay for it; a court of chancery would decree him to execute the contract.

The plaintiff's subsequent ratification of the act of the defendant, was equivalent to his previous assent. The contract then was executed on the part of Moore. The defendant had all his title, and the possession, and the title papers. No further act was necessary on the part of the plaintiff.

Besides, it does not appear, that the contract on the part of the plaintiff, if there was any, for the transfer of his right, was not in writing. If it was necessary that it should have been in writing, it will, after verdict, be presumed to have been so. 1 Chitty on Plead. 133; 1 Saund. 276, *a*, note 2; 4 East 400.

As to the *nolle prosequi*, the plaintiff has a right to enter it at any time before verdict, and even after verdict, before judgment. Sayer on Damages 113; 12 Mod. 558.

The defendant could not, by *oyer* of the agreement stated in the first count, make that agreement applicable to other counts which do not refer to it. The 3d and 4th pleas were only applicable to the first count.

It is immaterial, whether the plaintiff actually sustained damage to the *189] value of 700*l.* It is sufficient, if he sustained *any damage at all. It is an action for liquidated damages, and it is immaterial, what was the real injury which the plaintiff suffered. 7 Vin. 300, tit. Damages, S; *Colman's Case*, Moore 419; *Lowe* v. *Peers*, 4 Burr. 2228; 1 Lord Raym. 1164.

The court below was correct in the opinion, that a judgment in this suit would have barred a suit in equity to set aside the patent. It was only an agreement for the extinguishment of an equitable right, which need not be in writing. It transferred nothing to the defendant.(*a*)

(*a*) It is understood, that the opinion of the court below was grounded on the idea, that this case was to be governed by the principles relative to implied trusts, which are not within the statute of frauds. Darby and Hughes having obtained the legal estate, without the assent of the plaintiff, were to be considered as holding it in trust to secure to him the payment of 700*l.*, in case the land should turn out to be worth 2000*l.* This was an implied trust, resulting from the circumstances of the case, and which would cease to exist upon payment of the 700*l.* Upon the plaintiff's receiving payment of that sum, his equitable title would cease. It would not be transferred to the defend-

Hughes v. Moore.

March 7th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows :—Much of the seeming intricacy of this cause will disappear, if we extricate the questions made by the pleadings before the court, from others which might greatly embarrass and perplex it.

The declaration contains four counts. The first recites an original contract between Cleon Moore and John Darby, for the sale of certain lands, lying in Kentucky, and proceeds to recount in detail those transactions on which the action was founded. The other counts state, in different terms, the several *assumpsits*, which they allege to have been made.

The defendants crave *oyer* of the written contract stated in the first count, and file several pleas to that *count. They, then, without repeating the *oyer*, file similar pleas to the remaining counts. After taking issue on some of the pleas, and demurring to others, the plaintiff below discontinues his first count. [*190

By the counsel for Hughes, this has been considered as error. But the court can perceive no reason for this opinion. After this discontinuance, the parties are in precisely the same situation, as if all the issues, both of law and fact, which were joined upon that count, had been decided in favor of the defendant below. Such decision could not, in point of law, have affected the rights of the parties, under the issues joined on the remaining counts, and consequently, the discontinuance upon that count must leave those rights unimpaired. Whether this count remain in the declaration, or be stricken out of it, the right of the plaintiff in the circuit court, to recover on the other counts, will be precisely the same. The examination of this right must be conducted on the same principles as if the declaration had never contained the first count.

By the plaintiff in error, it is contended, that the *oyer*, which was prayed of the written contract alleged in the first count, spreads that contract on the record, and makes it a part of all his subsequent pleas. This is certainly true, with respect to all his subsequent pleas to that count, but not with respect to his pleas to the other counts. Different counts allege different contracts, and different *assumpsits*. It is upon this idea alone, that a verdict can be rendered for the plaintiff, on one count, and for the defendant on another. Now, the *oyer* of one contract cannot be the *oyer* of another contract, and cannot spread upon the record a contract supposed to be totally distinct from that which was read. The discontinuance of the first count produces no change in this respect, in the condition of the parties. Had it remained, it could have had no influence on the other counts, nor could the *oyer* of the written contract it stated, have transferred that contract to the other counts.

The second count states, that Cleon Moore was owner and proprietor of

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ant; but would be extinguished. If the 700*l.* mentioned in the declaration were to be considered as the compensation for the injury done in depriving the plaintiff of his legal security for 700*l.* to be paid upon a contingency, it is evident, that that injury could not have exceeded 700*l.* And whether it were to be paid as compensation for that injury, or as the sum which would be due upon the happening of the contingency, it would equally destroy the implied trust. And as an implied trust can be raised without writing, so, it was thought, it could be extinguished without writing.

a plat and certificate of survey for lands lying in Kentucky, for which he was entitled to a patent from the government of that state; and that *James Hughes, without authority, transferred that plat and certificate, in the name of Cleon Moore, to John Darby and the said Hughes, by which wrongful act, a patent for the said land was issued to the said Darby and Hughes, to the great injury of the said Moore. That afterwards, the said Hughes promised to pay to the said Moore, "the sum of seven hundred pounds for the said injury, and loss of the said land assigned as aforesaid; the said plaintiff at the same time, agreed to the said terms, and to accept of the said compensation in full of all claims and demands for the said land and for the injury aforesaid. To this count, the defendant pleaded several pleas, one of which was, that neither the promise nor any memorandum thereof was made in writing. To this plea, the plaintiff demurred, and the court sustained the demurrer. The correctness of this decision depends entirely on the application of the statute of frauds to the contract stated in the declaration.

*191]

Cleon Moore is averred to have been the proprietor of a plat and certificate of survey, on which Hughes and Darby obtained a patent, by using his name, without authority. This tortious act did not divest Moore of his equitable title. The land, in equity, was his. Did he part with this title by the contract stated in the declaration? The answer must, in the opinion of the whole court, be in the affirmative. "He agreed to accept of the said compensation in full of all claims and demands for the said land, and for the injury aforesaid. This, then, was an agreement to sell his equitable title to the land for the sum of 700*l.* The court can perceive no distinction between the sale of land to which a man has only an equitable title, and a sale of land to which he has a legal title. They are equally within the statute. It is, therefore, the unanimous opinion of this court, that the judgment upon the demurrer to this plea, ought to have been in favor of the defendant below. This plea being a complete bar to the second count, it is unnecessary to consider the other pleas.

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*The third count states the title of Cleon Moore, and the injury sustained by him to the same effect with the second count. It then states a conversation between the parties, "concerning a compensation for the loss, and a liquidation of the damages sustained by the said Cleon, by reason of the misconduct and wrongdoing of the said James in the premises, and of the vesting them, the said Darby and Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James, on his part, in consideration of the premises, and of the just claims of the said Cleon, for compensation and damages as aforesaid, that the said James should pay to the said Cleon, in satisfaction for the same, the sum of 700*l.*," &c. "And the said Cleon then and there agreed, on his part, to accept of the said 700*l.* in full compensation of his just claims as aforesaid," and, upon the same being secured, &c., to release and quit-claim to the said James, all his, the said Cleon's claims and demands whatsoever, for compensation, redress or damages arising from the wrongdoing and misconduct of the said James in the premises, and from the vesting the said Darby and Hughes, with the legal title to the said land as aforesaid. To this count also, the statute of frauds was pleaded in bar. The plaintiff below demurred to the plea, and the defendant joined in demurrer.

Upon the true construction of the contract stated in this count, there was some contrariety of opinion among the judges. It is, however, the opinion of the majority, that the contract must be understood to import a sale of land, and that the sum of money stipulated to be paid, was, in contemplation of the parties, to extinguish the title of the said Cleon Moore. The conversation was "concerning a compensation for the loss and a liquidation of the damages sustained by the said Cleon," not only "by reason of the misconduct of the said Hughes, but also by reason "of the vesting them, the said Darby and Hughes, with the legal title to the said land." "And it was then agreed, in consideration of the just claims of the said Cleon, for compensation and damages, that the said *James should pay the said Cleon, in satisfaction for the same, the sum of 700*l.*" To the majority of the court, it seems, that a compensation for the loss of the title to the land must be understood to be a compensation for the land itself, and that the receipt of this money by Cleon Moore, would not only have barred an action for damages, but a suit in equity for the title. If this opinion be correct, then, the contract is substantially for the sale of land, and, to be valid, ought to have been in writing. On this plea also, the demurrer ought to have been overruled. [*193

The fourth count states the injury more in detail than is done in either the second or third counts. It states the claim of Cleon Moore to be compensated for the loss sustained by his land being granted without his consent to Hughes and Darby. A conversation was then held, and "propositions for a compromise were made, touching the compensation and indemnification of him, the said Cleon," "and it was then and there agreed by the said James, in consideration of the just claims of the said Cleon, to be compensated for the damage and injury for the misconduct of the said James in the premises, and in consideration of the said James having procured and obtained a patent to be completed and issued to the said James, and the said John Darby, as last aforesaid, for the said land," that he, the said James, would well and truly pay the said Cleon, one other sum of 700*l.* This the "said Cleon agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid." The compensation here offered and accepted, is for the injury sustained by Cleon Moore, in consequence of the grant of his land, by the state of Kentucky, to Hughes and Darby. It seems to the court, that this compensation was in lieu of the patent itself, and must have been intended to extinguish his right to that patent. It is difficult to suppose an intention, in this case, to receive a full compensation for the loss of a title, and yet to retain the right to that title. The majority of the court is of opinion, that, under the contract as stated in this count also, the payment of the money agreed to be *paid, would have extinguished the right of Cleon Moore to the land in question, and that this contract likewise is substantially a contract for the sale of land. The demurrer, therefore, to this plea ought to have been overruled. [*194

It is unnecessary to examine other points which were made in the cause. The judgment of the circuit court must be reversed, and judgment rendered for the plaintiff in error.

Judgment reversed.

Barton *v.* Petit & Bayard. (*a*)

Practice.—Action against several defendants.

A plaintiff, who has declared jointly against two defendants, as being in custody, when in fact only one of the defendants was taken on the *capias*, cannot abate his own action against the party not taken, unless authorized so to do by the return of the process against that party.

If the marshal of Virginia return, that the defendant is no inhabitant of the district of Virginia, the suit must abate as to such defendant.

The plaintiff, in Virginia, is not bound to declare, until all the defendants have appeared, or the suit be abated as to such as have not appeared.

Error to the Circuit Court for the district of Virginia. The transcript of the record which was sent up, began by stating that—

"Heretofore, to wit, at rules held in the clerk's office of the said court, in the month of December, in the year 1807, Andrew Petit and Andrew Bayard, by Philip N. Nicholas, gent., their attorney, appeared and filed their certain bill against Seth Barton and Thomas Fisher, which bill is in the following words, to wit: 'United States, fifth circuit, district of Virginia, to wit: Andrew Petit and Andrew Bayard, citizens and inhabitants of the state of Pennsylvania, merchants and partners, trading under the firm of Petit & Bayard, plaintiffs, complain of Seth Barton and Thomas Fisher, citizens and inhabitants of the state of Virginia, late merchants and partners trading under the firm of Barton & Fisher, defendants, in custody, of a plea that the said defendants render unto the said plaintiffs the sum of $4000, also 1004 pounds of tobacco, at twelve shillings and six pence the hundred-weight, being of the value of $20.92, which to the said plaintiffs the said defendants owe, &c.; stating a judgment of the general court of Maryland.'"

The record then stated, that the defendant, Seth Barton, having been arrested upon the *capias ad respondendum*, and being called, but not appear-
*195] ing, it was ordered, *that he appear at the next rules, and give special bail, &c., which he did, and pleaded payment, upon which the issue was joined, and verdict for the plaintiffs. Whereupon, the defendant Barton moved in arrest of judgment; because—

1. The declaration states a joint cause of action against this defendant and a certain Thomas Fisher, and therefore, a judgment ought not be rendered against this defendant alone.

2. Because the plaintiff has not, in and by his declaration, made a *profert* of the judgment stated in the declaration, under the seal of the general court of Maryland, where the said judgment is stated to have been rendered.

3. Because the said Thomas Fisher ought, upon a joint judgment against him and this defendant (the said Thomas being stated to be in life and a citizen and inhabitant of the district of Virginia), to be a party to the judgment, if one is rendered against the said defendant; and—

4. Because the verdict is insufficient, uncertain and wants form.

This motion was overruled, and judgment entered upon the verdict against the defendant Barton alone, for "$4000, also 1004 pounds of tobacco, at twelve shillings and six pence the hundred-weight, of the value of $20.92, and their costs, &c." Whereupon, the defendant brought his writ of error.

(*a*) March 5th, 1812. Present, all the judges.

Barton v. Petit.

P. B. Key, for the plaintiff in error.—1. The suit being joint, upon a joint debt, and the declaration being against both, averring both to be in custody, the judgment against one alone is erroneous. The writ of *capias*, not being considered as part of the record, according to the practice in Virginia, does not appear in the transcript. The record states, that Barton was arrested, but says nothing as to Fisher. No reason appears upon the record why he was not a *party to the judgment. The declaration avers them both to be in custody, and complains against both. That is an averment of a fact upon record, which the plaintiffs cannot contradict. If it appears on the declaration, or in any of the proceedings on the part of the plaintiff, that another was jointly bound with the defendant, and is still living, judgment against one is error and must be reversed. 1 Saund. 291, *c*, note 4 ; 5 Burr. 2614. [*196

It is a rule in good pleading, that the count must conform to the writ, and the bar and judgment to the count. Co. Litt. 203 *a*. If this count conforms to the writ, which in good pleading it ought to do, then both were taken, and the judgment is erroneous. But if both were not taken upon this joint writ for a joint debt, yet there is error. At common law, if there be process against two, on a joint cause of action, and one only be taken, the other must be outlawed, before there can be any other proceeding. *Edwards* v. *Carter*, 1 Str. 473. But if you could proceed against one, you must, upon the return of the writ, count against one, stating that the other was not taken, according to the truth of the case, and this must appear upon the record, to justify a judgment against one. To authorize a judgment against one, upon a joint suit against two, there must be a discontinuance, abatement or outlawry, or death suggested upon the record. You cannot aver anything out of the record, to support the judgment. Everything necessary to justify the judgment, must be affirmatively shown in the record, by the plaintiff.

2. The court below erred in rendering judgment for more money than was authorized by the Maryland judgment, which was filed and declared upon as a judgment of record. This is not an action of debt upon a simple contract, but technically upon a judgment on record. The act of congress of May 1790, declares the mode of authenticating a judgment ; and when so authenticated, *it is to have the same faith and credit in every court within the United States as in the courts of that state in which it was rendered. It may be declared upon in the same manner as if it were a judgment of a court of the state in which the suit upon it is brought. *Armstrong* v. *Carson*, 2 Dall. 303. Whenever a judgment or matter of record is the gist of the action, it must be certainly and truly alleged. Any variance is fatal. The Maryland judgment is for $4000, and 1004 lbs. of tobacco at twelve shillings and six pence per hundred. This twelve shillings and six pence must be Maryland currency, as the judgment was rendered in Maryland, where the dollar is seven shillings and six pence. The value of the tobacco was only $16.73, whereas, the judgment of the court below fixes its value at $20.92, which was at the rate of twelve shillings and six pence, Virginia currency, per hundred. [*197

The court was bound to take notice of the Maryland currency. It was matter of law ; and if they have mistaken it, it is error. But if it was matter of fact, it ought to have been found by the jury ; and their not having found it is error. *Bagshaw* v. *Playn*, Cro. Eliz. 536. If it is an error, it is

not amenable. *Thompson* v. *Jameson*, 1 Cr. 282. And in such a case, there can be no remittitur. *Incledon* v. *Crips*, 2 Salk. 658.

E. J. Lee and *Swann*, contrà.—1. There is no evidence in the record that will authorize the court to take notice of the Maryland currency. Upon the plea of payment, it was not necessary for the plaintiffs to produce the record of the judgment in Maryland. Besides, it was a matter for the jury to ascertain, and they have found it. Their verdict was "that the defendant hath not paid the debt in the declaration mentioned." *The debt in *198] the declaration mentioned was "the sum of $4000, also 1004 pounds of tobacco, at twelve shillings and six pence the hundred weight, 'being of the value of $20.92.'" This was the debt which the defendant pleaded that he had paid, and which the jury found that he had not paid. *Strode* v. *Head*, 2 Wash. 149.

2. The averment in the declaration, that the defendants are in custody, is only matter of form, and is always made in cases where the defendants are not in custody, and cannot be holden to bail. In this very case (it being debt on a judgment), according to the decisions in Virginia, the defendant cannot be holden to bail. It is an immaterial averment, and if it appear by the record, that one of the defendants never was taken, a judgment against the other is not erroneous. *Brown* v. *Belches*, 1 Wash. 9.

The omission of the clerk, at the rules, to enter the suit abated as to Fisher, is not error. By the statute of Virginia, respecting the district courts of that state, it is enacted, "that where the sheriff or other officer, shall return on any writ of *capias* to answer in any civil action, that the defendant is not found within his bailiwick, the plaintiff may either sue out an *alias* or a *pluries capias*, until the defendant shall be arrested, or a *testatum capias*, where he shall be removed into another county; or may, at his election, sue out an attachment against the estate of the defendant to force an appearance." Rev. Code, p. 86, § 33. And "on the return of the *pluries*, that the defendant is not found, the court, instead of the process of outlawry formerly used, may order a proclamation to issue, warning the defendant to appear at a certain day therein named, or that judgment will be rendered against him, which proclamation shall be published," &c., "and if the defendant fails to appear pursuant to such proclamation, the same proceedings shall be had, and the same judgment given, as in other cases of default." Rev. Code, p. 87, § 41.

By the statute of Virginia, respecting the county courts, "for the better *199] ascertaining what process may *be sued out, where the sheriff or other officer returns that the defendant is not to be found in his bailiwick, it is enacted, that where any sheriff or other officer shall make such return, the plaintiff or plaintiffs in any civil action, shall and may sue an attachment, &c., to force an appearance, or an *alias* or *pluries capias*, at the election of the plaintiff or plaintiffs:" "and where any defendant shall be a known inhabitant of another county, and not of the county of that sheriff to whom the process shall be directed, such sheriff shall return the truth of the case, but not that the person is not found in his county, and thereupon, such process issued from any county court clerk's office, as to such defendant, shall abate and be dismissed." Rev. Code, 95, § 32.

By the former act, Rev. Code, p. 86, § 35, rules are to be holden monthly

at the clerk's office, and "the plaintiff shall file his declaration in the clerk's office, at the succeeding rule-day after the defendant shall have entered his appearance, or the defendant may then enter a rule for the plaintiff to declare, which if he fails or neglects to do, at the succeeding rule-day, he shall be nonsuited" and pay costs, &c.

The practice, under these statutes, in Virginia, is, to enter the suit abated against a defendant who is returned by the sheriff, "no inhabitant of his county," and to proceed against the other; and the declaration is always joint, and in the same form as if both had been taken. After one defendant has appeared, the plaintiff is bound by law to declare against him or to suffer a nonsuit. So, if one suffers judgment to be rendered against him by default, you proceed against the other, and file your declaration against both. So, one defendant in custody may confess judgment, and you proceed against the other. In the case of *Brown* v. *Belches*, cited from Washington's Reports, the declaration was against both, and stated them both to be in custody; such has been the uniform practice for more than twenty years.

Afterwards, *E. J. Lee* obtained a *certiorari*, upon a *suggestion that the transcript of the record did not contain the writ of *capias ad respondendum* against Barton and Fisher, and the marshal's return thereupon. [*200

Upon the return of the *certiorari*, the clerk sent up a copy of the *capias*, which was in the usual form, against both defendants, and of the marshal's return, which was "executed on Seth Barton only, and bailed by Thomas R. Rootes." The clerk also certified, "that the said *capias* not having been executed upon the said Thomas Fisher, an *alias capias* was awarded against him, which has not been returned; and the attorney for the plaintiffs having information that that defendant was no inhabitant of the Virginia district, at rules held at the clerk's office, in the month of June, in the year 1809, caused the said suit to be abated as to the said Thomas Fisher." This was stated by *E. J. Lee* to be conformable to the practice in Virginia.

March 14th, 1812. All the judges being present, WASHINGTON, J., delivered the opinion of the court, as follows:—This was an action of debt, brought in the circuit court for the district of Virginia, by Petit & Bayard against Seth Barton and Thomas Fisher, upon a judgment rendered in the general court of Maryland. The declaration is against the said Barton and Fisher, late merchants and partners, trading under the firm of Barton & Fisher, citizens and inhabitants of the state of Virginia, both of whom are alleged to be in the custody of the marshal. The record states that Barton, who had been arrested upon the *capias*, gave bail and put in the plea of payment, on which an issue was joined, and a verdict was rendered against him. He afterwards moved in arrest of judgment, and amongst other reasons, assigned the following, viz: That the declaration states a joint cause of action against the said Barton and one Thomas Fisher, and that, therefore, a judgment ought not to be rendered against him alone. The *motion in arrest of judgment having been argued and overruled, judgment was rendered against Barton, and the record has been removed into this court, by writ of error. [*201

The general rule certainly is, that if two or more persons are sued in a

joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process, or until the other defendants have been proceeded against so far as the law authorizes, for the purpose of forcing an appearance. In England, the plaintiff must proceed to outlaw the defendants who have not been served, before he can proceed against those who appear. In Virginia, where this suit was brought, the plaintiff might have taken out an *alias* and a *plurias capias*, or *testatum capias*, or, at his election, an attachment against the estate of such defendant; or, upon the return of a *pluries*, not found, the court may order a proclamation to issue, warning the defendant to appear on a certain day, and if he fail to do so, judgment by default may be entered against him.

But whatever may be the mode provided by law for forcing an appearance, the plaintiff cannot proceed to obtain a judgment against one defendant, in a joint action against two, until he has proceeded against the other so far as the law will authorize, unless the law dispenses with the necessity of proceeding against the other defendant beyond a certain point to force an appearance. Thus, in Pennsylvania (as is known to one of the judges of this court), if the sheriff return *non est* as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating, in his declaration, the return of the writ as to his companion.

To remove the objection which arises in this case, the plaintiff obtained a *certiorari* to the circuit court of Virginia, on a suggestion of diminution, and it now appears, by the certificate of the clerk of that court, that an *alias capias* issued against Thomas Fisher, which was not returned, but the plaintiff's attorney caused the suit to be abated as to the said Fisher, upon information which he had received that the said Fisher was no inhabitant of the
*202] district of Virginia. Had the *marshal returned the writ, and stated this fact, the law would have abated it as to Fisher; in which case, the objection to the subsequent proceedings against Barton would have been removed. But since the plaintiff could not have supported his action originally against one defendant, on a joint cause of action, where it appeared, by his own showing, or by a plea in abatement, that there was another person who was jointly bound, and might be sued, he ought not to be permitted, after stating a joint cause of action, to abate or discontinue his action against one, unless authorized to do so by the return of the process against that defendant. If he do so, it furnishes a good ground for arresting the judgment.

It is contended, in support of this judgment, that, as, by the law of Virginia, the plaintiff must file his declaration at the next succeeding rule-day after the defendant shall have entered his appearance, or that the defendant may rule him to do so, which if he fails to do, he shall be nonsuit, the plaintiff not only may, but is bound to proceed against one defendant alone, after he has appeared. But the court understands this law as applying to a sinfle defendant, or, if there be more, to the appearance of all the defendants.

Judgment reversed.[1]

[1] For a further decision in this case, see *post*, p. 288.

Wilson *v.* Koontz. (*a*)

Statute of limitations.

The defendant to an attachment in chancery, in Virginia, may plead the statute of limitations, without supporting it by answer.

A defendant who removes from one county to another, in Virginia, is not thereby prevented from pleading the act of limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed in bringing or maintaining his action.

This was an appeal from the decree of the Circuit Court for the district of Columbia, which dismissed the complainant's bill in equity.

Wilson filed a bill in equity, in the nature of an attachment in chancery, against Koontz, surviving partner of Koontz & Ober, as principal debtor, and Thomas Irvine and Joseph Mandeville, as garnishees. It *stated, [*203
that Koontz, a resident of Virginia, as surviving partner of the firm of Koontz & Ober, was indebted to the plaintiff by note, in the sum of $1261, and had in the hands of Thomas Irvine and Joseph Mandeville goods and effects which were liable to be attached for the payment of the debt; and that unless he could make them liable by the intervention of the court below, he would be without any means of recovering his debt. In tender consideration whereof, and forasmuch as he had no remedy at law, and could only subject the effects and money in the hands of Irvine and Mandeville to the payment of his debt, by means of a court of equity, he prayed a discovery, and a decree that Koontz might pay the debt, and that Irvine and Mandeville might be restrained from paying away the effects in their hands, and that they might be applied to the payment of the debt; and for general relief.

Koontz having entered his appearance, gave security to perform the decree of the court, if it should be against him, thereby discharging the attached effects, and pleaded the statute of limitations in bar of the suit; to which the complainant replied, that on the 4th of August 1794, a suit was brought, by the orders of the complainant, in the name of the president, directors and company of the Bank of Alexandria, as nominal plaintiffs, in the district court, in the town of Winchester, in the state of Virginia, upon the note in the bill mentioned, against Koontz & Ober; and upon the writ the sheriff returned, that Koontz was not found, and that Ober was no inhabitant of that county. That in September 1794, it was agreed, that Koontz should place in the hands of the complainant sundry bonds towards the discharge of the note, and that he would pay the balance in 12 or 18 months; in consequence of which, the suit was dismissed; in pursuance of which arrangement, part of the money was paid, and the residue was still due, with interest. That afterwards, in the year 1794, Koontz removed into some other part of the state of Virginia, unknown to the complainant. That in 1803, the complainant having learned the residence of the defendant, in Rockingham county, 60 or 70 miles from his former residence, and more remote from the complainant, ordered a suit against him, which was brought, but not prosecuted, because the defendant required *security [*204
for costs from the complainant, who did not reside in Virginia.

To this replication, there was a general rejoinder and issue, and a general

(*a*) March 6th, 1812. Present, all the judges.

dedimus to take depositions. Upon the return of which, the cause came to hearing upon the pleadings and evidence. Whereupon, the court below decreed, that the bill should be dismissed, with costs; from which decree, the complainant appealed to this court.

E. J. Lee, for the appellant.—It was not necessary for the complainant to reply matter to bring himself within an exception to the statute of limitations; because the circumstances which take the case out of the statute are stated in the bill. Before the defendant can be permitted to plead the statute, he must, by answer, either deny the debt, or aver it to be paid. Gilb. Chancery Practice 61. The statute of limitations is not properly a plea in equity. The statute does not make it an absolute bar in equity. It is only under the equity (*i. e.*, the reason) of the statute, that courts of equity allow it to be pleaded. If it appear clearly that the debt has not been paid, the statute is no bar in equity. The questions put by Koontz upon the examination of the witnesses show that the debt was not paid. Less evidence than this has been held to take a case out of the statute. It would have been no bar for Ober, who never resided in Virginia: and if not a good bar for Ober, it was not for Koontz. The plea does not state that Ober, the other partner, did not promise within five years.

Taylor, contrà.—There is nothing in the replication, or the evidence, to take the case out of the statute. The only question then is, whether the statute is a good plea in a suit in chancery? This is not properly a case of equity jurisdiction. It is simply an action at law upon a promissory note. Nothing gave jurisdiction to the court, as a court of equity, but the circumstance that the defendant was a resident of Virginia and had effects in the
*205] *hands of residents in this district. The defendant having appeared and given security, so as to discharge the attached effects, nothing remains to be decided, but the sheer law of the case; and when a court of equity gets possession of a case, which is a mere case at law, if it is allowed to proceed at all, it must decide the case as a court of law would decide it.

If a bill charge fraud or trust, it is admitted, that the defendant must answer to the fraud or trust, before he can plead the statute of limitations. But this bill charges no fraud nor trust, nor seeks any discovery from the defendant. He is, therefore, not bound to answer, but may rely entirely on his plea. *South Sea Company* v. *Wymondsell*, 3 P. Wms. 144; 2 Com. Dig. 261; 2 Atk. 51. If the complainant thinks the plea bad, he may demur, or except. But here is neither exception nor demurrer. Laws of Virg., Rev. Code 73, § 40.

March 10th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—This is a suit in chancery, and the defendant pleads the act of limitations. The plaintiff, by his replication, attempts to bring the case within the exception contained in the 14th section of that act; but it seems essential, under that section, that the complainant should have been actually defeated or obstructed in bringing his action, by the removal of the defendant. There is no evidence of his intention of bringing his action sooner than he did, or that he was delayed by the defendant's removal from the county. The court is, there-

fore, of opinion, that the circumstance of removal is not sufficient to take the case out of the statute.

It is objected, that the plea of the statute of limitations is not good, unless the defendant answer also, and deny the debt, or aver it to be paid. But if this be a valid objection, it ought to have been taken, at the time of offering the plea, and before the issue was joined. It is now too late. If it be a good objection, in cases within the general *jurisdiction of a court of equity, yet it is not valid, in a case like the present, which is really a case at law as between the present parties. [*206

The court is of opinion, that the plea is a good bar, and that the decree should be affirmed.

Decree affirmed.

Riddle *v.* Moss. (*a*)

Competency of witness.

The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs, in case the judgment should be against him.

Error to the Circuit Court for the district of Columbia. This was an action of debt on a joint bond, given by John Welch, as principal obligor, and the defendant Moss, as his surety. The suit abated as to Welch, by the return of the marshal, that he was no inhabitant of the district. The defendant, Moss, pleaded specially certain facts in avoidance of the bond as to him alone; upon which issue was joined; and upon the trial, the defendant Moss offered as a witness the said John Welch, the principal obligor, who was permitted by the court below to testify for the defendant, and upon his cross-examination confessed, that he had made over to Moss all his property, as security to indemnify him against the event of this suit. The plaintiff took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error to this court.

E. J. Lee and *Jones*, for the plaintiff in error.—Welch was clearly an interested witness. By relieving Moss from this suit, he would relieve his property from the lien which Moss held upon it. If the plaintiff recovered against Moss, the latter could immediately recover judgment against Welch for the whole debt, together with the costs of this suit. Laws of Virg., Rev. Co. 292; *Buckland* v. *Tankard*, 5 T. R. 578; Bull. N. P. 283; 5 Burr. 2727; 3 Atk. 402; 1 Day 81. *Welch is also interested to the amount of his legal fees for attendance as a witness. It appears upon the record, that he was regularly summoned, and is by law entitled to demand of Moss one dollar and a quarter *per diem*. If the plaintiff should be defeated, he will retain this to his own use, but if the plaintiff should recover judgment, he will have to refund it to Moss. [*297

C. Lee, contrà.—The defence set up by Moss did not affect Welch's liability upon the bond. He was bound at all events. He was not a party to this suit. Neither the verdict nor judgment could affect him. He would be

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(*a*) March 6th, 1812. Present, all the judges.

obliged to pay either Riddle or Moss, and it was immaterial to him, which of them should recover against him. If the plaintiff should be defeated by Moss, he would sue Welch, and recover judgment, with costs; so that it was immaterial to him, whether he paid costs to one or the other. He, therefore, stood indifferent as to interest. In chancery, one defendant is a good witness for another, and it would be as good a rule at law. Courts of law have, of late, inclined to refer all cases of doubtful interest, to the credibility, rather than to the competency of the witness. The interest should be immediate and direct, in order to exclude the witness. 3 Esp. Rep. 60.

The statute of Virginia, which gives to a surety a remedy against his principal, does not alter the case. He had an equal remedy before. In the case of *Pawling* v. *United States*, 4 Cranch 219, the point was made by a bill of exceptions to the refusal of the district court of Kentucky to admit a co-obligor as a witness, but was not decided, the judgment having been reversed upon other grounds.

March 10th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The court is of opinion, that Welch, the co-obligor, was interested, and was, therefore, an
*208] incompetent witness. *It was a consideration of some importance, that he had given Moss a deed of trust of his effects to indemnify him against this suit; but the principal circumstance was, that Welch's liability would be increased, to the extent of the costs of this suit, if the judgment should be against Moss.(*a*)

Judgment reversed.

SHEEHY *v.* MANDEVILLE. (*b*)

Action on promissory note.— Variance.

A note payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable; the variance is fatal.

Upon executing a writ of inquiry, in Virginia, in an action of *assumpsit* upon a promissory note, it is necessary to produce a note corresponding with that stated in the declaration; but it is not necessary to prove the note.

The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria.

This cause having been sent back to the circuit court, by the mandate of this court, at February term 1810 (6 Cr. 253), commanding that court to render judgment for the plaintiff on his first count, and to award a writ of inquiry of damages, upon executing that writ of inquiry, the plaintiff produced the following note.

(*a*) The same point was also decided in the case of the *Governor of Virginia* v. *Evans and others*, at this term; which was the case of a bond with collateral condition. It was a joint action; and all the defendants were taken, but pleaded separately.

(*b*) March 6th, 1812. Present, all the judges.

"Alexandria, 17th July 1804.

"Sixty days after date, I promise to pay to Mr. James Sheehy, or order, six hundred and four dollars and ninety-one cents, for value received, negotiable in the bank of Alexandria. R. B. JAMESON."

The note was thus described in the declaration, "And whereas, the said defendants, under the name, firm and style aforesaid, did, on the said 17th of July 1804, make their certain note in writing, called a promissory *note, subscribed by them under the name, style, title and firm of Robert B. Jameson, bearing date the same day and year, and then [*209 and there delivered the said note to the plaintiff, and by the said note, did, under their firm aforesaid, promise to pay to the said plaintiff, or to his order, six hundred and four dollars and ninety-one cents for value received, negotiable at the bank of Alexandria, by reason whereof and by virtue of the law in such cases made and provided, the said defendants became liable to pay to the said plaintiff the said sum contained in the said note, according to the tenor and effect of said note;" and being so liable, &c.

Which note the court below refused to suffer the plaintiff to read in evidence to the jury, because it varied from that set forth in the declaration; to this refusal, the plaintiff excepted. The plaintiff then contended before the jury, that the existence, the execution, the amount, and the validity of the note set out in the declaration, were determined by the judgment of the court upon the demurrer, and claimed damages to the full amount of that note, without producing it. But the court, upon the motion of the defendant, instructed the jury, that it was necessary for the plaintiff to produce the note, or sufficiently account for its non-production, otherwise, the jury may and ought to presume that the note has been paid, or has been passed away by the plaintiff to a third person, for value received, and in such case, ought to assess only nominal damages. To this instruction, the plaintiff also excepted.

The plaintiff, then, in order to rebut the presumption that the note mentioned in the declaration had been paid or passed away to a third person, for a valuable consideration, produced and offered to show to the court and jury, the record and judgment on the defendant's first and second pleas, which had been adjudged bad upon demurrer, and also the same note in the said pleas mentioned to have been the foundation of the suit and judgment set forth in the said pleas (which was a separate suit and judgment against R. B. Jameson, upon the same note, as the sole note of Jameson, and which judgment Mandeville had pleaded in bar to the present action, averring the note be the same, but which *plea was by this court adjudged bad [*210 on demurrer), and also the *fieri facias* issued against Jameson upon that judgment, with the return of *nulla bona;* and also offered to prove by a competent witness, that the promissory note produced to the jury, and in the said record of the suit against Jameson mentioned, is the same promissory note upon which the present declaration was founded, and the same which was intended to have been therein set out and described, and that the omission to state in the declaration, the time in which the said note was originally made payable, arose from a mere oversight of the attorney who drew the declaration, and that there was no other note ever intended to have been described in that declaration, or answering the description therein con-

tained, but the court rejected the whole of the said evidence as incompetent ; to which the plaintiff also excepted.

It being the prime object of courts to do justice, the court will decide in favor of the plaintiff, if the justice of the case be with him, unless there be some technical rule so strong as to leave the court no ground in his favor.

The jury assessed the plaintiff's damages, and judgment was rendered accordingly at one cent only ; whereupon, he brought his writ of error.

E. J. Lee, for the plaintiff in error.—1. The first question is, whether there be any variance between the note declared upon, and that produced before the jury on the execution of the writ of inquiry ? What is, in law, a variance ? The rule is, that the *allegata* and *probata* must correspond in all material points. The note produced was payable "sixty days after date." The declaration does not state when it was payable. There is, therefore, no repugnance, no inconsistency, between them. To have made it a variance, the declaration should have expressly averred that the note was payable on demand. The omission to state a fact, without a direct averment of a different fact, is not a variance. 1 Bos. & Pul. 225.

*211] *The declaration leaves it uncertain when the note was payable ; but the note itself renders that certain which had been left uncertain on the face of the declaration. An averment is a positive statement : and is used in opposition to argument, or inference. Cowp. 683–84. From the statement in the declaration, it is only matter of inference, that the note was payable on demand. But there is no variance between the *assumpsit* laid and the note offered. The statement of the note in the declaration is only inducement ; but in the *assumpsit*, it does not say when the money was to be paid. In setting forth the matter of inducement, exact certainty is not required. 5 Com. Dig. 35, C, 30.

The declaration states what, in law, is considered as a parol agreement, and the action is a general, and not a special, *indebitatus assumpsit*. Under the count of general *indebitatus assumpsit*, any evidence substantially corresponding with the cause of action set forth in the declaration, may be given in evidence. There is no variance, whenever the time or date is uncertainly set forth or omitted. It may be supplied by pleading, or by finding, and therefore, in order to render, by finding, that certain, which is omitted, or which does not correspond with the statement in the narration, evidence must be heard. *Cromwell* v. *Grumsden*, 1 Lord Raym. 335. If a patent be pleaded without a date, and the one produced has a date, it is not a variance. 5 Com. Dig. 395. Everything is form, without which the right of action appears to the court. Hob. 233–35 ; Com. Dig. 139. This suit was brought, after the note became due, therefore, the time of payment was then not material to the plaintiff's right of action. The promise, for a valuable consideration, gives the right of action. The time of payment was not material, and could not have been put in issue. 5 Com. Dig. 27.

The omission is cured by the statute of *jeofails*. Virg. Laws, 112, § 26.

*212] If, after verdict, the plaintiff could not be required to *show such a note as is set forth in the declaration, so, upon a judgment by confession, *nil dicit*, or *non sum informatus*, he is not bound to show such a note.

2. If there be a variance, it is not a material one. *Evans* v. *Smith*,

1 Wash. 72. In the bond in that case, the obligor was stated to be "of the county of Essex," which part of the description was omitted in the declaration, and it was held to be an immaterial variance.

It is only necessary to prove substantially the cause of action declared upon. *Mc Williams* v. *Willis*, 1 Wash. 199. In that case, the agreement was made by Willis, "as treasurer of the jockey-club." The declaration omitted this description, and it was holden no variance. The reason was, that he was equally liable, whether he contracted as treasurer or not. So, in this case, the defendant was equally liable, whether the note was payable in sixty days, or on demand, the sixty days having expired before the suit was brought.

In the case of *Peter* v. *Cocke*, 1 Wash. 257, the suit was upon a bond given to U. P. "of the county of Surrey, on account of Messrs. G. & P., merchants in Glasgow." The declaration stated the bond to be given to W. P., without stating on whose account; yet it was holden no variance.

In the case of *Wroe* v. *Washington and others*, 1 Wash. 357, the declaration stated an agreement by which the appellant was to rent and furnish a house in Leedstown, and entertain one of the appellees, two of their storekeepers, and a servant, with meat and drink, for one year, for which the appellees agreed to pay him, for the first three, 25*l.* each, and for the last, 8*l.* The evidence offered did not show any agreement respecting the renting of a house at Leedstown; but it showed an agreement to pay 83*l.* in gross: held, no variance.

The date of a deed is not of its substance. *Goddard's Case*, 2 Co. 5 *a*. Upon the same principle, the time of payment is not of the substance of a contract. A variance between the date of the bond declared *upon, and that cited in the award, is not fatal, if they agree in every other particular. *Ross* v. *Overton*, 3 Call 309; *Lyons* v. *Gregory*, 3 Hen. & Munf. 237. In the case of *Baptiste* v. *Cobbold*, 1 Bos. & Pul. 7, the contract stated in the declaration was for 52*l.* 10*s.* for rum-money; the evidence was a note by which the defendant agreed to allow the plaintiff the above sum; together with a pint of rum per day; and held no variance. [*213

The grounds upon which the law requires that the *probata* should agree with the *allegata*, are, 1. To apprise the defendant of the nature of the charge; and 2. To enable him, by a reference to the record itself, to plead the judgment in bar of another action for the same cause. The declaration in this case did apprise the defendant of the nature of the charge; for he appeared and pleaded to the action, and by his plea identified the note. The second object is obtained by the record, by which it appears, that the note offered in evidence is that which was declared upon. If this note had been received in evidence, it would have been filed, and formed a part of the proceedings which the clerk is bound, by the statute of Virginia, to retain. If the reason of the rule requiring the *allegata* and *probata* to correspond, is attained in this case, and if there was no danger of a second suit being maintained upon the came cause of action, against the defendant, the variance cannot be material.

3. The plaintiff was not bound to produce, upon the execution of the writ of inquiry, the note or the evidence of the debt. Where there is judgment by default, in an action upon the case on a promissory note, the court will (without a jury) direct the clerk to ascertain the damages. 1 H. Bl.

252, 529, 541. These cases were decided upon the ground, that the amount claimed in the declaration is admitted in the same manner, as if the action was debt; because a sum certain is demanded, and it is not like the case, where the cause of action sounds in damages, and not in contract, ascertain, ing on its face the amount claimed.

*214] *Upon executing a writ of inquiry, the plaintiff is not bound to prove his cause of action, because it is admitted as laid. Cro. Jac. 220. If the cause of action is admitted, and the note not required to be proved, and it is to be produced for no other purpose than to see whether there is any credit on it, and there should be a difference in the date; yet it is not a variance, because a variance can exist only where proof is to be made.

The case of *Green* v. *Hearne*, 3 T. R. 301, shows that upon a writ of inquiry, it is not necessary to prove the bill of exchange; that a variance between that declared upon, and that produced, is not material, and that evidence *dehors* the bill is admissible, to prove that the bill produced is that which was declared upon. *Mills* v. *Lyne*, Bayley on Bills, appendix No. 7, p. 74; Kyd on Bills 155; 2 W. Bl. 748; *Bevis* v. *Lindsell*, 2 Str. 1149; Bayley 66–7. All these cases show, that after judgment by default, a promissory note set out in a declaration need not be produced. Sayer on Damages 112, 113, says, where there is judgment upon demurrer, the justices may award damages; the amount of the damages laid in the declaration is admitted.

4. The court erred in directing the jury, that they were bound to presume, from the non-production of the note declared upon, that it was paid or had been assigned away by the plaintiff to a third person, for a valuable consideration, unless the non-production was sufficiently accounted for. The non-production of the note was only a circumstance to be left to the jury, to draw such inference from, as they should think proper, under the whole of the circumstances attending the case. The court undertook to decide on the weight and effect of this negative kind of evidence. Presumptive evidence is always left to the jury. *Hull* v. *Horner*, Cowp. 109.

5. The court ought to have admitted the evidence offered, to show that this was the note intended by the description in the declaration; especially,

*215] the defendant's own pleas, in which he affirms the note described *in the declaration to be the same note upon which judgment was obtained against Jameson, which is the same note which was produced to the jury on the execution of this writ of inquiry. In the former opinion, the court admitted the principle, that it was competent for the plaintiff to account for the non-production of such a note as is described in the declaration; and yet when the plaintiff offers evidence to account for its non-production, the court reject it.

A finding by a special verdict, or an admission in former pleadings is good evidence, unless the contrary appears. *Lee* v. *Boothby*, 1 Keble 720, pl. 50.

Swann, contrà.—No time of payment being mentioned in the note, it is to be taken as a note payable on demand. The note produced was payable at sixty days. Such a variance is fatal upon an issue. 3 Selwyn's Nisi Prius 999.

The principal question is, whether it be necessary to produce the note, on the execution of a writ of inquiry. The practice in Virginia is, to produce

the note. Such also is the practice in England. Esp. N. P. 180, tit. Assumpsit; 2 Str. 1149. The cases from Bayley, &c., only show that the note need not be proved; this we admit; but still we contend, it ought to be produced. The judgment upon the demurrer does not admit the amount of the damages.

Jones, in reply.—1. There was no material variance. The description of the note in the declaration, as far as it goes, is correct. The time and mode of payment are no part of the substance of the contract necessary to be set forth. It is only necessary to set forth the legal effect of the note, and as the sixty days had expired before the suit was brought, it was in effect a note payable on demand. *Bristow* v. *Wright*, 2 Doug. 670. *2. Upon such special counts, for a precise sum, it is not necessary to produce proof upon the writ of inquiry. The judgment by default confesses the whole sum, as well as the cause of action. In debt, and *indebitatus assumpsit*, you could not recover less than the precise sum stated in the declaration; and therefore, a judgment by default confessed the whole. And although the courts have relaxed as to those counts, and you may now recover less, yet when the declaration is for a precise sum, a judgment by default carries the whole. The rule to produce the note is only a matter of discretion; a mere rule of practice, intended to prevent injustice. [*216

March 14th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was instituted on a promissory note, executed by the defendant, and made payable to the plaintiff. After describing the note accurately, with the exception of the time when it became payable, which is altogether omitted, the declaration proceeds, in the usual form, to state, that the defendant, being so liable, assumed to pay the sum mentioned in the note, when he should be thereunto required, &c. To this count, a special plea was filed, which, on demurrer, was held sufficient. Judgment, on the demurrer, being rendered for the plaintiff, and writ of inquiry was awarded. On executing this writ, the plaintiff produced a note payable sixty days after date, and offered to prove that it was the note on which the suit was instituted, and that the omission to state the day of payment in the declaration was the mistake of counsel. The court refused to permit the note to go to the jury; and also instructed them, that unless a note conforming to the declaration should be adduced, or its absence accounted for, they must presume it to have been passed away or paid. The jury, under these instructions *found one cent damages, for which judgment was rendered. To this judgment, the plaintiff has sued out a writ of error. [*217

The errors assigned are, 1st. That the variance was not fatal; 2d. That on a writ of inquiry the production of the note was unnecessary. Courts, being established for the purpose of administering real justice to individuals, will feel much reluctance at the necessity of deciding a cause on a slip in pleading, or on the inadvertence of counsel. They can permit a cause to go off on such points, only when some rule of law, the observance of which is deemed essential to the general administration of justice, peremptorily requires it. One of these rules is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer, to require that it should be repeated.

It is not necessary to recite the contract *in hæc verba*, but if it be recited, the recital must be strictly accurate. If the instrument be declared on, according to its legal effect, that effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence. The plea of *non assumpsit* denies the contract; and an instrument, not conforming to the declaration, either in words, where it is recited, or according to its legal effect, where the legal effect is stated, although proved to be the act of the defendant, is not the same act, and therefore, does not maintain the issue on his part.

In this case, the legal effect of the promissory note is stated; and that effect, on a note, having no day of payment, would be, that it was payable immediately. This declaration goes on that idea, and avers a promise to pay, when required. A note payable sixty days after date, is a note differ-
*218] ent from one payable immediately, *and would not support the issue, had *non assumpsit* been pleaded, and issue joined on this plea.

Now, what difference is produced by the default of the defendant? He confesses the note stated in the declaration, but he confesses no other note. The necessity, then, of showing a note conforming to the declaration, is precisely as strong on executing a writ of inquiry, as on trying the issue. No reason is perceived why a variance which would be fatal in the one case, would not be equally fatal in the other.

The cases cited by the plaintiff's counsel have been considered, but they do not come up to this. They are not cases where the legal effect of the written instrument, offered on executing the writ of inquiry, has differed from that of the instrument stated in the declaration.

The court is also of opinion, that the production of the note, on executing the writ of inquiry, was necessary. The default dispenses with the proof of the note, but not with its production. In England, damages have, in some circumstances, been assessed without a jury, but it is not stated, that those damages have been assessed, without a view of the note. The practice of this country is, to require that the note should be produced, or its absence accounted for, and the rule is a safe one.

Judgment affirmed.

Conway's Executors and Devisees *v.* Alexander. (*a*)

Conditional sale.—Mortgage.—Equity of redemption.

If A. advance money to B., and B. thereupon convey land to trustees, in trust to convey the same to A. in fee, in case B. should fail to repay the money and interest on a certain day; and if B. fail to repay the money on the day limited, and thereupon, the trustees convey the land to A.; B. has no equity of redemption.[1]

This was an appeal from the Circuit Court for the district of Columbia, sitting in chancery, at Alexandria.

(*a*) March 7th, 1812. Present, all the judges.

[1] To make an instrument, in the nature of a mortgage, a conditional sale, the intention of the parties, at the time of contracting, must be clearly proved, or necessarily implied from the circumstances. Wheeland *v.* Swartz, 1 Yeates 579. In a doubtful case, it will be construed as a mortgage, rather than a conditional sale. Matthews *v.* Sheehan, 69

Conway v. Alexander.

*Walter S. Alexander, the appellee, son and residuary devisee of Robert Alexander, deceased, filed his bill in equity against the executors and devisees of Richard Conway, deceased, to be permitted to redeem a certain tract of land, which his father, Robert Alexander, had, in the year 1788, conveyed to certain trustees, by a deed which the complainant contended was a mortgage; which land the trustees had conveyed to W. Lyles, who had conveyed the same to the said Richard Conway. The deed was by indenture, dated March 20th, 1788, between Robert Alexander of the first part, W. Lyles of the second part, and certain trustees of the third part, whereby Robert Alexander (after reciting his title to an undivided moiety of 400 acres of land, holden in common with Charles Alexander), in consideration of 800*l.* paid to him by W. Lyles, and in consideration of the covenants to be performed by the trustees, bargained, granted and sold, aliened and confirmed to W. Lyles, in fee, twenty acres, being part of the said undivided moiety; and to the trustees, the residue of the moiety, except part thereof conveyed to B. Dade on the 1st of January 1788; which residue was supposed to contain 140 acres: To have and to hold the 20 acres to W. Lyles, his heirs and assigns, to his and their use for ever; and the said residue of the said moiety to the trustees and the majority of them, and the survivors and survivor of them, in trust as follows, to wit: "To convey the said residue of the said moiety, except as before excepted, unto him the said W. Lyles, his heirs and assigns for ever, by good and sufficient deeds in law for that purpose, at any reasonable time after the first day of July, which shall be in the year 1790, unless the said Robert Alexander, his heirs, executors or administrators, shall pay, or cause to be paid, to the said W. Lyles, his heirs, executors or administrators, the sum of 700*l.* current money of Virginia, in gold or silver coin, with lawful interest thereupon, from the date hereof, on or before the first day of July, which shall be in the year of our Lord 1790. And if the said Robert Alexander, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said W. Lyles, his heirs, executors or administrators, the said sum of 700*l.*, current money of Virginia, in gold or silver coin, with lawful interest thereupon, *at any [*220
time on or before the said first day of July, which shall be in the year 1790, in trust, immediately upon the payment being made, to reconvey to him the said Robert Alexander, and his heirs for ever, by good and sufficient deeds in law, all the title which by virtue of these presents passeth to them the said (trustees) or any of them, of, in and to the said residue of the said moiety, except as before excepted, herein before granted and confirmed unto them." Robert Alexander then covenanted that he had good title in fee-simple to the land conveyed; and that the 20 acres should be laid off in a certain situation contiguous to other land of Lyles, and by certain metes

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N. Y. 585. What was intended as security for a loan, cannot be converted into a conditional sale, by the form of the transaction; and an agreement to make it such, in default of payment at the day, will be relieved against. Kunkle *v.* Wolfersberger, 6 Watts 126; Kerr *v.* Gilmore, Id. 405; Rankin *v.* Mortimere, 7 Id. 372; Brown *v.* Nickle, 6 Penn. St. 390. And for that purpose, extraneous evidence is admissible, to inform the court of any material fact known to the parties when the deed was executed; and this, on the ground, that to insist on what was really a mortgage, as a sale, is, in equity, a fraud, which cannot be successfully practised, under the shelter of any written paper, however precise and complete they may appear to be. Russell *v.* Southard, 12 How. 147; Babcock *v.* Wyman, 19 Id. 299.

and bounds therein described. The trustees then covenanted, that they would well and truly execute the trusts reposed in them, by reconveying the land to Robert Alexander, if he should pay the money, and interest, on or before the 1st of July 1790; or by conveying it to Lyles, if Robert Alexander should not pay it by that day. Robert Alexander then covenanted with Lyles, that he would make further assurance, &c., both as to the 20 acres, and as to the residue of the moiety, if the trustees should convey it to him. He then covenanted to warrant the 20 acres to Lyles against the claims and demands of all persons whomsoever. This deed did not contain any covenant on the part of Alexander to pay the 700*l.*

On the 19th of July 1790, the trustees, by deed of that date, reciting the deed of the 20th of March 1788, and that Lyles had represented that R. Alexander had not paid the money, and had required them to execute the trust, conveyed the residue of the undivided moiety in fee to Lyles, in consideration of the covenants, agreements and trusts in the former deed contained on their part to be performed, and in consideration of 700*l.* mentioned in the said former deed to have been paid by Lyles to Alexander.

On the 23d of August 1790, Lyles, by deed of that date (after reciting the title of Robert Alexander to the undivided moiety of the 400 acres of land, and his deed of the 20th of March 1788, to Lyles and the trustees, and that Alexander failed to pay the 700*l.* on the 1st of July 1790, and that the *221] trustees, by their *deed of the 19th of July 1790, had conveyed the land in question to Lyles), in consideration of 900*l.* paid him by Richard Conway, conveyed the 20 acres, and the residue of the undivided moiety of the 400 acres, and all his right, title, interest, use, trust, property, claim, and demand, in and to the same, by force of the said indenture, and all deeds, evidences and writings in any manner or way touching the same, and the right and privilege of prosecuting in the name of Lyles (if at any time judged necessary by Conway, his heirs or assigns), any actions at law for the breach of any of the covenants in the said indenture contained: To have and to hold, all and singular the premises thereby granted, with the appurtenances, and all the estate, right, title, use, trust, interest, property, claim and demand of him the said W. Lyles thereto, by force and virtue of the aforesaid indentures to Conway, his heirs and assigns, to his and their use for ever: with a special warranty against the claims of Lyles and his heirs and assigns only.

On the 17th of January 1793, Robert Alexander made his will, and after devising specifically a number of tracts of land, and moieties of tracts, by name and description, to his son Robert, devised all the rest and residue of his estate, real and personal, to his son Walter, the complainant. Robert Alexander, the testator, died in February 1793. The land in question was not specifically devised by his will, and Walter, the complainant, obtained title under the will to several other tracts not specifically devised. The complainant became of full age in November 1803, and brought this suit in 1807.

The deposition of W. Lyles was taken on the part of the defendants. He testified, that Robert Alexander was not indebted to him, at the time of the contract for the land. No part of the money was advanced by him, as a loan to be secured by mortgage. He was no lender of money, and would not have lent Alexander the money on mortgage. Alexander was

generally reputed not punctual in paying his debts, and rather too fond of law, and at the time of the contract for the land, was confined in jail for a large debt, and sent several times to Lyles, and urged him to buy the land. Lyles then *resided on land adjoining the 20 acres; and his house [*222 was very near the line. He wanted the addition of about 20 acres, and was not anxious to have any more. Alexander was more willing to sell his whole residue of the moiety of 400 acres, than to sell a part, his object being to raise a considerable sum, to pay the debt for which he was in prison. It was agreed, that the 20 acres should be sold absolutely, and the residue should be sold conditionally, as otherwise Lyles would not advance the money. The 20 acres were purchased absolutely, to suit the convenience of Lyles, and the residue was purchased conditionally, to suit Alexander. Lyles was determined to advance no money on any bargain which should make it necessary to go into court to get it back. The condition was understood by both to be, that if he paid the money by the time limited, the trustees were to reconvey the land to Alexander, but otherwise, they were to convey it to Lyles in fee-simple, and he was to have the land thereafter absolutely, to his own use for ever. He sold it, as soon as he could, after he left Alexandria, to get back his money. He received from Conway 900*l.*, at the date of the conveyance, or a few days after. Alexander never made any claim upon Lyles for any part of the land, and never expressed to him any dissatisfaction with the sale, although he saw him frequently afterwards. Alexander was not in confinement, when the trustees made their deed to Lyles. No part of the land was cultivated, and no formal possession delivered.

The deposition of Charles Lee, Esq., who drew the deeds of the 20th of March 1788, and the 19th of July 1790, stated, that Lyles consulted him about the bargain with Alexander, and represented that Alexander wanted a considerable sum of money, to pay a debt which was pressing, and offered to sell some land, but would not sell the whole of it absolutely, but was willing to sell part of it absolutely, and the residue was to be conveyed to trustees, in trust, to convey the fee to Lyles, if a certain sum of money was not paid by a certain day; and if it was, the trustees were to reconvey to Alexander. The deponent was asked, if such a contract was lawful, or would be deemed in law only a mortgage; and gave it as his opinion, that the parties might make such a contract, and that it could not be considered a mortgage. Lyles intimated, that if that was not very clear, he *would [*223 not have anything to do in the business. That he would not, on any terms, make a bargain with Alexander, if he should be obliged to go into a court of equity about it, which might be the case, if there should be a mortgage; that Alexander was well known to be troublesome and fond of law. The deponent was requested to draw such instruments as would place the contract in the state of a conditional purchase of a part of the land, and with this view, he drew the writing. He is certain, that Lyles consulted him as to the nature and effect of the contract, and did not intend to have a deed in the nature of a mortgage, but of absolute sale of a part, and of a conditional sale of the other part of the land, and such was the deponent's intention, when he drew the deed. That he afterwards drew a deed of conveyance from the trustees to Lyles, to carry into effect their trust, and delivered it to Lyles, to carry to the trustees. Lyles informed him, that one

of the trustees refused to execute the deed, unless Alexander would signify his consent, and asked, whether a verbal consent would not do. The deponent sketched a note in writing for Alexander to sign, signifying his consent, and was afterwards informed, that the trustees were satisfied, and did execute the deed, but he does not know whether Alexander gave his consent. Lyles was not easy in his pecuniary affairs, and he never knew him lend a large sum upon mortgage. Alexander was a bad manager of his estate, was generally needy of money, and not punctual in payment of his debts, though his landed estate was really of great value.

The answer of the executors did not admit the deed to be a mortgage, and stated that Conway began to make expensive and permanent improvements on the land, in the summer of 1791 ; that Alexander had an opportunity of seeing part of them, and probably did see them, and made no objection as they believe.

It appeared in evidence, that the land had lately been sold for more than $20,000 ; but that it was very poor, much broken by gullies, and exhausted, when Conway began his improvements. There was also evidence tending to show, that it was then worth more than he gave for it.

*224] The court below being of opinion, that the deed was *to be considered as a mortgage, directed an account to be taken of the value of the permanent improvements, and the original sum advanced by Lyles, and interest, and of the rents and profits, which being done, it appeared, that the complainant would have to pay the sum of $4943 to redeem the land ; and the court accordingly decreed a release upon the payment of that sum. From this decree, the defendants appealed to this court.

C. Lee, for the appellants.—The only question is, whether this is a case of mortgage. The bill does not state fraud or oppression.

1. As to the deed itself. The question is, whether it be a defeasible purchase, or a redeemable mortgage ? It sets forth the consideration of 800*l.* as one entire sum. There was no prior debt due to Lyles. That allegation of the bill is disproved ; and unless there was an old debt, or an actual loan, there could be no mortgage. It may as well be a mortgage of the 20 acres, as of the residue. If both contracts were not actual purchases, the parties would have required different instruments. All instruments are to have a reasonable construction, according to the intent of the parties. One distinguishing mark of a mortgage is a covenant for the repayment of the money ; but this deed contains no such covenant ; it was purposely omitted, that it might not be a mortgage. The whole question is, as to the intention of the parties. Lyles had no personal remedy ; if the land should fall in value, it was his loss ; if there had been a valuable house upon the land, which had been destroyed by fire, it would have been the loss of Lyles. It was not reasonable, that Alexander should have the chance of gain, but not of loss. It was in his power to compel Lyles to take the land, by neglecting to pay the money on the day. Another circumstance showing the intention of the parties is, that Alexander covenanted to make further assurance, if required, whenever the trustees should have conveyed the land

*225] to Lyles. *It was not intended as a security for money to Lyles, but a mere right in Alexander to repurchase, until a certain day. A court of equity cannot change the agreements of parties.

In the case of *Tasburgh* v. *Ecklin*, 4 Bro. Parl. Ca. 142, cited in Powell on Mortgages 174, there had been a bill to foreclose, which clearly showed the intention of the purchaser to consider it as a mortgage. But the House of Lords decided it to be an irredeemable purchase, and not a mortgage. That was an assignment, by lease and release, of a reversion, expectant on a lease for years, of which 43 were yet to come, in consideration of 200*l.*, paid by Sir John Eustace to Charles Tasburgh, in trust for John Tasburgh, dated in 1681. In the indenture of release, there was a proviso, that if Sir John Eustace should pay Charles Tasburgh, at the end of five years, 200*l.* with interest, it should be lawful to him to re-enter and enjoy in his former right; but if he should fail to pay, within the time limited, the estate of Charles should be absolute, as well in equity as in law, and that Sir John and his heirs should be for ever debarred from all right and relief in equity, against the tenor of the said release; and Sir John did thereby, for himself and his heirs, release to Charles Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid; and there was no covenant in the deed for the repayment of the money, or the interest, by the grantor, as is usual in mortgages. After the five years, John Tasburgh exhibited a bill, in 1687, against Sir John Eustace, praying payment at a certain day, or that the conditional estate of Charles (in case it should be adjudged a defeasible or redeemable estate), should be made absolute, and that Sir John might be foreclosed of all equity of redemption. This bill was taken for confessed, and a decree in December 1688, that he should be foreclosed, unless payment were made of principal, interest and costs, before December 1689. Sir John acquiesced under this decree for eighteen years, when he died. John Tasburgh died in 1691, and Henry Tasburgh succeed to his estate, and in 1722, demised *the premises to McNamara. In 1723, the heirs of Sir John Eustace [*226
exhibited a bill, alleging that the decree for foreclosure had been obtained by surprise, fraud and imposition, and praying it might be reviewed and reversed, which was done by the court of chancery in Ireland, who decreed that Henry Tasburgh should release to the heirs of Sir John, upon payment of the principal, interest and costs. From this decree, Henry Tasburgh appealed to the House of Lords, who reversed it and dismissed the bill. The principle upon which this case wase decided by the House of Lords is supposed by Powell to be, that the contract was to be considered as a conditional purchase, and not a mortgage.

And in the case of *Barrell* v. *Sabine*, 1 Vern. 268, the Lord Keeper said, "he thought, that where there was a clause or provision to repurchase, the time limited ought to be precisely observed." In the case of *Chapman* v. *Turner*, 1 Call 192, Judge PENDLETON, in delivering his opinion, said, "As on the one hand, the chancellor would not permit a real mortgage to be made irredeemable, by the act of the scrivener, so, neither on the other, will he suffer real conditional or defeasible sales to be changed into mortgages by the like acts. The real intention of the parties governs him. In a defeasible purchase, the condition must be strictly performed at the day, or no relief will be granted; because it does not admit of compensation for the risk. If the thing perish the next day, it must be the loss of the purchaser, he having no covenant, or even implied promise, to return the money in that event; and we are taught by a maxim in equity, that in these casual

cases, eventual loss or gain must accrue to, or fall on him who runs the risk.

In the present case, both parties confided in the trustees. Their deed, after the failure of Alexander to pay the ready money, was as valid, as if he himself had then released all equity of redemption, or had made an absolute deed to Lyles.

*227] 2. As to the evidence in the case. It appears, that *the trustees refused to execute the deed, until they had the consent of Alexander. A writing was drawn for him to sign, signifying his assent. The trustees executed the deed : the probability is, that they had his assent in writing. He knew that the deed had been executed, and he acquiesced : he saw the expensive improvements made by Conway, and he was silent. Conway continued making substantial and permanent improvements for seventeen years, without keeping any account either of the cost of his improvements, the expenses of cultivation, or the value of the crops. It has now become impossible to account : justice cannot now be done. In 2 Eq. Cas. Abr. 599, it is said, that "equity will not enlarge the time for the mortgagor to redeem, after six years' acquiescence under a forfeiture by his own consent, especially, if there be any improvement on the estate." And again, "there shall be no redemption, after long possession, settlements made, and estate improved." In the case of *Hollingsworth* v. *Fry* (4 Dall. 345), Judge PATERSON, in delivering his opinion, said, that the time of payment was material—a cardinal point ; and the party ought not to be suffered to lie by and take the chance of the rise of value.

Lyles's giving a special warranty only, is no evidence that he considered it as a mortgage. The boundary was unsettled, and then in a course of litigation, which was a sufficient reason for his not giving a general warranty. And that Alexander did not consider it as a mortgage is evident, from the circumstance, that he did not mention this land in his will, although he specified almost every tract of land in which he had any interest, especially, that part of this very tract which he had previously contracted to sell to Baldwin Dade.

This deed, therefore, was neither a mortgage *per se*, nor was it the intention or understanding of either of the parties that it should be so considered ; but conveyed a good, absolute, and indefeasible estate, both at law and in equity, to W. Lyles, and his heirs and assigns.

Taylor, contrà, admitted the distinction between an agreement to repur-
*228] chase, *and a mortgage. But in this case, if it be not a mortgage, it was a most unconscionable bargain. The evidence shows that, at the time of the bargain, other land less advantageously situated, and not better in quality, was worth three or four times the price which Lyles paid for this.

As to the question of mortgage. "Every contract for the receiving of money, by the conveyance of a real estate to the lender, not made in contemplation of an eventual arrangement of property, is, in equity, deemed a mortgage." *Mellor* v. *Lees*, 2 Atk. 495. And all provisoes and stipulations between the parties, tending to alter, in any subsequent event, the original nature of the mortgaged interest, or prevent the redemption of the estate pledged, upon payment of the money borrowed, with interest, are void. For

were any such agreements suffered to prevail, they would put it in the power of every mortgagee to take advantage of the necessities of the mortgagor, by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity, therefore, the right of redemption is considered as inseparably incident to every contract founded on a mortgage, and can no more be restrained, than the power of tenant in fee-simple to alien generally, or of tenant in tail, to suffer a recovery; it being a maxim in equity, that the same estate or interest cannot be a mortgage, at one time, and at another time, cease to be so." Powell on Mortgages 146. Nor will an agreement to make the conveyance absolute, upon payment of a further sum, if the money lent be not paid at the day appointed, alter the case; such stipulations being deemed unconscionable; because a man ought not to have interest for his money, and a collateral advantage besides; nor may he clog the redemption by any bye agreement. *Willet* v. *Winnell*, 1 Vern. 488; Powell 152.

Powell, in concluding his observations upon the case *Tasburgh* v. *Ecklin*, p. 183, says, "But in all these cases, where the equity of redemption is rebutted by agreements of this kind, and the transaction is considered as a conditional purchase, the intention of the parties at the time of contracting must, I apprehend, be clearly proved, or necessarily implied from the circumstances *attending it; otherwise, the general rule will not be departed from." [*229

It is not necessary, to constitute a mortgage, that it should contain a covenant for the repayment of the money; *Lawley* v. *Hooper*, 3 Atk. 280; where the Lord Chancellor says, that all Welsh mortgages are without this covenant, and so are most copyhold mortgages. So, in case of *King* v. *King*, 3 P. Wms. 358, it was decided, that every mortgage, although there be no covenant nor bond to pay the money, implies a loan, and every loan a debt; as in the case of the mortgage of a ship, which was taken at sea, although there was no covenant to pay the money, yet the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. And the Lord Chancellor said, it was so in the case of Welsh mortgages, where no day certain is appointed for the payment, but the matter left at large. The case of *Howell* v. *Price*, 1 P. Wms. 291, was upon a Welsh mortgage, viz., conveyance in fee of an estate in Wales, worth 52*l.* per annum, under a proviso, to be void, if the mortgagor, his heirs or assigns should pay to the mortgagee, or his heirs, 300*l.* on any Michaelmas day, giving six months notice, and the mortgagee to have the rent which should then be in arrear; but there was no bond or covenant to pay the money. Yet it was decreed that it was a debt, which the executors should pay. The case of *Ross* v. *Norwell*, 1 Wash. 14, shows that a covenant to pay is not essential.

A deed of trust is a modern invention by which the equity of redemption is supposed to be foreclosed, without the aid of a court of chancery. But the present differs from the modern deed of trust. In that, there is a public sale, and the surplus is paid to the mortgagor, which, if the sale is fairly and judiciously made, may be considered as the fair value of his equity of redemption. Yet the efficacy of such a sale as that, to pass an irredeemable estate, is doubted. Powell 19. But here, the trustees were the mere instruments to convey; they had no powers to do anything but convey, upon the payment or non-payment of the money. Here was no provision made, to ascer-

tain the value of the equity of redemption, or to mitigate the severity of the
*230] contract. The intervention of the trustees did not alter the case, *or make it more or less a mortgage, than it would have been without them.

It is, in effect, the same as if the deed had been directly from Alexander to Lyles, with a proviso that it should be void, if Alexander should pay the money on the day appointed. Such a deed would unquestionably have been considered as a mortgage. It has been shown above, that a covenant to pay was not necessary; and a covenant for further assurance is usual in mortgages, and is, therefore, no evidence that this conveyance is not to be considered a mortgagee.

If, then, it is to be considered as a mortgage upon the face of the instrument, is the extrinsic evidence so clear, as to rebut the equity of redemption? Why was there a distinction made between the conveyance of the 20 acres and that of the 140? Why were the 20 conveyed to Lyles, and the 140 to the trustees? The answer apparent upon the face of the transaction, and expressly avowed by Lyles himself, in his deposition, is, that Lyles did not want to purchase, and Alexander did not want to sell, more than 20 acres. Lyles says, that the 20 acres were conveyed absolutely, to suit his convenience, and the residue was conveyed to the trustees, to suit Alexander. As to the 140 acres, then, Lyles did not wish to purchase them, nor Alexander to sell them. If a sale and disposition of the land were not the object of the transaction, it could be nothing but a loan of money by Lyles, and a security upon the land by Alexander. This was evidently the substance of the negotiation. And wherever there is a loan of money upon the security of land, however the transaction may be disguised by the writings, it is substantially a mortgage. Lyles, indeed, admits his object to have been a loan of money, but says his intention was to have the means of getting back his money, without going into a court of chancery; that is, he wished to loan his money, upon a real security, without allowing his debtor the right of redemption. It was an attempt to do that which courts of equity have uniformly discountenanced; to devise a mode to defeat the equity of redemption, where the transaction was really a loan of money upon a mortgage.

*231] *It is said, Lyles had no personal remedy against Alexander, because there was no covenant to repay the money. But the authorities already cited show, that wherever the transaction is really a loan, and the security is inadequate, there is a personal remedy. That Lyles considered the land as a security only, is evident, from the circumstance that he received from Conway only his principal and interest, and assigned to Conway his right and title only, together with the title-papers, and expressly assigned all his right of action against Alexander.

There is no evidence of acquiescence on the part of Robert Alexander, in the idea, that this was an absolute sale. He died in January 1793: Mr. Lyles himself states, that he does not know whether Alexander knew of the deed of the 19th July 1790. Conway's agreement with Charles Alexander respecting a division of part of the land which they held in common, was in April 1791. No improvements could have been made before that date. One of the witnesses states, that he began to ditch the land in March 1791. It is probable, he meant March 1792. If so, there were only ten months in which Alexander could have seen any improvement on the land; and what

he did see, was not inconsistent with the nature of the estate of a mortgagee in fee, in possession. The buildings, &c., were not erected, until after Alexander's death. The digging of a ditch, and erecting of a post and rail fence, upon a part of the land, was not decisive evidence that Conway claimed an irredeemable estate; and there is no evidence, that even that small improvement was seen by Alexander. It is only stated by the witnesses, that he might have seen it, at a distance, as he passed along the road from his house to Alexandria. The complainant did not become of full age, until November 1803, and brought suit in 1807. His guardian did not know the nature of Conway's title. The length of time is no bar to the complainant, because he has been under a legal disability. Powell 407–8, 411–12.

It is said, that Robert Alexander did not specify this land in his will, although he mentioned that part of the tract which was in the possession of Baldwin Dade; *and from this circumstance an inference is drawn, [*232
that he considered it as an absolute sale, and not a mortgage. But the reason why he mentioned that part of the land which was in possession of B. Dade was, that he devised it to his son Robert; and it will be perceived by his will, that he specified everything by name, which he devised to Robert, but nothing which he devised to Walter, the complainant; for after making specific devises to Robert, he says, "I give to my son Walter, and his heirs, for ever, all the rest and residue of my estate, both real and personal." So that, if his not specifying this land be evidence, that he thought he had no interest in it, his not specifying the half of his estate which he intended for his son Walter, is evidence that he thought he had no interest therein. No such inference can be drawn from his silence as to this land, which would not apply to one-half of his estate.

There is no evidence of Alexander's understanding of this transaction. His circumstances were embarrassed, up to the very time of his death, so that he never had it in his power to make an offer to redeem. It is evident from the deed itself, that he expected to be able to redeem, in about two years from the date of that instrument; and the insertion of such a clause was evidently intended for his benefit, and shows that he did not wish to sell. He was in prison for debt: his object was to get money to relieve him from confinement; and the stipulation for a time of payment, is evidence that he meant to borrow. There is no evidence, that this was not a negotiation for a loan of money. Mr. Lyles, in his deposition, does not say that the money was not advanced by him as a loan; but says, it was "not advanced as a loan, to be secured by mortgage;" and that he would not have loaned him money "on any mortgage by him." That he "was determined to advance no money on any bargain which should make it necessary to go into court to get it back." That he sold the land as soon as he could, after he left Virginia, "for the purpose of getting back his money." All this shows that he had no objection to lend the money, but he wished to get real security, without an equity of redemption. And it appears, he employed counsel to devise a plan for that purpose; a *purpose [*233
which is never countenanced in a court of equity.

The case of *Chapman* v. *Turner*, which has been cited, was a contract respecting personal property, and depended upon its own peculiar circumstances, none of which resemble the present. The case of *Tasburgh* v. *Ecklin*, was a sale or mortgage of a reversion. There had been a decree of fore-

closure, and a long acquiescence under it. It does not appear, upon what grounds the House of Lords refused to review that decree; whether it was because it had been so long acquiesced under, or whether upon the construction of the original conveyance. But the decision of the court of chancery in Ireland was clearly upon the ground of its being a mortgage.

In the case of *Robertson* v. *Campbell and Wheeler*, 2 Call 428, Judge PENDLETON, in delivering the opinion of the court of appeals of Virginia, says, "It must often happen, in disquisitions of this sort, that there will be a difficulty in drawing a line between these two sorts of conveyances" (mortgage and conditional sale). "The great *desideratum*, which this court has made the ground of their decision is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed? Or, whether the object was the loan of money and a security, or pledge, for the repayment, intended?" The cases cited from 2 Eq. Cas. Abr., only show, that a court of chancery will not decree a redemption, after a forfeiture by consent of the mortgagor, and improvements by the mortgagee, and acquiescence by the mortgagor.

Upon the whole, then, this case appears to have been originally a loan of money, upon real security, with an attempt to defeat the equity of redemption; and not a real bargain, with a view to the purchase of the land. The want of a covenant to repay the money, does not alter the nature of the original transaction, and the same evidence which appears in this case, would *234] have *supported a personal action by Lyles against Alexander, upon the loan of the money, in case the title of the land had failed, or it had by any other means become an inadequate security.

Jones, in reply.—It must be admitted, that it was competent for the parties to make a conditional sale, and the only question is, whether they have done so. The depositions of Mr. Lyles and Mr. Lee show, that it was their intention to make a conditional purchase, and not a mortgage. If the instrument does not create a conditional sale, it must have been the mistake of the person who drew the deed.

It is true, that no covenant in a mortgage can clog the equity of redemption. But if the transaction be not a mortgage, that principle does not apply. Wherever a deed is as collateral security, there must be a personal remedy, And it is no mortgage, unless it contain a personal obligation, or show it to be a loan. In the present deed, there is no recital, acknowledging a debt, and no covenant to pay; but the money is expressly acknowledged to be received as purchase-money. It was entirely within the discretion of Alexander, to pay the money or not, at the time.

The evidence justifies the inference, that the deed from the trustees to Lyles was made with the consent of Alexander; and being by consent, it is equivalent to a foreclosure by a court of equity. Even if it were a mortgage, originally, it might, by subsequent assent, become absolute. And if, at the time of the release of the equity of redemption, a note be given that the releasor should have the lands conveyed to him, upon payment of what was given for the lands, within a year, such payment having been neglected for several years, there shall be no redemption. *Endsworth* v. *Griffith*, 2 Eq. Cas. Abr. 595, § 6.

In all the cases cited to show that a covenant to pay the money is not

necessary in a mortgage, there is some other circumstance, showing a loan of money, or designating *the instrument to be a mortgage. But in the present case, there is no such circumstance. [*235

March 14th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed, dated the 20th of March 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March 1788, is between Robert Alexander, of the first part, William Lyles, of the second part, and Robert T. Hooe, Robert Muire and John Allison, of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of 800*l.* paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns for ever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles, at any reasonable time after the first day of July 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of 700*l.*, with interest from the said 20th of March 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of 700*l.*, with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of 700*l.*; and to reconvey to Robert Alexander, in the *event of payment. [*236 Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July 1790, the trustees, by a deed, in which the trust is recited, and that Robert Alexander has failed to pay the said sum of 700*l.*, convey the said land in fee to William Lyles. On the 23d of August 1790, William Lyles, in consideration of 900*l.*, conveyed the said 20 acres of land, and 140 acres of land, to Richard Conway with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense. In January or February 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained

his age of twenty-one years, in November 1803, brought his bill to redeem, in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is, whether Robert Alexander, by his deed of March 1788, made a conditional sale of the property conveyed, by that deed, to trustees, which sale became absolute by the non-payment of 700*l.*, with interest on the 1st of July 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed?

*237] To deny the power of two individuals, capable of *acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, to make a sale, with a reservation to the vendor, of a right to repurchase the same land, at a fixed price, and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited, either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description, to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason, the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale?

In this case, the form of the deed is not, in itself, conclusive, either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms, will not affect the case. But it must exist, in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is, certainly, not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law, for the recovery of the money, certainly, could not have been sustained; and if, to a bill in chancery, praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered, that this was a sale and not a mortgage, clear

*238] proof to *the contrary must have been produced, to justify a decree against him.

That the conveyance is made to trustees, is not a circumstance of much weight. It manifests an intention in the drawer of the instrument, to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose, than to entitle William Lyles to a conveyance, subsequent to the non-payment of the 700*l.*, on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced, and to be repaid. It is also

a circumstance which, though light, is not to be entirely disregarded, that the 20 acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as, at least, possible, that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage. It is certain, that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete, that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a *syllable in the [*239
cause, intimating a proposition to borrow money, or to mortgage property. . No expression is proved to have ever fallen from Robert Alexander, before or after the transaction, respecting a loan or a mortgage. He does not appear to have imagined, that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance, the court attaches much importance. Had there been any treaty—any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice, that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete, that Lyles did not intend to take a mortgage. But it is insisted, that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat. His not being in the practice of lending money, is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion, that Robert Alexander himself did not so understand it. In this view of the case, the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles, without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage, he would *naturally have resisted the conveyance, and it is probable, [*240
that the trustees would have declined making it. This probability is

very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it, until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion, that this assent was given.

It is also a very material circumstance, that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander: they passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court. The sale, on the part of Alexander, was not completely voluntary. He was in jail, and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional, implies an expectation to redeem.

*241] *A conditional sale made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at 5*l.* per acre conditionally, which, in fact, were worth 15*l.*, or 20*l.*, or 50*l.* per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause. But the testimony on this point is too uncertain and conflicting, to prevail against the strong proof of intending a sale and purchase, which was stated.

The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different, at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for 5*l.* per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others, unsuccessfully; that it was valued by several persons, at a price

not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful, to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court, that the decree of the circuit court is erroneous, and ought to be reversed, and that the cause be remanded to that court, with directions to dismiss the bill.

Decree reversed.

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*Dunlop *v.* Munroe. (*a*) [*242

Negligence of postmaster.

Where issue is taken upon the neglect of a postmaster himself, it is not competent to give in evidence, the neglect of his assistant.

Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.

In order to make a postmaster liable for negligence, it must appear, that the loss or injury sustained by the plaintiff was the consequence of the negligence.

Parol evidence cannot be given, that one set of written instructions from the postmaster-general, susperseded another set of written instructions.

Dunlop *v.* Munroe, 1 Cr. C. C. 536, affirmed.

Error to the Circuit Court for the district of Columbia, sitting at Washington, in an action wherein James and John Dunlop were plaintiffs, and Thomas Munroe, the deputy postmaster at Washington, was defendant. The declaration, after having been several times amended, contained nine counts.

1. The first count was as follows: Thomas Munroe, late of Washington county, gentleman, was attached to answer unto James Dunlop and John Dunlop, in a plea of trespass on the case, &c., whereupon, the said James and John, by Francis S. Key, their attorney, complain, that whereas, by the laws of the United States of America, relative to the post-office establishment of the United States, and of the post-roads within the United States, it was enacted, that there should be established, at the seat of the government of the United States, a general post-office, under the direction of a postmaster-general, and that post-offices should be established, and that postmasters should be appointed, by the said postmaster-general, at all such places as should appear to him expedient, on the post-roads which then were, or might thereafter be established, and the carriage of the mail on all such post-roads provided for; and that every postmaster, so appointed by the said postmaster-general, should keep an office, in which one or more persons should attend for the purpose of performing the duties thereof; and a post-road was directed to be established from Passamaquoddy, in the district of Maine, to St. Mary's, in Georgia, within the said United States; and the city of Philadelphia, in the state of Pennsylvania, and the city of Washington, in the district of Columbia, and the town of Petersburg, in the state of Virginia, were places through which the said post-road was directed by law to pass. And whereas, in pursuance of the said laws, a general post-office was

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(*a*) March 9th, 1812. Present, all the judges.

established at the seat of government of the United States, under the
*243] *direction of a postmaster-general, duly appointed and qualified, and a post-road established within the United States from Passamaquoddy, in the district of Maine aforesaid, to St. Mary's, in Georgia aforesaid; and the said city of Philadelphia, and the said city of Washington, and the said town of Petersburgh, were places through which the said road did pass, and post-offices were duly established at the said places, so as aforesaid, on the said post-road, by the said postmaster-general; and postmasters by him duly appointed and qualified to attend to the duties of the said post-offices, and the carriage of the mail of the United States on the said post-road provided for by the said postmaster-general, agreeable to law: and the said Thomas Munroe was, by the said postmaster-general, duly appointed and qualified the postmaster at the said office, so as aforesaid established at the said city of Washington, on the said post-road, and between the city of Philadelphia and the town of Petersburgh aforesaid, also on the said post-road, and as such was bound to attend to and perform all the duties thereof, and to receive, make up, and distribute and forward the mails of the said United States, and all the letters and packets contained therein, which should arrive or come to his said post-office so by him kept as aforesaid, at the said city of Washington, to all such places on the said post-road to which the same were directed and addressed; and the said Thomas, so being, as aforesaid, postmaster at the said post-office, so as aforesaid lawfully established at the said city of Washington, on the post-road so as aforesaid, also lawfully established, and post-offices being also, in like manner, lawfully established at the said city of Philadelphia, and the said town of Petersburg, on the said post-road, and postmasters duly appointed and qualified, and attending to the duties of the said post-offices, on the 30th day of July, in the year 1806, the said James and John being possessed of a large sum of money, to wit, the sum of $2000 current money of the United States, of their own proper money, and being so possessed thereof, on the same day and year, did inclose the same, in bank notes, by means of their agents in that particular (a certain Walker & Kennedy) in a letter sealed and directed to the said James and John, at Petersburg, in Virginia aforesaid, on the post-road aforesaid, and the said sum of
*244] money, so sealed and inclosed *in said letter, so directed, did place in the post-office in the said city of Philadelphia, so as aforesaid established on the said post-road, to be forwarded on the said post-road, in the mail of the United States, to the said town of Petersburg, on the post-road aforesaid, and the said letter, directed as aforesaid, and the money in bank notes as aforesaid, to the said amount, inclosed in the same, were, accordingly, by the said postmaster at Philadelphia, and from the office there established as aforesaid, on the said post-road, sent on and forwarded in the mail of the United States, on the day and year aforesaid; and did afterwards, to wit, on the first day of August, in the year aforesaid, arrive at the post-office of the said Thomas, postmaster as aforesaid, in the said city of Washington, on the said post-road, in the mail of the United States, on the route to the post-office at Petersburg aforesaid, on the post-road aforesaid, and was, on the day and year last mentioned, at the county of Washington aforesaid, received by the said Thomas, to be by him sent on and forwarded in the mail of the United States, on the said post-road, to the said James and John, at Petersburg, to whom the same was directed and addressed:

Yet the said Thomas, regardless of his said duty as postmaster, and wholly neglecting the same, did not send on the said letter, and the sum of money contained and inclosed in the same, to the said town of Petersburg, on the said post-road, in the mail of the United States, to the said James and John, to whom the same was directed, as it was his duty to do ; but the same letter, and the said sum of money therein contained as aforesaid, were fraudulently and improperly secreted, withheld and taken, in the said post-office at the city of Washington aforesaid, by the said Thomas, or some other person employed by him in his said office, so that the said James and John were prevented from receiving the same, and the same letter, and sum of money, have been wholly lost to the said plaintiffs.

2. The second count was like the first, in every particular, except that it stated that the plaintiffs placed the letter, inclosing the money, in the post-office at Philadelphia, to be forwarded "without delaying the same a single post," and that it was received by the defendant, at his office in Washington, on the 1st of August 1806, to be by him sent on and forwarded, without delaying the same a single *post, in the mail of the United States, [*245 &c.; "yet the said Thomas, regardless of his said duty as postmaster, and wholly neglecting the same, did not, on the first day of August, in the year aforesaid, send on the said letter, and the sum of money contained and inclosed in the same, to the town of Petersburg, on the said post-road, in the mail of the United States, which left the city of Washington on the said first day of August, in the year aforesaid, for Petersburg aforesaid, as it was his duty and in his power to have done ; but the same letter, and the said sum of money therein contained as aforesaid, were, by the negligence, carelessness and misconduct of the said Thomas, in his said office aforesaid, utterly, afterwards, to them, the said James and John, lost ; by reason whereof, the said James and John, the sum of money so as aforesaid contained and inclosed in the said letter, directed and addressed as aforesaid, and the use and possession of the same, have entirely lost ; to the great damage," &c.

3. The third count was like the first, in every respect, except that instead of averring that the plaintiffs were possessed of a large sum of money, it averred, that they were possessed of "certain property of great value, to wit, "of certain bank-notes for the payment of money, to the amount of the value of $2000, current money of the United States, as their own property, and inclosed the same bank notes," &c., using the words "bank-notes," in lieu of the words "sum of money," in the residue of the count. It contained also an averment of a demand and refusal of the defendant to deliver the letter and bank-notes, whereby the same had been totally lost to the plaintiffs, whereof the defendant had notice.

4. The fourth count was like the first, except that it used the terms "bank-notes," instead of "sum of money in bank-notes ;" and instead of averring, that the letter and sum of money were "fraudulently and improperly secreted, withheld and taken, in the said post-office," it averred, that "the same letter and bank-notes were, by the negligence, carelessness and misconduct of the said Thomas, in his said office, lost," &c.; and averred a demand and refusal to deliver them, whereby they had been totally lost to the plaintiffs, whereof the defendant had notice, &c.

*5. The fifth point varied from the others considerably in the recital [*246 respecting the establishment of post-roads and post-offices ; but the

principal difference consisted in an averment, that the postmasters, appointed by the postmaster-general, were to perform their duties according to law, "and to the instructions of the postmaster-general relative to their duty." That the post-office at Washington was a distributing office, and that it was the duty of the defendant, according to the instructions of the postmaster-general, then in force, to open the mail addressed "Southern," and to distribute and remail the letters and packets into proper mails, before the departure of the mail; and on no account to delay them a single post, by which it was in his power to send them in the regular course of the mail. It then averred, that the letter and bank-notes were put into the post-office at Philadelphia, on the 30th of July, and were from thence forwarded in the mail on the 31st, and arrived at Washington on the 1st of August, and were, in the usual manner, delivered and placed in the post-office at Washington, kept by the defendant, to be, by him, remailed, and sent on and forwarded in the mail of the United States to Petersburg, to the plaintiffs; and were delivered and placed in the usual and regular course of the mail, at and in the post-office at Washington aforesaid, "in time to be remailed and sent on, according to the instruction and direction aforesaid of the postmaster-general aforesaid, in the same day of the arrival aforesaid, and by the same mail which, thereafter, and on the same day, departed from the post-office aforesaid, in the city of Washington aforesaid, with letters for the town of Petersburg aforesaid; by virtue of which premises, it was the duty of the defendant, on the said 1st day of August, in the year 1806, at," &c., "to have distributed, remailed, and sent on, or caused to have been distributed," &c., "the said letter, containing the said bank-notes, to the town of Petersburg aforesaid, in the mail of the United States aforesaid, on the same 1st day of August, in the year aforesaid, which it was in the power of the defendant to have done, in the usual and regular course of the business of his said office: Nevertheless, the said defendant, on the first day of August, in the year aforesaid, at the county aforesaid, regardless of his duty as postmaster as aforesaid, did not send on or forward, or cause to be sent
*247] on or forwarded, *on the said first day of August, in the year aforesaid, the said letter containing the bank-notes aforesaid, to the town of Petersburg as aforesaid, in the mail of the United States aforesaid, which left the said city of Washington, on the said 1st day of August, and which ought to have received and carried the said letter, and bank-notes inclosed therein, to the post-office in the said town of Petersburgh, but by reason of his negligence and misconduct aforesaid, in his said office, on the said first day of August, the said letter, and the said bank-notes inclosed therein as aforesaid, have been, afterwards, utterly, and ever since, lost to the plaintiffs."

6. The sixth count was like the fifth, except that it averred that the letter, with the bank-notes inclosed, was received at the post-office in Washington, on the 1st of August, "by Henry Whetcroft, then and there agent and clerk of the defendant, duly authorized to perform the duties of the said office for the defendant, to be remailed and sent on," &c. "By virtue of which premises, it was the duty of the said defendant, postmaster as aforesaid, by himself, his said agent, or some other person, on the 1st day of August aforesaid, to have distributed, remailed and sent on the said letter," &c., "in the mail of the United States, on the same 1st day of August,

which it was in the power of the defendant, by himself or his said agent and clerk, to have done," &c.: "Nevertheless, the said defendant, on the said 1st day of August," "regardless of his said duty as postmaster as aforesaid, did not, by himself, or his said servant and clerk, or any other person, send on and forward, on the said 1st day of August, the said letter," &c. "But by reason of the negligence and misconduct aforesaid, in transacting the business of the said office on the said 1st day of August," &c., "the said letter," &c., have been, afterwards, utterly and ever since, lost to them, the said plaintiffs," &c.

7. The seventh count was like the sixth, except that it averred, that the letter, &c., were received at the post-office in Washington, by William Hewitt, another agent, servant or clerk of the defendant.

8. The eighth count charged, that the letter, &c., was *duly, by the carrier of the mail, placed in the office of the defendant, at Washington, on the 1st of August 1806, in time to be remailed and sent on by the mail of the same day, and that it was his duty, by himself or by his agents, or some of them, to have remailed and sent it on, accordingly, by that mail, which he did not do, or cause to be done; but by reason of the negligence and misconduct aforesaid, in his said office, on the said first day of August, the letter, &c., have been afterwards utterly and ever since lost to the plaintiff. [*248

9. The ninth count was like the eighth, except that it averred, that the mail which left Washington for Petersburg, on the 1st of August (and which ought to have carried the plaintiff's letter), arrived safely at Petersburg, with all its letters, &c.; "but the said defendant did unduly, improperly and negligently delay, detain, and keep the letter aforesaid, containing," &c., "in his said post-office, until and after the departure of the mail aforesaid, which ought, as aforesaid, by the laws and postmaster-general's instructions aforesaid, to have carried and contained the same, on the said first day of August; and the letter and bank-notes aforesaid, so as aforesaid unduly detained, the said defendant did delay, and keep in his said office, for a long space of time, to wit, until the departure of the mail, which thereafter, to wit, on the 3d day of August next following, left his said office for the town of Petersburg aforesaid, but which never did arrive at the post-office in the said town of Petersburg, but was, together with the letters and packages contained therein, and with the letter and bank-notes aforesaid of the said plaintiffs, thus improperly delayed and unduly forwarded, wholly and entirely lost on its said route to the town of Petersburg aforesaid, and before its arrival at the said post-office in the said town of Petersburg; by reason of which said undue, improper and unlawful delay and detention, negligence and misconduct of the said Thomas Munroe, in his said post-office, the letter, and bank-notes contained therein as aforesaid, have been then, and ever since, utterly lost to the plaintiffs."

To these nine counts, there were eighteen pleas in bar: *1. The first plea was the general issue of not guilty, pleaded to all the counts. [*249

2. The second plea was also pleaded to all the counts, and was, "that the said letter containing," &c., "was not brought to and delivered, nor in any manner given in charge at the said post-office at Washington, in the mail of the United States, which, on the 31st of July 1806, left the post-office at Philadelphia, and which, on the 1st of August next ensuing, arrived at

the post-office in Washington, in manner and form," &c.; and of this he puts himself on the country, and the plaintiffs likewise.

3. The third plea was to the 1st, 2d, 3d and 4th counts, and denied that the letter, &c., was received by the defendant, in manner and form, &c. Upon this plea, issue was joined.

4. The fourth plea was to the 1st and 3d counts, and denied that the letter, &c., was fraudulently secreted, withheld and taken, by the defendant, in manner and form, &c. Upon this plea, also, the plaintiffs joined issue.

5. The fifth plea was also to the 1st and 3d counts, and averred, that as to the defendants having personally received the said letter, &c., and as to his having fraudulently secreted, withheld and taken the same, &c., he was not guilty, and of this he put himself upon the country; and the plaintiffs likewise. And as to the residue of the allegations, charges and complaints of fraud and misconduct, in the two last-mentioned counts of the said declaration above supposed to have been committed in the said post-office at Washington, by some other person employed by the defendant in the said office, he says, that the plaintiffs, their action aforesaid, to have, &c., ought not, because he says, that at the time when, &c., and always before and ever since, the defendant, in pursuance of regulations and instructions duly made and issued by the postmaster-general, took due precaution and exercised all reasonable care, diligence and circumspection, to cause all mails, letters and packets brought to the said office, to be duly sent on and forwarded, according to the destination of the same, and to prevent all frauds and embezzlements in the said *office, by selecting, appointing and employing as clerks and assistants in the said office, and to attend in the said office at the regular hours directed by the postmaster-general, for the purpose of performing the duties of the same, none but persons of competent skill and knowledge, of fair character, of known good-repute for fidelity and honesty, and who, upon being so appointed and employed; and previous to entering upon the duties assigned them as aforesaid, or the execution of their trusts aforesaid, had, in pursuance of the act of congress in such case made and provided, and in obedience to the express instructions of the postmaster-general, respectively taken and subscribed, before a magistrate, in due manner and form, the oath prescribed by the said act of congress, and also the oath, in due manner and form, as directed by the postmaster-general aforesaid; that is to say, an oath to support the constitution of the United States, and had respectively transmitted to, and caused to be duly filed in the general post-office, certificates, in due form, of the said oaths so taken and subscribed as aforesaid. And the said defendant in fact says, that at the time when, &c., and for a long time before and after, he had, with due precaution and circumspection, and with all reasonable care and diligence, and in pursuance of regulations and instructions duly made and issued by the postmaster-general of the United States, selected and duly appointed and employed, two persons of competent skill and knowledge, of fair character and of known good-repute for fidelity and honesty; that is to say, one Henry Whetcroft and one William Hewitt, as clerks and assistants in the said post-office, and to attend regularly, &c., for the purpose of performing the duties of the said office, and to whom, and to no other person or persons, were, then and there entrusted, by the said defendant, the duties of receiving and opening the mails brought to the said office for distribution or delivery, and of receiving,

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distributing, remailing and sending on, according to the proper destination of the same, all mails, letters, &c., there being, then and there, no other person or persons employed in the said office, to whom the defendant had entrusted any agency in the duties of the said office, or who were suffered by the defendant to inspect or handle any letters, newspapers or other articles constituting a part of any mail brought, &c., they, the said Henry Whetcroft and William Hewitt, upon being appointed and * employed [*251 as aforesaid, and previous to entering upon the duties, &c., having, in pursuance of the said act of congress, and in obedience to the instructions and directions of the postmaster-general aforesaid, respectively, and duly, taken and subscribed the oaths aforesaid, and duly transmitted to and caused to be filed in the general post-office, certificates, in due form, of the said oaths, respectively, so taken and subscribed as aforesaid; and the said defendant says, that if the said letter, &c., was in fact delivered and received, or in any manner given in charge at the said post-office, or was, in fact, fraudulently secreted, withheld and taken by any person employed and entrusted by the defendant to attend in the said office, for the purpose of performing the duties of the same, then such fraudulent embezzlement was without any participation or connivance whatsoever of the defendant, and without any fraud, collusion or other misdemeanor in office whatsoever, on the part of the defendant, or by him done or permitted, but altogether without his consent or knowledge, and against his will; and this he is ready to verify, &c.

To the latter part of this plea, there was a special demurrer and joinder, because: 1. The plea is argumentative in this, that it states that the defendant has appointed competent and honest men to do the duties of the said office, and therefore infers, that he himself is not liable for their negligence; and further, in this, that he states what acts he did in relation to his office, and reasons from them in his exculpation. 2. Because the plea does not confess and avoid, nor deny the allegations of the said counts, or of any of them. 3. Because it does not state the nature and circumstances of error or mistake supposed to be made by his said clerks and assistants, so as to show that it did not proceed from a want of reasonable care and diligence. 4. Because the plea amounts to the general issue. 5. Because it does not set forth any matter of law, proper for the decision of the court, but states facts proper to be given in evidence upon the general issue joined between the parties. 6. Because the plea tends to draw from the consideration of the jury to that of the court, matters of evidence proper to be shown only to the jury, on the general issue; and is immaterial, insufficient and informal.

*6. The sixth plea was to the said 4th and 9th counts, and denied [*252 that the letter was lost by the negligence, carelessness, or misconduct of the defendant in his office; upon which the plaintiffs joined issue.

7. The seventh plea was to the 1st and 3d counts, and stated, that the bank-notes mentioned in those two counts were notes of the bank of Virginia, "which was a bank duly established under a charter from the government of the state of Virginia, and if the same were in fact fraudulently taken, withheld and secreted by the defendant, or any person employed and entrusted in the said post-office at Washington, then, according to the form of the several statutes in force within the county of Washington aforesaid, every person so acting and doing, became guilty of a felonious embezzle-

ment of the same letter and bank-notes, and liable to suffer the pains and penalties of felony, and ought to have been prosecuted for such crime accordingly; yet the defendant in fact saith, that no criminal prosecution whatsoever has been commenced, nor any conviction had against any person or persons whatsoever, in the said two counts of the said declaration, supposed to be guilty as aforesaid, and this he is ready to verify," &c. To this plea, there was a general demurrer and joinder.

8. The eighth plea was to the 6th count, and denied that the letter, &c., were received by Henry Whetcroft, at the post-office in Washington, in manner and form, &c., upon which, issue was joined.

9. The ninth plea was to the 7th count, and denied that the letter was received by William Hewitt, at the post-office, &c., in manner and form, &c., upon which, issue was also joined.

10. The tenth plea was to the 9th count, and averred, that the defendant did not unduly, improperly and negligently, delay, detain and keep in the post-office at Washington, nor anywhere else, the said letter, &c., in manner and form, &c.; upon this plea also, the plaintiffs joined issue.

*253] *11. The eleventh plea was to the 5th, 6th, 7th and 8th counts, and averred, that the loss of the letter, &c., was not caused or produced by reason of the same not having been remailed and sent on, at and from the said post-office at Washington, on the same day of the supposed arrival of the said letter and bank-notes at the said post-office, to wit, on the 1st day of August 1806, and by the same mail which, after the said supposed arrival, and on the same day, departed from the said post-office at Washington, with letters for the said town of Petersburg, and by the said letter and bank-notes being delayed by the said Thomas, in the post-office at Washington, until the departure of the next succeeding mail of the 3d of August, in manner and form, &c. Issue was also joined upon this plea.

12. The twelfth plea was to the 9th count, and was precisely like the 11th plea.

13. The thirteenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and stated that the defendant, as to his having received the letter, &c., and having wilfully and negligently omitted to forward and send on the same, in the mail, according to the proper destination of the same; and as to his having unduly kept and detained the same in his office, and as to his having disregarded the duties of his said office, and as to the negligence and misconduct in office imputed to him the defendant, he is not guilty; and of this he puts himself upon the country, and the plaintiffs likewise.

And as to the residue of the allegations, charges and complaints of negligence and misconduct in the several counts last aforesaid, above supposed to be committed and suffered in the said post-office at Washington, the defendant (protesting that he has in all things demeaned himself, in his said office of postmaster, as a good and faithful officer of the United States, and that he has always exercised all practicable care and diligence to have the business and duties of the said office, regularly, duly and faithfully transacted, performed and executed) says, that at the time when, &c., he took due precaution, &c., by selecting and appointing proper persons, &c. (as in the 5th plea), and if the said letter, &c., were delivered at his office at Washington,

*254] and if the *same were, by reason of any casual negligence, misconduct, inadvertence, oversight, error or mistake of any person or per-

sons so employed and entrusted in the said office, not in fact duly remailed, forwarded and sent on, &c., such the delivery of the said letter, &c., at the said office at Washington was entirely unknown to the defendant, and every such misconduct, &c., was likewise entirely unknown to the defendant, and was not caused or produced by any misdemeanor in office of the defendant, nor willingly or knowingly suffered or permitted by him, but was caused and produced by the casual, inadvertent and unintentional mistake, error and oversight of some person or persons so appointed, &c., and altogether without the consent or knowledge of the defendant, and against his will. And so the defendant says, that he took due precaution and used all reasonable care, diligence and circumspection to cause the said supposed letter, &c. (if ever in fact delivered and given in charge of the said post-office), to be duly sent on and forwarded, &c.; and this he is ready to verify, &c.

To the latter part of this plea, as pleaded to the 5th and 9th counts, the plaintiffs, by way of replication (protesting that the defendant did not use due care in selecting proper persons, &c.; and that the loss of the letter, &c., did not happen without the knowledge, consent and authority of the defendant), say, &c., that the letter, &c., regularly arrived at the post-office of the defendant, on the 1st of August 1806, and were received by him, and ought to have been sent on or caused to have been sent on by him, on that day, in the mail, &c., which regularly arrived at Petersburg, and that he did not do so; and did not use due care and diligence in remailing and forwarding the same, and did delay and detain the same unduly, negligently and improperly, whereby the same have been lost, &c.; without this, that the loss of the said letter, &c., was caused or produced by any act without the control, knowledge or authority of the defendant in his office, and which, by using due and reasonable diligence in his said office, he could not have prevented; and this they are ready to verify, &c. To this replication, the defendant demurred. *To the latter part of the 13th plea, as pleaded to the 2d, 4th, 6th, 7th and 8th counts, the plaintiffs demurred. [*255

14. The fourteenth plea was to the same counts, and was the same in substance as the 13th; and the plaintiffs demurred to it as a plea to the 2d, 4th, 6th, 7th and 8th counts, and replied to it as a plea to the 5th and 9th counts; to which replication, the defendant demurred.

15. The fifteenth plea was to the same counts as the 13th plea, and was like it, except that it averred, that if there was any error or omission, &c., it was without the defendant's knowledge and consent, and without any fraud, or wilful or gross negligence of any person by him employed. To this plea, were the same replication and demurrer as to the 13th.

16. The sixteenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and, after protesting, as in the 13th plea, and admitting that the letter, &c., were not duly remailed and sent on by the mail of the 1st of August as it ought to have been, averred that it was sent on by the next mail, which left Washington on the 3d of August, and after departing from the post-office at Washington, and being entirely without the care and custody of the defendant, and of every person employed in his post-office, were taken and embezzled by some person or persons as yet undiscovered and unknown, and so lost to the plaintiffs without any participation, connivance, procurement, consent or knowledge of the defendant, or of any person employed or entrusted in his post-office. To this plea, as pleaded to the 2d,

4th, 5th, 6th and 7th counts, the plaintiffs demurred; and as pleaded to the 8th and 9th counts, they replied, in substance, that by reasonable care and diligence the letter, &c., might have been sent on by the mail of the 1st of August, and was not, and that the loss happened thereby; and concluded to the country. To this replication, the defendant demurred.

*256] *17. The seventeenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and was like the 16th plea, in all respects, except that it concluded with the following traverse, viz: "without this, that the loss of the said letter and bank-notes aforesaid was caused or produced by reason of the same not having been remailed and sent on, as aforesaid, in the mail of the 1st of August, as aforesaid, according to the postmaster-general's instructions as aforesaid, instead of having been delayed for the next succeeding mail of the 3d of the same August as aforesaid, and remailed and sent on in that mail as aforesaid." On this plea, as pleaded to the 9th count, the plaintiff took issue upon the traverse, and demurred to the plea, as pleaded to all the other counts.

18. The eighteenth plea was to the 5th, 6th, 7th, 8th and 9th counts, and after protesting as in the 13th plea, averred, that according to the duly-established regulations of the post-office, and the instructions of the post-master-general in the declaration mentioned, and then in full force, all letters, &c., put into the post-office at Philadelphia, directed to Petersburg, ought to have been put up in a separate and distinct mail, directed to Petersburg, which mail ought to have been sent on through the several intermediate post-offices, from Philadelphia to Petersburg, and which, according to the regulations and instructions aforesaid, could not have been properly opened either at the post-office in Washington, or at any other intermediate post-office on the route from Philadelphia to Petersburg, for any purpose whatever; and no such letters, &c., ought, according to the said regulations and instructions, to have been put up and sent on in any mail, which, according to the direction of the same, and the said regulations and instructions, could have been properly opened at the post-office in Washington, to be there distributed and remailed, previous to being sent on and forwarded to Petersburg; and that the letter, &c., ought not to have been put up and sent on from the post-office at Philadelphia, in any mail to be opened, distributed and remailed at the post-office at Washington, but in a separate and distinct mail, directed to Petersburg, and to be sent on through the post-

*257] office at Washington, *without being there opened, distributed or remailed. Whereas, the said letter, &c., was not, &c., but together with all the other letters sent by the same post, and directed and destined for Petersburg, was, contrary to the said regulations, &c., sent on from Philadelphia in a mail which, according to the direction of the same, and the said regulations, &c., was to be opened at the post-office in Washington, for the purpose of being distributed and remailed, &c.; and the defendant said, that if the said letter, &c., had been put up in a distinct and separate mail, directed to Petersburg, it would have been duly sent on in the mail of the first of August, and so the delay was occasioned by the erroneous and irregular manner in which the letter was put up and sent on from Philadelphia, and not by the negligence, carelessness or misconduct of the defendant in his office: "without this, that the said letter was put and forwarded in the mail at and from Philadelphia, and delivered at the said post-office in

Washington, in any other manner than as aforesaid; and this he is ready to verify," &c.

To this plea, as pleaded to the 5th count, the plaintiffs demurred; and as pleaded to the other counts, they replied, and (after protesting that the postmaster at Philadelphia was not bound to send on the letter in a separate mail directed to Petersburg, &c., and protesting that the loss of the letter or the delay, &c., was not occasioned by the supposed erroneous manner in which it was put up and sent on from Philadelphia), for replication said, that the letter, &c., was put up and forwarded by the postmaster at Philadelphia, according to the said instructions of the postmaster-general, in a mail addressed "Southern," containing the letters addressed to places in Virginia, and was thereafter duly and regularly placed in the post-office in Washington, on the 1st of August, to be remailed and sent on in the mail of that day, and that the delay and loss were not occasioned by any error or irregularity in the manner in which it was put up and sent on from Philadelphia, but was occasioned by the want of due and reasonable care and diligence in the performance of the duties of the post-office at Washington, on the first of August; and concluded to the country. *To this replication, the defendant demurred. [*258

All the demurrers were decided by the court below in favor of the plaintiffs.

Upon the trial of the issues of fact, the plaintiffs took seven bills of exception.

1. The first bill of exception stated, that the plaintiffs offered evidence to the jury, that the defendant was deputy-postmaster at the city of Washington, from the 1st of January 1806, until the time of trial, and had under his management and direction, the affairs and business of the post-office at that place; and the plaintiffs produced and read to the jury the printed instructions of the postmaster-general of the United States; and proved by a witness, that those were the instructions delivered to the defendant for his government in the duties of his office as deputy-postmaster in the city of Washington. The plaintiffs further produced to the jury, evidence that they had $2000 in bank-notes, in the hands of Walker & Kennedy, merchants, at Philadelphia, and that that sum of money, in bank-notes, was inclosed in a sealed letter, and directed to the plaintiffs, at Petersburg, in Virginia, the place of their residence, and put into the post-office at Philadelphia, and was by the postmaster at that place forwarded in the mail, addressed to the state of Virginia, on the 31st of July 1806. That it arrived, in due course of post, at the post-office in the city of Washington, under the care and management of the defendant. That it was the duty of the office at Washington, as a distributing office, to open the said mail, so addressed, and to forward to Petersburg, in Virginia, the said letter, according to its address. That the said letter was lost, and never arrived at the post-office in Petersburg, nor came to the hands of the plaintiffs, and that the same was demanded of the defendant, who denied he was liable for it. It was admitted, that the course of conveying the mail from Philadelphia to Petersburg, was as follows: the Virginia mail, tied with a string, and wrapt in papers, was, with many other mails similarly secured, inclosed in a locked portmanteau, and sent by stage to the city of Washington, distant 144 miles. No person or post-office between Philadelphia and Washington was legally authorized

*to open the mail addressed to Virginia; but the portmanteau was unlocked and opened at the Baltimore post-office, and the various mails were there taken out of the portmanteau, in order to select the Baltimore mail. When the mail arrived at the post-office in Washington, the mail addressed to Virginia was opened in said office, as a distributing office, and the letters addressed to Petersburg assorted, tied and wrapped as aforesaid, and put into a mail addressed to the post-office at Petersburg. The said Petersburg mail, so tied and wrapped, was, with many other mails, put into the portmanteau, which was locked and opened on the route only at Fredericksburg and Richmond. But the said Petersburg mail, wrapped in paper, and tied with a string as aforesaid, though it might properly be taken out of the portmanteau with the other mails at Fredericksburg and Richmond as aforesaid, could not be legally opened at any office between Washington and Petersburg. Whereupon, the plaintiffs' counsel prayed the court to instruct the jury, that if they should find the above facts to be true, the plaintiffs were entitled to recover in this case, on their 2d count, unless the defendant should prove the said letter to have been forwarded from his office, in the time and manner prescribed by law and the said instructions of the postmaster-general; which opinion the court refused to give.

2. The second bill of exception stated the same facts, and that, thereupon, the plaintiff's counsel prayed the court to instruct the jury, that if they should find those facts to be true, then the plaintiffs were entitled to recover in this case, upon their fourth and fifth counts, unless the defendant should prove the said letter to have been forwarded from his office, in reasonable time, and in the manner prescribed by law and the instructions of the postmaster-general; which instruction the court refused to give.

3. The third bill of exception stated, that, in addition to the above facts, the plaintiffs offered evidence, under the issues joined on the 6th and 10th pleas, to prove that the letter and bank-notes were lost by the negligence and carelessness of Henry Whetcroft and William Hewitt, sworn clerks and assistants employed by the defendant in his said post-office; and also certain
*260] acts *of omission, undue delay and detention of the said letter and bank-notes by such clerks and assistants of the defendant; to the competency of which evidence, to support the issues joined on the 6th and 10th pleas on the part of plaintiffs, the defendant objected; and the court was of opinion, that under those issues, such evidence was incompetent, and refused to suffer the same to be given to the jury under those issues; and instructed the jury, that the defendant was not liable, under those issues, for any acts or omissions of his said clerks and assistants: to which refusal and opinion, the plaintiffs excepted.

4. The fourth bill of exception stated, that the plaintiffs offered evidence of the facts stated in their 5th and 8th counts, and moved the court to instruct the jury, that if they should believe, from the evidence, that the letter and bank-notes were duly delivered into the defendant's post-office, then it was incumbent on the defendant to prove that the same were duly forwarded. And if the jury should further believe, that the same were not so forwarded, and had become lost, then it was incumbent on the defendant to prove, that the same were not lost by any undue negligence or unreasonable detention of himself, or any person employed by him in his office; which instruction the court refused to give; but instructed them, that if the jury should

believe, from the evidence, that the letter and bank-notes were duly delivered into the defendant's office, then it was incumbent on the defendant to prove that the same were duly forwarded; and if the jury should further believe, that the same were so delivered, and were not so forwarded, and had become lost in consequence thereof; then it was incumbent on the defendant, to prove that the same were not lost by any undue negligence and unreasonable detention of himself or any other person employed by him in his office. To which refusal, the plaintiffs excepted.

5. The fifth bill of exception stated, in addition to the facts before stated, that the plaintiffs offered in evidence a copy of a post-bill from Philadelphia, of the 31st of July 1806 (showing that a letter whose postage was one dollar and twenty cents, corresponding with the postage upon the letter in question, was charged in the post-bill from Philadelphia to the state of Virginia, *and offered to prove, that the post-bill, of which it was a copy, [*261 was received at the defendant's post-office, with letters in the mail from Philadelphia. And the defendant offered evidence to prove, that it never was the custom, until after the report of the loss of the letter and bank-notes in question, for the actual contents of the mails, sent to the said office for distribution, to be compared with the contents noted in the accompanying post-bills; except that it was customary to examine the column of paid letters, in order to see whether as many paid letters, and of the same amount of postage, came on in the mail; that this was done, because the deputy-postmaster had to account to the postmaster-general for all letters sent on from his office and marked "paid;" whether originally put into his office, or coming there in mails for distribution; and according to the routine of office, any deficiency, appearing on the arrival of the mail, in the amount of postage marked in his post-bill as "paid," would be chargeable to him; that in no other respect was any attention paid, or notice taken, whether the actual contents of the mail, as to any letters not marked "paid," corresponded, or not, with the post-bill. That if, by accident, any variance between the post-bill and the actual contents of the mail received for distribution, was discovered, it would never be noted in the office, inasmuch as the printed forms, furnished to the defendant and other deputy-postmasters, from the postmaster-general for the account of mails for distribution, contained no column for noting letters either over-charged, or under-charged, or mis-sent, such as are to be found in the form furnished for account of mails for delivery, and marked No. 1, in the schedule annexed to the instructions of 1804. Whereupon, the plaintiffs prayed the court to instruct the jury, that if they believed, from the evidence, that the copy of the post-bill produced, was a true copy of the post-bill sent on from Philadelphia to the Washington post-office, and that the same was received with letters in the mail from Philadelphia, at the defendant's office, then the jury ought to presume, that the letters accompanying the said post-bill corresponded therewith, unless the defendant should prove the contrary; which instruction the court refused to give as prayed; but instructed the jury, that it was competent for them, from *those circumstances, so to presume; and [*262 to decide upon the force of such presumption, from all the circumstances proved in the case; to which refusal and instruction, the plaintiffs excepted.

6. The sixth exception was to the refusal of the court to suffer a witness

to be asked, whether the printed general instructions from the postmaster-general, given to the deputy-postmasters in 1804, superseded those before given to the postmaster in Philadelphia, in 1800; both instructions having been produced and read in evidence to the jury.

7. The seventh bill of exception stated that the plaintiffs offered evidence to "prove the several allegations in the said declaration; and further offered in evidence the several printed instructions of the postmaster-general (thereto annexed), and also the depositions (thereto annexed, and which tended to prove the delivery of the letter and bank-notes into the post-office at Philadelphia, and their arrival at the post-office in Washington). And the defendant offered evidence to prove that Petersburg, ever since the 1st of November 1804, was a distributing post-office, as established by the said instructions; that after the said instructions, it was the practice of post-offices (except that of Philadelphia) in which letters were deposited for Petersburg, to put the same up in a separate mail, addressed to Petersburg, and not in the Virginia state mail. That the Philadelphia post office, since the said 1st of August 1806, and not before, had adopted the same practice. That the Virginia state mail, above mentioned, contained the letters directed to the several post-offices in Virginia, except Norfolk and Richmond, and also the letters directed to the states of Ohio and Kentucky; and that before the letters for Petersburg contained in the said mail could be distributed and remailed, it was necessary to assort and distribute the whole contents of the said mail. The plaintiffs then moved the court to instruct the jury, that if they should believe, from the evidence, that the letter and the bank-notes in the declaration mentioned, were put, at the post-office in Philadelphia, in a bundle superscribed 'Virginia state mails,' and that it *263] *had been, since the year 1800, and was the practice, in the said Philadelphia post-office, during the months of July and August 1806, to send letters for delivery at Petersburg, Virginia, in that manner; and that all letters in the Virginia state mail, for Petersburg, Virginia, brought to the defendant's office, had been usually remailed, distributed, and sent on from the post-office kept by the defendant, to Petersburg aforesaid; and should be further of opinion, that the said letter, containing the said bank-notes, was delivered in the said bundle superscribed 'Virginia state mail,' on the first day of August 1806, in the said office of the defendant, and in due time to be remailed, distributed and sent on by the defendant, on the first day of August 1806, from his aforesaid office, in a bundle addressed to Petersburg, Virginia, then it was the duty of the said defendant to have remailed, distributed and sent on the said letter by the mail which left the Washington post-office on the said first day of August 1806; and if they further believed, that this was not so done, or caused to be done, by the said defendant, that it was incumbent on the defendant to make out a just, reasonable and sufficient excuse for the omission:" which instruction the court refused to give as prayed, and the plaintiffs excepted.

The act of congress of March 2d, 1799 (1 U. S. Stat. 733), establishes a general post-office at the seat of government of the United States, under the direction of a postmaster-general; and enacts, that he shall establish post-offices, and appoint postmasters at all such places as shall appear to him expedient, on the post-roads that are or may be established by law. And that he shall give the postmasters instructions relative to their duty;

and shall obtain from them their accounts and vouchers, &c., once in three months, &c. That all persons employed in the care of the mail shall take an oath faithfully to perform the duties required of them, and abstain from everything forbidden by the laws in relation to the establishment of the post-office and post-roads within the United States. That every post-master shall keep an office in which one or more persons shall attend at such hours as the postmaster-general shall direct, for the purpose of performing the duties thereof, and all letters brought to any post-office half *an hour before the time of making up the mail of such office, shall be [*264 forwarded therein ; except at such post-offices where, in the opinion of the postmaster-general, it requires more time for making up the mail, and which he shall accordingly prescribe ; but this shall in no case exceed one hour. That if any person employed in any of the departments of the general post-office shall secrete, embezzle or destroy any letter with which he shall be entrusted, or which shall have come to his possession, and intended to be conveyed by post, containing any bank-note, &c., he shall, on conviction, be publicly whipped, not exceeding forty stripes, and be imprisoned not exceeding ten years. That the postmaster-general be authorized to allow to the postmasters, respectively, such commission on the moneys arising from the postages, or shall be adequate to their respective services and expenses ; not exceeding, &c.

The instructions of the postmaster-general, issued in pursuance of this act, to the postmasters, in 1804, required that every person employed in a post-office as assistant or clerk should take the oath, and send a certificate thereof to the general post-office. That every postmaster should be responsible " for the care and fidelity of every person so employed." That " the postmasters at distributing offices are to distribute and remail all letters and packages, before the departure of the mail, and on no account delay them a single post."

The verdict and judgment of the court below being for the defendant, the plaintiffs brought their writ of error.

F. S. Key and *C. Lee*, for the plaintiffs in error.— The 3d bill of exception brings into view the question, whether the negligence of the defendant's clerks can be given in evidence, to prove an allegation of negligence of the defendant himself ; which necessarily involves the question whether the defendant is liable for the negligence of his clerks. This bill of exception *arose upon the issues joined on the 6th and 10th pleas. The 6th [*265 plea was, that the letter was not lost by the negligence or misconduct of the defendant in his office ; and the 10th was, that the defendant had not negligently or improperly delayed or detained the letter in the office.

The law in respect to the liability of the postmaster-general is admitted to be the same here as it is stated in *Lord le Despencer's Case* (Cowp. 754), to be in England. But the opinion of Lord MANSFIELD, in that case, clearly shows that the action lies in the present case. In the case of *Brucker* v. *Fromont*, 6 T. R. 659, it is decided, that a declaration which charges the defendant with negligence, is supported by proof of the negligence of his servant. Where the negligence is in a post-office, it is scarcely possible, in any case, for a plaintiff to know exactly to which of the persons, employed in the office, the negligence is to be attributed. If, as the court below

decided, the defendant is liable for the negligence of his clerks, it seems to be immaterial, whether the declaration state the neglect to be on the part of the defendant or of his clerks; or state it in the alternative. A collector of the revenue is liable for his deputies, although they are sworn officers; yet the secretary of the treasury is not liable for the collectors. So, the marshal is liable for his deputies, who are also sworn officers, and who give bond for the faithful discharge of their duty. Why should there be a difference in the case of a postmaster?

The 4th exception is, that the court refused to instruct the jury, that proof of negligence and loss raised a presumption that the loss was a consequence of the negligence, unless the contrary be shown. Or, in other words, the court below decided, that proof of negligence and loss did not throw the burden of proof on the defendant, to show that the loss was not a consequence of the negligence. To oblige the plaintiffs to prove, that the loss was a consequence of that negligence, was to impose upon them an impossibility, in the nature of things.

The fifth exception is to the refusal of the court to instruct the jury, that
*266] they ought to infer that the contents *of the mail from Philadelphia corresponded with the post-bill, when it was received at the Washington office, unless the defendant should prove the contrary. What a jury may infer from facts proved, is a question of law for the court to decide. And what a jury may thus infer, they are bound in law to infer, unless the contrary be proved. The court, therefore, ought not to have left the matter entirely to the jury, but to have given the instruction as prayed. Presumptions are inferences of law. Thus, from long possession, the court will instruct the jury that they ought to presume a deed. So, from evidence of payment of the last ten years' rent, the jury ought to presume all the former rents were paid. So, in trover, from evidence of a demand and refusal, the jury ought to presume a conversion. So, if stolen goods are found in possession of a man, the jury ought to presume that he stole them, unless the contrary be shown.

The 7th exception raises the question whether the defendant was not bound to remail and send on the letter, according to law, and the instructions of the postmaster-general, although the mail arrived at his office in an irregular manner Upon this point, the 5th section of the post-office law (1 U. S. Stat. 734), and the instructions, are decisive. These instructions being given in conformity with the law, become part thereof, and are equally binding.

Jones and *Morsell*, contrà.—All the questions in this case are resolved into one, viz: On which side was the burden of proof, in certain stages of the trial. All the exceptions are grounded upon the idea, that it was only necessary for the plaintiffs to show negligence in the office, and a loss of the letter, without showing that the loss was a consequence of the negligence.

We admit, that the defendant is liable for any loss happening by his own
*267] negligence; but we deny, that he *is liable for that of his clerks. The act of congress requires that the defendant should employ clerks, and that they should be sworn, and imposes specific penalties upon each person employed in the office for his own misconduct. They are all public officers, and liable to be charged *ex delicto officii*. The postmaster is only

bound to use due care and circumspection in selecting proper clerks. He is not like a common carrier, who receives hire in proportion to the risk, and the value of the article. He has only a compensation for his trouble in the office. The liability of a master arises from his supposed assent, arising from the fact that the servant is employed for the benefit of the master. But here, the clerk does not act for the postmaster, but for the public. The servant must be employed in the business of the master and for his benefit, or the latter will not be liable.

JOHNSON, J.—It has never been attempted to assimilate him to a common carrier. He has nothing to do with the carrying of the mail.

Jones.—It is decided, in England, that the postmaster-general, in England, is not liable for his deputies. *Lane* v. *Cotton*, 1 Ld. Raym. 647 ; 1 Salk. 17. The instructions from our postmaster-general to the postmasters, that they should be liable for their deputies or clerks, &c., only means that they shall be liable in accounting with him officially for the revenue. He could not make them liable to individuals.

In the case of *Rowning* v. *Goodchild*, 2 W. Bl. 906 ; 3 Wils. 443, the principal question was, whether the postmaster was bound to send out the letters to the inhabitants ; but a question incidentally arose, whether the action, which was brought against the deputy-postmaster, should not have been brought against the postmaster-general. The court, however, was of opinion, that in all cases, deputies are answerable for their own personal misfeasance, such as detaining the letter in question. And in that case, the deputies were made, by act of parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such.

But if the defendant was liable for the default of his *clerks, yet [*268
the declaration ought to have shown, whether the defendant was called upon to account for his own negligence, or that of his clerks. The case of *Brucker* v. *Fromont*, 6 T. R. 659, was reluctantly decided upon the authority of *Turberville* v. *Stampe*, 1 Ld. Raym. 264 ; but which does not support the case of *Brucker* v. *Fromont*, which is evidently against principle ; and at all events, is confined to the case of master and servant. In the following cases, a discrimination is made in the declaration between the act of the master and that of his servants. *Turner* v. *Hawkins*, 1 Bos. & Pul. 472 ; *Ogle* v. *Barnes*, 8 T. R. 188 ; *Savignac* v. *Roome*, 6 Ibid. 125.

Presumptions arising from circumstantial evidence are always to be left to the jury. Such a positive inference as will justify the court in directing the jury, that they ought to make it, can arise only from some solemn act. In the present case, there was other evidence, showing that no such inference could be drawn as the plaintiffs had supposed ; and therefore, the court did right to leave the whole to the jury.

The 7th exception required the court to say, that the defendant was bound to send on the letter, on the 1st of August, or to show a reasonable excuse for not sending it on, although the mail was made up in an irregular manner in Philadelphia. The idea of reasonable diligence is excluded ; and it supposes the defendant bound, at all events, to send the letter on by that mail, or to give a sufficient excuse for not doing so, although he sent it by the next mail, and although the loss was not the consequence of not sending it on the 1st of August.

The defendant was not bound to show that he sent it on; it would be impossible, in the course of the business of the office, to prove the sending on of every particular letter. Sworn officers are presumed to have done their duty, until the contrary is proved. *Williams* v. *East India Company*, 3 East 192.

March 14th, 1812. All the judges being present, JOHNSON, J., delivered
*269] the opinion of the court, as follows:—*It is necessary to dissipate the cloud of pleading in which this case is enveloped, in order to form a distinct idea of the questions intended to be brought to the view of the court below. The object is to charge the postmaster with the loss of money sent by mail; and the points, which the exceptions are intended to make, are, how far he is liable for his own act or neglect? how far for the acts or neglect of his assistants? and what evidence shall be sufficient to support the plaintiff's action? But unfortunately, as not unfrequently happens, in this complex and injudicious mode of conducting a suit, with all the clerical skill displayed by counsel in multiplying their counts, and pointing their bills of exception, the principal questions are really, at last, not brought to the view of this court.

On the first and second exception, it is unnecessary to make any remark, as they are admitted to apply to counts which the evidence did not support, and have been, in fact, abandoned.

The third exception is intended to raise the question, how far a postmaster is liable for the neglect of his assistants; but connected with the pleadings, it presents another and a very different question, to wit, whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence, neglect in the assistant, acting under him? Now, the distinction between the relation of a postmaster to his sworn assistant, acting under him, and between master and servant, generally, has long been settled; and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion, that, if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.

In the fourth exception, the only difference between the opinion prayed for and that given, is, that the court require the loss to be a consequence of
*270] not forwarding *the letter described in the declaration. Now, in justice to the correctness of the plaintiff's counsel, this court hope that they meant nothing more than what the court conceded; for, certainly, if the loss was not a consequence of the state of things made out in the evidence, they were not entitled to recover.

On the fifth exception, it is only necessary to remark, that if the court below erred at all, it was in conceding too much to the prayer of the plaintiff. An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage.

The sixth exception is equally untenable. The instructions of the postmaster-general spoke for themselves. If the one superseded or rescinded the other, the evidence was to be sought for by comparing them together.

And the seventh exception affords the court an opportunity to remark, how much more conducive to the purposes of justice it would be, to substitute special verdicts, and demurrers to evidence, for the tedious and embarrassing practice of the court from which this case comes up. It is a fact, that this bill of exceptions claims a right of recovery, without stating any loss or damage whatever. The opinion prayed for was, that if the jury believed the various facts therein detailed, then it is incumbent on the defendant to make out a just, reasonable and sufficient excuse for omitting to forward the letter described. But, unless an individual has sustained some loss or damage by an omission of that kind, why should the postmaster be held to make out a defence? Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone, that the court is to decide. We cannot go beyond it, and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for. Upon the whole, the judgment below must be affirmed.

Judgment affirmed.

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*Hezekiah Wood *v.* John Davis and others. (*a*) [*271

Conclusiveness of judgment.

A verdict and judgment that a mother was born free, is not conclusive evidence of the freedom of her children; unless between the same parties or privies.[1]

Error to the Circuit Court for the district of Columbia, sitting at Washington.

The defendants in error, John Davis and others, were children of Susan Davis, a mulatto woman, who had obtained a judgment for her freedom, in a suit which she had brought against Caleb Swann, to whom she had been sold by Wood, the plaintiff in error. The petition of the children stated that their mother, Susan Davis, had obtained a judgment for her freedom, upon the ground, that she was born free. The issue was joined upon the question, whether the petitioners were entitled to their freedom.

Upon the trial of this issue, in the court below, the plaintiff in error, Wood, tendered a bill of exceptions, which stated, that it was admitted, that the petitioners were the children of Susan Davis; and they produced the record of the judgment in favor of their mother, Susan Davis, against Caleb Swann (in which case her petition stated that she was born free, being descended from a white woman; and the issue joined was upon the question whether she was free or a slave); and it was admitted, that Susan Davis had been sold by Wood to Swann, before the judgment; whereupon, the petitioners, by their counsel, prayed the court to direct the jury, that the record aforesaid and the matters so admitted were conclusive evidence for the petitioners in this cause; and the court directed the jury as prayed: to which direction, the defendant, Wood, excepted.

(*a*) March 9th, 1812. Present, all the judges.

[1] This overrules Davis *v.* Forrest, 2 Cr. C. C. 23. But a judgment in favor of the freedom of the mother, is conclusive in favor of her subsequent issue, as against the same claimant. Alexander *v.* Stokely, 7 S. & R. 299.

F. S. Key, for the plaintiff in error, contended, 1. That Wood was not a *272] party, nor privy to any party, to the suit of Susan Davis against Swann, and *is, therefore, not concluded by the judgment in that case: and—

2. That the judgment was only proof, that Susan Davis was free, at the time of the judgment; not that she was born free, and therefore, it did not appear, that she was free at the time of the birth of the petitioners. She might have been manumitted, after the birth of her children, and so entitled to her freedom, at the time of the judgment, and yet the petitioners might remain slaves. The only issue ever joined in Maryland (under the laws of which state this case was tried), upon a petition for freedom, is, whether the petitioner be free, at the time of issue joined; not whether she were born free. 2 Harris's Entries 530. It is immaterial, what title is set out in the petition. The petitioner is not confined to it, but may, on the trial, show any other title to freedom; the practice in Maryland is merely to state in the petition, that the petititioner is entitled to freedom and is holden as a slave. The act of assembly of Maryland, of 1796, directs that the jury shall be charged to determine those allegations in the petition which may be controverted. The only allegation controverted is that the petitioner is free.

Duvall, J., stated, that in all the petitions which he filed in Maryland, in the cases of the *Shorters*, the *Thomases*, the *Bostons*, and many others, he always stated their title at large, tracing it up to a free white woman; and after judgment in those cases, the courts always held, that the subsequent petitioners, who claimed under the same title, were only bound to prove their descent.

C. Lee, contrà.—The issue in Susan Davis's case is, in fact, whether she was born free. And the case of *Shelton* v. *Barbour*, 2 Wash. 64, shows that the verdict is conclusive as to all claiming under the same title. Wood's title was the same as Swann's; and that of the petitioners, the same as that of Susan Davis.

F. S. Key, in reply.—Wood did not claim under Swann, but Swann *273] claimed under Wood. There was no privity between them, *as to the children. Swann could do nothing to injure Wood's title to them.

March 10th, 1812. All the judges being present, Marshall, Ch. J., stated the opinion of the court to be, that the verdict and judgment in the case of *Susan Davis* against *Swann*, were not conclusive evidence in the present case. There was no privity between Swann and Wood; they were to be considered as perfectly distinct persons. Wood had a right to defend his own title, which he did not derive from Swann.

Judgment reversed.

Morgan *v.* Reintzell. (*a*)

Action by indorser against maker.

In a suit against the maker of a promissory note, by an indorser, who has been obliged to take it up, the plaintiff must produce the note, upon the trial.

The payment of the money by the indorser, after protest, is a good consideration for an *assumpsit* on the part of the maker, to pay the amount of the note, with costs of protest.

The maker of a promissory note, payable to order, is, under the custom of merchants, liable to refund the amount of the note, and costs of protest, to an indorser who has been obliged to take up the note, after protest.

Reintzell *v.* Morgan, 2 Cr. C. C. 20, affirmed.

Error to the Circuit Court for the district of Columbia, sitting in Washington, in an action of *assumpsit*, brought by Reintzel against Morgan, upon a promissory note made by Morgan, payable to Reintzel, or order.

The declaration contained three counts: 1st. Upon the promissory note, in the usual form, under the statute of Anne; 2d. For money paid, laid out, and expended; and 3d. The following special count, viz:

"And whereas also, afterwards, to wit, on, &c., the said William Morgan, according to the custom and usage of merchants, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date on the day and year aforesaid (August 9th, 1809) by which said note, the said William Morgan, sixty days after the date thereof, promised to pay to the said Anthony Reintzel, or order, five hundred dollars, without off-set, value received; and then and there delivered the said note to *the said Anthony Reintzel; and the said [*274
Anthony Reintzel, to whom, or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made, before the payment thereof, or any part thereof, and before the time appointed by the said note for the payment thereof, that is to say, on the day and year last aforesaid, at the county aforesaid, indorsed the said note, his own proper handwriting being thereto subscribed; by which said indorsement, the said Anthony Reintzel ordered and appointed the contents of the said note to be paid to the president, directors and company of the Bank of the United States, and then and there delivered the said note, so indorsed, to the said president, directors and company of the Bank of the United States, of which said indorsement, so made on the said note, the said William Morgan, afterwards, to wit, on the day and year aforesaid, had notice; by reason whereof, and also by force of the statute in such case made and provided, the said William Morgan became liable for, and chargeable to pay to the said president, directors and company of the Bank of the United States, the said sum of money mentioned in the said note, according to the tenor and effect thereof, and in consideration thereof, assumed upon himself so to do. And the said Anthony Reintzel avers, that the said William Morgan, although afterwards, to wit, on the 8th day of October, in the year 1809, at the county aforesaid, he, the said William Morgan, was called upon by the said president, directors and company of the Bank of the United States, and solemnly required to pay the sum of money in the said note mentioned, refused to pay the same; whereupon, afterwards, upon the day and year last aforesaid, the said president, directors and company of the Bank of the United States, having made no

(*a*) March 9th, 1812. Present, all the judges.

order concerning the payment thereof, protested the said note, at the county aforesaid, according to the said usage and custom of merchants upon such non-payment; by reason whereof, the said Anthony Reintzel, according to the usage and custom of merchants, became liable to pay to the said president, directors and company of the Bank of the United States, the contents of the said note, together with the interest and damage which should accrue from the delay of payment thereof, and being so liable, afterwards, to wit, *275] on the day and year last aforesaid at the county *aforesaid, (did) pay to the said president, directors and company, the contents of the said note, and the costs of protest thereon, whereof the said William Morgan afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. By reason of the premises, and by force of the statute and usage and custom of merchants, the said William Morgan became liable to pay to the said Anthony Reintzel the said sum of money in the said note mentioned, and the said costs of protest, and being so liable afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, upon himself assumed, and to the said Anthony Reintzel then and there faithfully promised, to pay the same, when he should be thereunto afterwards required; and which said costs of protest, and the said sum of money in the said note mentioned, amount unto the sum of $502.28, current money, whereof the said William Morgan, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice."

After a general verdict for the plaintiff, in the court below, upon the issue of *non assumpsit* to all the counts, the defendant moved in arrest of judgment, and assigned as a reason therefor, that the last count in the declaration was bad. The court, however, overruled the motion, and rendered judgment upon the verdict.

The defendant took out a writ of error; and the cause was now submitted to this court, by *F. S. Key*, for plaintiff in error, and *Morsell*, for defendant, without argument.

March 13th, 1812. All the judges being present, MARSHALL, Ch. J., after stating the case, observed, that the court could see no error in the judgment. The payment of the money by the plaintiff, under the circumstances stated in the count, was a sufficient consideration for the *assumpsit*. The principal objection was, that the count ought to have been founded upon the note, so as to oblige the plaintiff to produce it on the trial. But it *276] states that *the note was paid by the plaintiff; and the court thinks that the note must have been produced upon the trial.

Judgment affirmed.

Wise and Lynn *v.* Columbian Turnpike Company. (*a*)

Appellate jurisdiction.

Upon a writ of error to the circuit court for the district of Columbia, this court has no jurisdiction, if the sum awarded be less than $100, although a greater sum may have been originally claimed.

The Columbian Turnpike Company obtained a rule upon the plaintiffs in error, Wise and Lynn, to show cause why this writ of error should not be dismissed for want of jurisdiction, the matter in dispute being less than $100, and the writ of error being to the circuit court for the district of Columbia.

March 14th, 1812. Upon the return of the rule, it appearing that the sum awarded was only $45, The Court (all the judges being present) decided, that they had no jurisdiction, although the sum claimed by Wise and Lynn, before the commissioners of the road, was more than $100.

Writ of error dismissed.

Caldwell *v.* Jackson. (*b*)

Costs in error.

Each party is liable to the clerk of this court for the fees due to him from such party, respectively.

A copy of the record is not a part of the taxable costs of suit, to be recovered by one party against the other; but the party who requests the copy, must pay the clerk for it.

Caldwell, the clerk of this Court, obtained a rule against Jackson, to show cause why an attachment should not issue for non-payment of his fees in the suit *of *Winchester* against *Jackson*, which had been dismissed, on the motion of Jackson, with costs, at a former term. [*277

Milnor now showed cause, and contended, that Jackson was not liable to the clerk for his fees, inasmuch as Jackson was the defendant in error, and the writ of error had been dismissed, with costs. The clerk must look to the plaintiff in error for all the costs. The bill, which had been rendered, included the expense of a copy of the record, which is not regularly taxable as costs, and therefore, the non-payment of that charge can be no ground for an attachment.

Duvall, J.—In Maryland, each party pays to the clerk his own fees; that is, the fees for those services which the clerk has performed for him; and the successful party recovers them from his antagonist. If either party requires a copy of the record, he must pay for it, as for any other service performed; but it is not a part of the costs which are to be taxed against the other party, as costs of suit.

March 13th, 1812. All the judges being present, Marshall, Ch. J., stated the opinion of the court to be, that each party was liable to the clerk for his fees for services performed for such party; and it is immaterial to the clerk, which party recovers judgment.

Rule absolute.

(*a*) March 9th, 1812. Present, all the judges.

(*b*) March 12th, 1812. Present, all the judges.

Blackwell *v.* Patten and others.

Writ of error.—Teste.

A writ of error, issued in September, may bear *teste* of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the *teste* and return of the writ.

March 13th, 1812. *Jones*, for the defendants in error, moved this Court to dismiss the writ of error, because it bore *teste* of February term 1810, was issued in September 1810, and was returnable to February term 1811, whereas, it ought to have been tested of August term 1810. The plaintiff in error, aware of this objection, has sued out another writ of error, which stands on a subsequent part of the docket.

*278] * *Campbell*, on the same side.—August term is as much a term for *teste* and return of writs, as February term. Suppose, the writ bore *teste* ten years ago: it might as well be made returnable to February term 1811, as this writ which bore *teste* of February term 1810. If tested of February term 1810, it ought to have been returnable to August term 1810, and not to February term 1811. The appearance of the defendants in error only cures the want of a citation, not a fault in the writ of error itself.

March 14th, 1812. All the judges being present, The Court refused to quash or dismiss the writ of error, on account of the irregularity of its *teste*.

Wallen *v.* Williams. (*a*)

Supersedeas.

The court will not quash an execution, issued by the court below, to enforce its decree, pending the writ of error, if the writ of error be not a *supersedeas* to the decree.

Error to the Circuit Court of the district of Tennessee, to reverse a decree in chancery. The court below had issued a writ of *habere facias possessionem* to enforce its decree. The writ of error was too late to be a *supersedeas* to the decree.

Jones, for the plaintiff in error, now moved to quash the writ of *habere facias* as irregular, and contended, that the court below, sitting as a court of chancery, under the laws of Tennessee, could only enforce by execution decrees for the payment of money; and cited Tennessee Laws (Ed. 1807), p. 158, § 2.

P. B. Key, contrà.—This court has no jurisdiction to quash an execution issued from the court below, and executed. But if this court had the power to do it, it would not, in its discretion, quash a process which has merely carried into effect the decree of the court below. If the decree be reversed upon the merits, the execution *will be of no avail; but the court *279] will not anticipate the merits, upon such a motion.

Marshall, Ch. J.—The writ of error is to the original decree, which did not award this writ of *habere facias*. It was awarded by a subsequent order of the court, to which no writ of error issued.

(*a*) March 13th, 1812. Present, all the judges.

TODD, J.—The attachment to compel a performance of the decree was unavailing; and upon the return of it, the *habere facias* was issued in conformity with the practice in that state, as admitted by the counsel on both sides in the court below. It was ordered as a matter of course, and no objection was made. If this motion should prevail, it will make the writ of error operate as a *supersedeas*, contrary to the intention of the act of congress.

Motion overruled.

MCKIM *v.* VOORHIES. (*a*)

Conflict of jurisdiction.

A state court has no jurisdiction to enjoin a judgment of the circuit court of the United States.[1]

THIS was a case certified from the Circuit Court for the district of Kentucky, in which the opinions of the judges were opposed.

At the July adjourned term of the court below, in the year 1808, McKim, a citizen of Maryland, recovered a judgment in ejectment against Voorhies, a citizen of Kentucky, for the undivided third part of a water-mill, with its appurtenances, in the county of Franklin, in the state of Kentucky. At the same time, Voorhies filed his bill in chancery, in the court below, against McKim, and John Instone, a citizen of Kentucky, and Hayden Edwards, a citizen of South Carolina, claiming an equitable lien on the said third part of the mill, &c., on account of contracts, &c., between Bennett Pemberton (under whom Voorhies held the premises) and Hayden Edwards and John Instone; Pemberton having *sold the said third part of the mill, &c., [*280
to Edwards, who sold to Instone, who sold and conveyed to McKim. Instone was the only defendant served with process from the court below. McKim and Instone answered the bill, and brought on a motion to dissolve the injunction on the merits, which was overruled by the court below.

At the term next preceding November term 1810 (Edwards not having answered), the court below dismissed the suit as to him; and as to Instone, for want of jurisdiction; after which, Voorhies had leave to discontinue as to McKim, on payment of costs. The suit was accordingly discontinued. Previous to this disposition of the cause, Voorhies filed his bill in chancery, against the same parties, in the state circuit court for the county of Franklin, in the state of Kentucky, in which he set up the same equity as he charged in his bill in the court below. On this bill he, by an order from one of the circuit judges of the state, obtained an injunction, staying all further proceedings on the said judgment in ejectment, until the matters of the said bill were heard in equity. This injunction was dissolved, at the July term of the Franklin circuit court; shortly after which, the said injunction was reinstated by the order of the Honorable Caleb Wallace, one

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(*a*) March 13th, 1812. Present, all the judges.

[1] City Bank *v.* Skelton, 2 Bl. C. C. 14, 26. Nor can a federal court enjoin proceedings in a state court. Diggs *v.* Walcott, 4 Cr. 179; Rogers *v.* Cincinnati, 5 McLean 337; Ex parte Dudley, 1 Clark (Pa.) 96; United States *v.* Collins, 21 Law Rep. 37; Butchers' Association *v.* Slaughter-house Co., 1 Abb. U. S. 338; Ex parte Campbell, Id. 183; Watson *v.* Jones, 13 Wall. 719.

of the judges of the court of appeals of the state of Kentucky, issued under the act of the general assembly of that state, passed at their December session, in the year 1807.

The injunction issued in the cause by the state court, and the order reinstating that injunction, were duly notified to the clerk of the court below, and official copies of each lodged in his office. On the third day of the session of the court below, at its November term 1810, McKim, by his attorney, applied to the clerk of the court below for a writ of *habere facias possessionem* on the said judgment in ejectment, but the clerk refused to issue the writ, in consequence of the injunction and orders aforesaid; whereupon, McKim, by his counsel, moved the court below to instruct and order their clerk to issue a writ of *habere facias possessionem*, on the judgment of that court, the injunction and orders aforesaid notwithstanding. Upon this motion of the plaintiff, the opinions of the judges were opposed.

*281] The case was submitted by *Harper*, for the plaintiff, *without argument. There was no appearance for the defendant.

March 14th, 1812. All the judges being present, Todd, J., stated the opinion of the court to be, that the state court had no jurisdiction to enjoin a judgment of the circuit court of the United States; and that the court below should be ordered to issue the writ of *habere facias*.

Beatty *v.* State of Maryland. (*a*)

Administration account.

A final account settled by the admininstrator with the orphans' court, is not conclusive evidence in his favor, upon the issue of *devastavit vel non*.

Error to the Circuit Court for the district of Columbia, sitting in Washington.

This was an action of debt, brought at the instance and for the use of Thomas Corcoran, against Thomas Beatty, upon the administration bond of Mrs. Doyle, administratrix with the will annexed of Alexander Doyle. The defendant was one of her sureties in that bond.

The defendant, after *oyer*, pleaded a special performance of every item in the condition of the bond. To which the plaintiff replied a judgment *de bonis testatoris* obtained by him, in May 1799, against the administratrix, *fieri facias* upon that judgment and a return of *nulla bona*. The replication also averred, that the administratrix had in her hands, at the time of the judgment, goods of her testator sufficient to satisfy the debt, but that she wasted them. The defendant took issue upon the *devastavit*.

Upon the trial of this issue, the defendant below took a bill of exception, which stated, that the plaintiff offered in evidence the record of the judgment in May 1799, against the administratrix, for $357, and the *fieri facias* returned *nulla bona*. And also the inventory which she had exhibited to the orphans' court of Montgomery county, in Maryland, in Janu-

*282] ary 1795, *amounting to 3701*l.* 2*s.* 7*d.*, Maryland currency, of which 200*l.* was stated in the inventory to be cash. Also an account of the

(*a*) March 13th, 1812. Present, all the judges.

administratrix with the estate of her testator, rendered by her to the orphans' court, upon oath, on the 17th of August 1799, in which she charged herself with the sum of 1085*l.* in addition to the former inventory, making in the whole 4786*l.*, and claimed credit for sums paid to other creditors, whose claims were not entitled to preference, amounting to 3566*l.* ; leaving a balance still in her, hands of 1220*l.*, equal to $3253 ; and also a second account rendered by her, upon oath, to the orphans' court, in November 1799, charging herself with a further sum of assets to the amount of 463*l.* 15*s.* 5*d.*, in addition to the former balance, and claiming credit for 1607*l.* 16*s.* 11*d.*, paid to sundry creditors not entitled to preference, and still leaving a balance of 76*l.* in her hands to be administered. The defendant then offered in evidence, a third account, rendered by the administratrix to the orphans' court, in 1801, in which she charged herself with the former balance of 76*l.*, and claimed allowance for payments and commissions to the amount of 123*l.*, leaving a balance in her favor of 47*l.* To this account, as well as to the two former, was annexed a certificate from the register of wills, that the administratrix made oath on the Holy Evangels of Almighty God, that the account was just and true, as it stood stated, and that she had *bonâ fide* paid or secured to be paid, the several sums for which she claimed an allowance "which, after due examination, passed by order of court."

This account was offered as conclusive evidence for the defendant on the issue. But the court instructed the jury, that it was not conclusive evidence in favor of the defendant upon that issue ; and further, at the request of the plaintiff's counsel, instructed the jury, that the said record of the judgment, the inventory and the two accounts of the administratrix, offered in evidence on the part of the plaintiff, were conclusive evidence in his favor, to prove the *devastavit* on the part of the administratrix, to the amount of the plaintiff's claim : to which instructions of the court, the defendant excepted; and the verdict and judgment being against him, he brought his writ of error.

**F. S. Key*, for the plaintiff in error.—The question is, whether [*283 the final settlement of the administration account is conclusive? If the court has a power to pass such an account, if it be a court of competent jurisdiction, its sentence is conclusive upon every other court. The sentence of the ecclesiastical court is conclusive, in England, as to all matters within its jurisdiction. Peake's Law of Ev. 69, 76, 78 ; Ambler 760 ; 3 T. R. 125. The order of the court, settling the account, is a judicial, not a ministerial act.

Had the orphans' court power to settle and adjust the account? By the act of assembly of Maryland, of February 1777, c. 8, which was in force at the time these letters of administration were granted, the orphans' courts had all the jurisdiction and authority which the commissary-general had before. By the act of 1715, c. 39, § 2, the commissary-general was to proceed according to the laws of England, and to hold his court once every two months. By the third section, he was to call all executors and administrators to exhibit inventories, within three months, and render accounts, within twelve months next after administration committed ; and to enforce obedience by attachment for contempt. By the 7th and 18th sections, he is to transmit an account of the distribution to the

county courts. By the 27th section, there was an appeal to the governor from the sentence of the commissary-general. By the 34th section, the deputy-commissaries had power to pass, audit and allow all such accounts as should come before them "relating to dead men's estates," not exceeding 50*l.*, provided there were no controversy thereon; but if any person claiming any interest in such estates should object to any articles of the account, the deputy-commissary was to send it, with all papers, &c., to the com-
*284] missary-general, "before *whom all parties are to appear and defend their interest." By the 40th section, the prerogative court (which was the commissary-general's court) had like authority in enforcing obedience to its process, orders, interlocutory sentences and decrees, as the high court of chancery had.

By the act of 1718, c. 5, the person entitled to the residue of an estate may, after twelve months from the date of the letters of administration, sue "for such residuary part as shall appear to be due by such accounts as shall then be made up."

This jurisdiction over accounts appears also in the practice of the commissary's court, as stated in the Deputy Commissary's Guide, p. 45–49, which shows also that the settlement of the account by that court was always holden to be conclusive upon the county courts. In the Appendix, p. 198, is the form of a special commission to pass an account. It appears also, that all the vouchers are to be surrendered and filed, upon passing the account. This shows that it must be conclusive; for nothing could be more unjust, than to oblige a man to be always ready to account and to support his account, after taking from him all his vouchers.

Duvall, J.—The account was only binding upon the representatives of the estate, the distributees; and they might still open it in the general court. But the creditors are no parties to the settlement of the account, and cannot be bound by it. There can be no doubt, that the judgment against the administratrix, the inventory and two first accounts were conclusive evidence of a *devastavit.*

Marshall, Ch. J.—I believe that is the law throughout the United States. The court is unanimously of opinion, that the settlement of the account by the orphans' court is not conclusive evidence for the defendant, upon the issue joined.

Judgment affirmed.

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*285] *United States *v.* John Tyler.

Criminal law.— Verdict.

Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States, contrary to the act of 9th January 1809, the punishment of which offence is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods.

This case having been submitted, without argument—

Livingston, J., delivered the opinion of the court, as follows:—The defendant was indicted under the act to enforce the embargo laws, passed the 9th January 1809, for loading on carriages, within the district of Ver-

mont, nineteen barrels of pearl-ashes, with intent to transport the same without the United States, to wit, into the province of Canada.

On the plea of not guilty, the jury returned the following written verdict, which was recorded: "The jury find that the said John Tyler is guilty of the charge alleged against him in said indictment, and that the said pot-ashes were worth two hundred and eighty dollars."

The defendant moved in arrest of judgment, because the verdict was not sufficiently certain as to the value of the property charged in the indictment, the same having found the value of pot-ashes, whereas, the defendant was indicted for the intention of exporting pearl-ashes. Upon this motion, the judges being opposed in opinion, the same has been certified unto this court for its direction in the premises.

The law which creates this offence provides that the party shall, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the court before which the conviction is had, equal to four times the value of the property, so intended to be exported. The court, then, is of opinion, that, under this law, no valuation by the jury was necessary to enable the circuit court to impose the proper fine; and therefore, *that that part of the verdict which is objected to, is regarded as surplusage, and cannot deprive the United States of the judgment to which they became entitled by the defendant's conviction of the offence laid in the indictment. [*286

It must, accordingly, be certified to the court below, that it proceed to render judgment for the United States, on the verdict aforesaid.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1813.

UNITED STATES *v.* GORDON and others. (*a*)

Appellate jurisdiction.—Embargo-bond.

A writ of error does not lie, to carry to the supreme court of the United States, a civil cause which has been carried from the district court to the circuit court by writ of error.[1]

Semble: It is a good defence to an action upon an embargo-bond, that it was given for more than double the value of the vessel and cargo, and that the master was constrained to execute it, by the refusal of a clearance.[2]

THIS was an action of debt, brought in the District Court of the United States for the district of Virginia, upon an embargo-bond, dated the 2d of November 1808, conditioned to reland the cargo of the Essex, in some port of the United States, the danger of the seas only excepted. The defendants, among other things, pleaded the following plea, viz:

"And the said defendants, for further plea why the United States ought not to have and maintain the said action, say, that the said bond was given and executed for more than double the value of the vessel and cargo, mentioned in the recital and condition of the said bond; to wit, in a sum of $8000 more than double the said value; and the said last-mentioned defendants aver, that the obligors were constrained to execute the said bond, by the refusal of the collector of the port of Tappahannock to clear and permit the said vessel and her cargo to depart from the port and district of Tappahannock, until the same bond was executed as aforesaid, and this they are ready to verify," &c.

*288] *To this plea, there was a general demurrer, which was overruled by the district judge (TYLER). The United States carried the cause up to the circuit court, by writ of error, where the judgment was affirmed by MARSHALL, C. J.

(*a*) February 16th, 1813. Absent, LIVINGSTON and TODD, Justices.

[1] Since remedied by statute: see R. S. § 691.

[2] So ruled in the court below. 1 Brock. 190. S. P. United States *v.* Morgan, 3 W. C. C. 10.

The United States brought another writ of error to the supreme court of the United States, which was dismissed for want of jurisdiction; upon the authority of the case of *United States* v. *Goodwin*, at the last term (*ante*, p. 108).

Writ of error dismissed.

Barton *v.* Petit & Bayard. (*a*)

Effect of reversal.

If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond," follows of course; but a special *certiorari* is necessary, to bring up the execution upon which the bond was given, so as to show the connection between the two judgments.

Error to the Circuit Court for the district of Virginia, on a judgment rendered on a bond (technically called in Virginia a "forthcoming bond"), given to the marshal, with condition to have certain goods forthcoming at the day of sale appointed by the marshal; being goods which he had seized under a *fi. fa.* issued upon a former judgment recovered by Petit & Bayard against Barton, which judgment was reversed at the last term of this court (*ante*, p. 194).

P. B. Key, for the plaintiff in error, contended, that the record of the former judgment being referred to in the condition of the bond, was to be considered as part of this record; and that the court could judicially take notice, that it was the same which was reversed by this court at the last term, the transcript of which record now remains with the clerk of this court. But if the court could not judicially notice that fact, he moved for a *certiorari* to the clerk below, to certify the record of the judgment on which the execution issued, upon which the bond was given.

E. J. Lee and *J. R. Ingersoll*, contrà, contended, that the former record was no part of the present record, and that the court could not judicially know it to be the same, and cited 4 Hen. & Munf. 293; 1 Wash. 94.

*February 11th, 1813. Washington, J., delivered the opinion of the court as follows:—This is a writ of error to a judgment of the circuit court of Virginia, rendered upon a bond given by the plaintiffs in error, with condition for the delivery, at a certain time and place, of property seized by the marshal, to satisfy an execution which had issued from the same court. The condition not having been complied with, this judgment was rendered upon motion, and notice thereof duly served upon the obligors in the bond, agreeable to the laws of Virginia. [*289

It is not pretended, that there is any intrinsic error in this judgment, to warrant its reversal; but it is contended, that the reversal of the original judgment, upon which the proceedings in this record took place, requires, necessarily, the reversal of this judgment. The general doctrine is undeniably so; but the application of it to this case is not admitted. That the judgment in this record is dependent upon some other judgment is apparent from the bond, which recites a prior execution, and seizure by the marshal of the property mentioned in the condition, for the purpose of satisfying it; but it

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(*a*) February 4th, 1813. Absent, Johnson and Todd, Justices.

does not appear judicially to the court, that the recited execution issued upon the identical judgment which has been reversed. The only difficulty which the court has felt has been, to devise some proper mode in this, as well as in all similar cases which may hereafter arise, to connect with the original reversed judgment that which is asserted to be dependent upon it.

A *certiorari*, upon a suggestion of diminution, would not answer the purpose, as the proceedings in the original suit form no part of those in the subsequent suit: the only foundation of which are, the bond and notice. Neither does it appear regular, for this court to receive as evidence of the dependency of the latter upon the former judgment, the certificate of the clerk of the circuit court.

The court has thought it best, to direct a special writ to be framed, applicable to cases of this nature, to be directed to the clerk of the court in
*290] which the judgments were rendered, to certify, under the seal of the *court, the execution recited in the bond on which the second judgment was rendered. This difficulty can never occur, except in cases where all the proceedings in the original judgment, except the execution, are already before this court. The execution, therefore, though no part of either the original or dependent record, being certified by the proposed writ, will supply the only link necessary to prove the connection between the two judgments.

In this case, the court, from the novelty of the practice necessary to be adopted, will not permit the plaintiff in error to suffer, in consequence of his not having applied sooner for a writ of *certiorari*, but will now direct the same to issue. In future, the party must take the consequences of his neglect, if he should fail to have the execution certified in time.

March 16th, 1813. WASHINGTON, J.—The court has examined the execution which has been sent up by *certiorari*, and is satisfied, that the judgment on which it issued is that which was reversed at the last term. The judgment, therefore, on the forthcoming bond must be reversed also.

Judgment reversed.

Mima Queen and child, Petitioners for Freedom, *v.* Hepburn. (*a*)

Hearsay.—Challenge to juror.

Hearsay evidence is incompetent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge.[1] Claims to freedom in Maryland are not exempt from that general rule.[2]

After a juror is sworn, no exception can be taken to him on account of his being an inhabitant of another county.

If a juror be challenged for favor, and upon examination before the triers, he declare that if the evidence should be equal, he should give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn.[3]

Mima Queen *v.* Hepburn, 2 Cr. C. C. 3, affirmed.

Error to the Circuit Court for the district of Columbia, sitting at Washington. At the trial several bills of exception were taken.

*1. The first was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact respecting the ancestor of the petitioners, which he had heard his mother say, she had frequently heard from her father. [*291

2. The second was for overruling part of the deposition of Freeders Ryland, which stated, what he had heard Mary, the ancestor of the petitioners, say, respecting her own place of birth and residence.

3. The third exception stated, that after a juror was sworn, the petitioners excepted to him, because he was not an inhabitant of the county, but the court overruled the exception.

4. The fourth exception stated, that a talesman being challenged for favor, and having, upon being questioned, avowed his detestation of slavery to be such, that, in a doubtful case, he would find a verdict for the petitioners, and that he had so expressed himself with regard to this very case, and that if the testimony were equal, he should certainly find a verdict for these petitioners, the court instructed the triers that he did not stand indifferent between the parties.

5. The fifth exception was similar to the second.

6. The sixth exception stated, that the petitioners having read the deposition of R. Disney, stating that he had heard a report from divers persons respecting the manner of the importation of the ancestor of the petitioners, &c., the court instructed the jury, that if they should believe from the evidence, that the existence of the report was not stated by the deponent, of his own knowledge, but from what had been communicated to him respecting the existence of such a report, many years after her importation, without its appearing by whom, or in what manner, the same was communicated to him, then the evidence is incompetent to prove either the existence of such report, or the truth of it.

F. S. Key, for the plaintiffs in error.—The principal exception is to the

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(*a*) February 5th, 1813. Present, all the judges, except Todd, J.

[1] Gaines *v.* Relf, 12 How. 472. s. p. Ellicott *v.* Pearl, 10 Pet. 437. And see Scott *v.* Ratcliffe, 5 Id. 86.

[2] Davis *v.* Wood, 1 Wheat. 6.

[3] See Respublica *v.* Richards, 1 Yeates 480; People *v.* Horton, 13 Wend. 9; People *v.* Christie, 2 Park. 579; Maretzek *v.* Cauldwell, 5 Rob. 660.

opinion of the court, that in tracing a pedigree, the hearsay of hearsay is
*292] *not admissible. Caleb Clarke's deposition, as to what he heard his mother say, was admitted, but, as to what he heard his mother say, her father said, was rejected. If this opinion be correct, it will be impossible to prove any ancient fact.

John Law, contrà.—Hearsay is only admissible on the ground of necessity and antiquity. 1 Wash. 123 ; 2 Ibid. 148. There was no evidence of the death of the person whose declarations were given in evidence. Hearsay of hearsay is analogous to a copy of a copy. The witness ought, at least, to state from whom he heard the report.

Jones, on the same side.—Every claim to freedom ought to be supported by the same kind of evidence as is necessary to support other claims. There is no rule of law that exempts it from the general principles of evidence. In the present case, the hearsay was not introduced to prove pedigree, nor prescription, nor custom ; but to prove that a certain ancestor came from England. It was the neglect of the parties, that they did not urge their claim, while they had legal evidence to support it. *Outram* v. *Morewood*, 5 T. R. 121. Although a general right may be proved by traditionary evidence, a particular fact cannot, except in tracing a pedigree. The admission of hearsay is an exception to the general rule of evidence, and therefore, must be confined strictly to the excepted cases, which are prescription, custom and pedigree ; cases in which the strength of the claim depends upon its antiquity. He who would use hearsay as evidence, must first prove all the facts which would entitle him to use it, and must satisfy the court that better evidence cannot be had. The hearsay must be of such a fact as, if the person were living, could be given in evidence by him. Hearsay evidence of a general reputation of a fact, is not admissible. The witness himself must know the fact of general reputation.

There are two objections to Disney's deposition : 1. That he does not state who informed him, so that it may be known whether that person be
*293] living or not, so *as himself to be a witness ; and 2. That a general reputation of a fact is not evidence.

Morsell, in reply.—The general rule of evidence is, that if the evidence offered be the best which the nature of the case admits, and leaves no presumption that there is better behind, it is admissible. Such evidence as this is always admitted in the courts of Maryland, under whose laws this case was tried, and its use had been sanctioned by the authority of the highest court of that state. The case cited by the opposite counsel shows that it is admitted, not only in cases of prescription, custom and pedigree, but in all cases of the like nature. So, it has been received in settlement cases, in all cases of paupers, and in questions of ancient boundaries, in ejectment. The evidence taken upon commissions to mark and bound lands, under the statute of Maryland, generally consists of testimony of this kind. 1 Harris & McHenry 84–5. After a lapse of 100 years, better evidence than this cannot be expected. The general reputation of the fact, that the ancestor was free, is sufficient to rebut the presumption arising from color, and throws the burden of proof on the other side. As to the admission of hearsay, he cited Peake's Ev. 10–13 ; Ibid. Appendix, p. 18.

Mima Queen v. Hepburn.

February 13th, 1813. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This was a suit instituted by the plaintiffs, in the circuit court of the United States for the county of Washington, in which they claim freedom. On the trial of the issue, certain depositions were offered by the plaintiffs, which were rejected by the court, and exceptions were taken. The verdict and judgment being rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error, and the case depends on the correctness of the several opinions given by the circuit court.

*The first opinion of the court to which exception was taken, was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact, which he had heard his mother say, she had frequently heard from her father. [*294

The second exception is to the opinion overruling part of the deposition of Freeders Ryland, which stated what he had heard Mary, the ancestor of the plaintiffs, say, respecting her own place of birth and residence.

The fifth exception is substantially the same with the second. The question is somewhat varied in form, and the testimony given by the defendant to which no exception was taken is recited, and the hearsay evidence is then offered as historical; but the court perceives no difference in law between the second and fifth exceptions.

The sixth exception is taken to an instruction given by the court to the jury, on the motion of the counsel for the defendants. The plaintiffs had read the deposition of Richard Disney, who deposed that he had heard a great deal of talk about Mary Queen, the ancestor of the plaintiffs, and had heard divers persons say, that Captain Larkin brought her into this country, and that she had a great many fine clothes, and that old William Chapman took her on shore once, and that nobody would buy her, for some time, until at last James Carroll bought her. Whereupon, the defendant's counsel moved the court to instruct the jury, that if they found the existence of this report and noise was not stated by the witness from his knowledge, but from what had been communicated to him, respecting the existence of such a report and noise, many years after her importation, without its appearing by whom, or in what manner, the same was communicated to him, then the evidence was incompetent to prove either the existence of such report and noise, or the truth of it: which instruction the court gave.

The plaintiffs also read the deposition of Thomas Warfield, who deposed that John Jiams, an inspector of tobacco, told him, that Mary, the ancestor of the plaintiffs, *was free, and was brought into this country by Captain Larkin, and was sold for seven years. The court instructed the jury, that if they should be satisfied, upon the evidence, that these declarations of John Jiams were not derived from his own knowledge, but were founded on hearsay or report, communicated to him, many years after the importation and sale of the said Mary, without its appearing by whom, or in what manner, such communication was made to him; then his said declarations are not competent evidence in this cause. To these instructions, the counsel for the plaintiffs excepted. [*295

These several opinions of the court depend on one general principle, the decision of which determines them all. It is this: that hearsay evidence is incompetent to establish any specific fact, which fact is, in its nature, susceptible of being proved by witnesses, who speak from their own knowledge.

However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this, and of any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases, in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others, where rights may depend on facts which happened many years past.

It was very justly observed, by a great judge, that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity, and the good sense in which they are founded." One of these rules is, that "hearsay" evidence is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground
*296] *of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule, that hearsay evidence is totally inadmissible. To this rule there are some exceptions, which are said to be as old as the rule itself. There are cases of pedigree, of prescription, of custom, and in some cases, of boundary. There are also matters of general and public history, which may be received without that full proof which is necessary for the establishment of a private fact.

It will be necessary only to examine the principles on which these exceptions are founded, to satisfy the judgment, that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye-witnesses to that fact are dead. But if other cases, standing on similar principles, should arise, it may well be doubted, whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence, is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all.

If the circumstance that the eye-witnesses of any fact be dead, should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained. This subject was very ably discussed in the case of *The King* v. *The Inhabitants of Eriswell*, where the question related to the fact that a pauper had gained a residence, a fact which it was contended, might be proved by hearsay evidence. In that case, the court was divided, but it was afterwards determined, that the evidence was inadmissible. This court is of the same opinion.

The general rule comprehends the case, and the case is not within any
*297] exception heretofore recognised. *This court is not inclined to extend the exceptions further than they have already been carried.

There are other exceptions taken, which appear on the record, but were not much relied upon in argument. The third exception is to the qualification of one of the jurors. He was called as a talesman, and was stated to

be an inhabitant of the county of Alexandria, not of Washington. The court decided, that he was a proper juryman, and he was sworn. After his being sworn, the objection was made by the plaintiff's counsel, and an exception was taken to the opinion of the court. Whatever might have been the weight of this exception, if taken in time, the court cannot sustain it now. The exception ought to have been made, before the juror was sworn.

The fourth exception also applies to an opinion given by the circuit court respecting the service of one of the persons summoned as a juror. James Reed, when called, was questioned, and appeared to have formed and expressed no opinion on the particular case; but on being further questioned, he avowed his detestation of slavery to be such, that in a doubtful case, he would find a verdict for the plaintiffs; and that he had so expressed himself with regard to this very cause. He added, that if the testimony were equal, he should certainly find a verdict for the plaintiffs. The court then instructed the triers, that he did not stand indifferent between the parties. To this instruction, an exception was taken.

It is certainly much to be desired, that jurors should enter upon their duties, with minds entirely free from every prejudice. Perhaps, on general and public questions, it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question, the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed, is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case, might not, *perhaps, have been so strong, as to render it positively improper to allow the juror to be sworn on the jury, yet it was [*298 desirable to submit the case to those who felt no bias either way; and therefore, the court exercised a sound discretion, in not permitting him to be sworn.

There is no error in the proceedings of the circuit court, and the judgment is affirmed.

DUVALL, J. (*dissenting.*)—The principal point in this case is, upon the admissibility of hearsay evidence. The court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This court has decided, that hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion, I dissent.

In Maryland, the law has been for many years settled, that on a petition for freedom, where the petitioner claims from an ancestor, who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the General Court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think, the decision was correct. Hearsay evidence was admitted, upon the same principle, upon which it is admitted to prove a custom, pedigree and the boundaries of land; because, from the antiquity of the transactions to which these subjects may have reference, it

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.

*Clarke's Executors *v.* Carrington. (*a*)

Guarantee.

In a case of guaranty and indemnity, a judgment against the person to be indemnified, if fairly obtained, especially, if obtained on notice to the guarantor, is admissible evidence, in a suit against him, on his contract of indemnity.[1]

A person who, upon receiving an assignment of a share of property, as security for a debt, agrees to comply with the contract of the assignor with a joint owner of the property, is bound to fulfil that contract, although it exceed in amount the value of the share of the property transferred to him.

Error to the Circuit Court for the district of Rhode Island, in an action of *assumpsit*, brought by Carrington against Clarke, in his lifetime, and prosecuted against his executors, after his decease, to recover from them five-ninths of the amount of a judgment recovered by Smith & Co., of Hamburg, against Carrington, upon a claim against him jointly with Greene & Barker, and J. C. Nightingale; Carrington having paid the whole.

The declaration contained the usual money counts, and several counts upon a special undertaking by Clarke to comply with the contract between Greene & Barker and Carrington, which contract was averred to be to pay all debts contracted by Carrington with Smith & Co., on account of the owners of the ship Abigail, in the proportion in which they are interested therein; the owners being Greene & Barker for five-ninths, J. C. Nightingale, for two and a half ninths, and Carrington for one and a half ninths; Clarke having received from Greene & Barker, who had become insolvent, an assignment of their share in the ship and cargo; and Carrington having paid over to Clarke, five-ninths of the proceeds thereof.

A bill of exceptions was taken to the opinion of the court below, and to the admission in evidence of a letter from Clarke to Smith & Co., of the 30th of June 1800; and of a letter from Greene & Barker, to Smith & Co., of the 12th of July 1800; and of the writ, proceedings and judgment, in the suit of Smith & Co. against Greene & Barker, J. C. Nightingale and Carrington.

The letter of 30th June 1800, from Clarke to Smith & Co., said, "This will be handed to you by Mr. Edward Carrington, who goes supercargo of the ship Abigail, of which he is a part-owner, in company with Messrs. *309] Greene & Barker and John C. Nightingale. *They have concluded to send their ship, on freight, to your city, where, having no correspondent, I do myself the pleasure of recommending them to your notice. Mr. Carrington proposes continuing in the ship, and it is probable, will require your advice and assistance in the voyage which he intends carrying into execution. I have ever found these gentlemen persons of strict integrity, and I doubt not, will punctually fulfil any engagements they may enter into with you."

The letter of the 12th of July 1800, from Greene & Barker to Smith & Co., was as follows:

(*a*) February 6th, 1813. Absent, Johnson and Todd, Justices.

[1] See Smeltzer *v.* White, 92 U. S. 394

"New York, 12th July 1800.

"Messrs. George Smith & Co.

"Gentlemen: By the recommendation of our mutual friend, Mr. John Innes Clarke, of Providence, we are induced to make an acquaintance with your house, and we haye accordingly recommended Mr. Edward Carrington, supercargo of the ship Abigail (of which he, together with Mr. John C. Nightingale and ourselves are owners), to call on you for the necessary aid he may require, while in your city. We have opened our plans of a voyage for the Abigail to your Mr. Adamson, which he doubts not, you will readily coincide with, and render Mr. Carrington the necessary aid he may require. We shall consider ourselves responsible for all contracts which Mr. Carrington may make, in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfilment of them. We have handed your Mr. Adamson bills of lading for a parcel of dye-wood, shipped in the Abigail, with an order to get one thousand pounds sterling insured on her cargo and freight, and shall draw on you, in consequence, for seven hundred and fifty pounds sterling. We are, your most obedient servants,

GREENE & BARKER."

"Please effect the above insurance, if not already done.

WM. ADAMSON."

*The record of the proceedings in the suit of *Smith & Co.* v. *Carrington and others*, was objected to, because Clarke was not a party to it. But it was proved, that Clarke had a power of attorney from Carrington, who was in Canton, and conducted the defence of that suit in his behalf. [*310

The evidence principally relied on by the plaintiff, in support of his action, was a letter from Clarke to him, of the 16th of March 1801, written at Providence. That part of the letter which relates to the subject is as follows:

"Mr. Edward Carrington.

"DEAR SIR: Since your departure from hence, our friends Messrs. Greene & Barker have been so unfortunate, as to reduce them to the necessity of compromising with their creditors. In order to secure me for the indorsements I have made in their behalf, they have conveyed to me two-thirds of the ship Abigail, with her appurtenances, also five-sixths of two-thirds of the cargo. Situated as this business is, I have to recommend your making the utmost dispatch in your sales, and proceeding immediately for this place, with such articles as you shall receive in return for the sales of your outward cargo, submitting the articles entirely to your judgment; but I recommend, that you leave no part of the property behind you, if it can possibly be avoided. With respect to the ship, notwithstanding I have a bill of sale from Greene & Barker of two-thirds, I shall view you (if you return here with her), as the owner of such proportion as agreed upon between you and them, and I give you my word, that you shall receive from me every aid and support in settling the business to mutual satisfaction, that is in my power. Mr. John Corlis, who has undertaken to conduct the business for Mr. John C. Nightingale, writes you by this opportunity, and will assure you in his behalf of one-sixth of one-third from him—that is to say,

to make you an owner in the whole ship Abigail and appurtenances of one complete sixth, and the same proportion in the cargo; and Greene & Barker's
*311] contract with you shall in every respect be fully complied *with, the same as it would have been done with them, had they continued owners."

The answer of Carrington to this letter was as follows:

"Havana, April 22d, 1801.

"John Innes Clark, Esq.

"Sir: Triplicate your letter of 16th of March, was handed me this day; original and duplicate having not appeared. Your letter gives me the first advice of our friends Messrs. Greene & Barker's misfortunes by the fire, and am very sorry that they have been obliged to dispose of the Abigail and her cargo, under their present situation of a bottomry to Messrs. Geo. Smith & Co., at Hamburg. But I presume, and doubt not, Messrs. Greene & Barker have acquainted you with the exact situation of them, and have only disposed to you of that part of the ship and cargo that may remain, after the bottomry bond is settled and discharged.

"In consequence of the capture and detention of part of the cargo, and bad condition of the ship, I have been unable to return direct to Hamburg, and obliged to make up a voyage to Providence, and have advised Messrs. Greene & Barker with particulars, and desired them to cause insurance to be made thereon. I shall leave here this day, and join the ship, and hope to be at sea, in a day or two. Should the voyage meet no other further disappointment, I flatter myself, that after settling the accounts of the adventure, it will turn to some advantage, and leave a considerable balance due Messrs. G. & B., and beg to assure you, that everything that is consistent and within my duty in this business, I shall give the strictest attention, and consult you therein. I am, with esteem and respect, your obedient servant,

Edw. Carrington."

Carrington, while at Hamburg, in order to procure a cargo for the ship,
*312] had obtained credit with Smith & Co., *to a large amount, upon the hypothecation of the ship, by a bottomry-bond, and upon agreeing to return to Hamburg with a cargo; for which purpose, he engaged Smith & Co. to procure insurance to be made in a large sum upon his return-voyage. The premium on this insurance constituted a considerable part of the debt due to Smith & Co., upon which they recovered judgment against Carrington, as before stated. One of the grounds of defence taken by Clarke's executors was, that Carrington had neglected to give notice to Smith & Co. of the dereliction of the return-voyage, in due time to save that premium of insurance, and therefore, he alone ought to suffer by it. The judge, in the court below, in charging the jury (as the manner is in Rhode Island), said "Great blame is attempted to be thrown on Mr. Carrington, for not giving notice to George Smith & Co. that he had changed his voyage, so as to prevent the insurance being made from Havana to Hamburg; and the defendants say, that for his neglect in not giving such timely notice, he ought alone to pay the whole of that premium; of this, you will judge." The judge also said, "I conceive the case to be clear, that as Greene & Barker were interested five-ninths in the voyage, they were bound to

indemnify Mr. Carrington, in the same proportion, for the damage he should sustain by the contract with George Smith & Co." And again he says, "If Mr. Clarke received from Mr. Carrington more than five-ninths of the surplus, after paying the company's debts, and Mr. Carrington has since been obliged to pay those debts, Mr. Clarke is bound to refund his proportion."

The judge finally concluded his charge in this manner, "Having gone through the case at great length, and conceiving it, on the whole, to rest principally on questions of law, I will give you my opinion explicitly upon them, so that, if your verdict should be against the defendants, they may have an opportunity to bring the cause before the supreme court. I conceive that Mr. Clarke's letter, bearing date March 16th, 1801, at Providence, and directed to Mr. Carrington, at Havana, and received by him 22d of *April 1801, taken in connection with the other evidence in the case, [*313 ought to be considered as a letter of guaranty, and binding Mr. Clarke to pay five-ninth parts of the debt due to George Smith & Co., as ascertained by the judgment in their favor against Mr. Carrington. I am also of opinion, that Mr. Clarke having received of Mr. Carrington, a large sum of money, under and by virtue of the assignment from Greene & Barker, of their interest in the ship Abigail and cargo, was bound, under the circumstances of this case, as made out and established by the evidence, to refund the same, or so much thereof, as would amount to five-ninth parts of the debt due to George Smith & Co. What sum Mr. Clarke received, is a question of fact proper for you to decide."

The verdict and judgment being against the defendants, they sued out their writ of error.

C. Lee, for plaintiffs in error.—The bill of exceptions is, 1. To the admission of improper evidence; and 2. To the judge's opinion as to the effect of that evidence.

1. As to the admission of improper evidence. The letter of the 30th of June was irrelevant, and could have no effect upon the present case. The letter of 12th of July 1800, from Greene & Barker to George Smith & Co., was improper evidence in the case, because it was between other parties. Clarke had no knowledge of such a letter, when he agreed to comply with the contract of Greene & Barker with Carrington. The record of proceedings in the case of Smith and others *v.* Carrington was inadmissible, because Clarke was not party or privy to that cause.

2. As to the opinion of the judge upon the effect of the evidence. *The letter of 16th of March 1801, did not bind Clarke to pay any [*314 money to George Smith & Co. It was intended only to bind Clarke to permit Carrington to have one-sixth of the ship and cargo, according to the contract between him and Greene & Barker. The engagement of Clarke was also upon a condition precedent, viz., that Carrington should return with the ship to Providence: which condition he never performed. It was very important to Clarke to get possession of the ship, and he, therefore, annexed the condition to his promise, that the ship should be brought to his place of residence. There is no evidence that Clarke knew of any other contract between Greene & Barker and Carrington, than the agreement that he should have one-sixth of the ship. The judge ought not to

have left it to the jury, to decide whether the conduct of Carrington, in not bringing the vessel to Providence, was satisfactory to Clarke, as a compliance with the condition of his promise; but ought to have told the jury, that the condition had not been performed, and therefore, Clarke was not bound by his promise.

The judge also erred, in directing the jury, that the letter of the 16th of March ought to be considered as a letter of guaranty, and binding Clarke to pay five-ninth parts of the judgment recovered by Smith & Co. *v.* Carrington. That judgment may include items for which Greene & Barker were not liable to reimburse Carrington. He erred also, in directing the jury, that the special counts were supported by the evidence, and that the plaintiff might, upon the money counts, recover less than the proportion of the judgment of Smith & Co.

Carrington had no equitable claim on Clarke. Clarke was not liable at all, unless he was bound by the letter of 16th March. As to the premium of insurance upon the return-voyage from Havana to Hamburg, which constituted a great part of the claim of Smith & Co. against Carrington, upon which their judgment was founded, it was an expense which arose solely from the neglect of Carrington to give due notice to Smith & Co., of his relinquishment of the return-voyage, and therefore, Carrington could not have recovered any part of it from Greene & Barker; and the judge ought to have instructed the jury accordingly.

*315] *Clarke was a creditor of Greene & Barker, and had as much equity as any other creditor. He took the bill of sale, without notice of any prior equity. Clarke, by accepting the bill of sale, could not be considered as a partner, nor liable for any transactions prior to his interest in the ship and cargo. If Greene & Barker had never paid for the ship, and had become insolvent, Clarke could not have been held liable to the vendor. There was no lien on the vessel or cargo. An assignee is not a partner. There is no partnership without an agreement. 1 H. Bl. 37, 48; Watson on Part. 21, 67; *Parker* v. *Pistor*, 3 Bos. & Pul. 288; *Chapman* v. *Koops*, Ibid. 289.

Stockton, contrà.—Upon every principle of law and justice, this judgment ought to be affirmed. The suit was by one joint-owner to recover of another joint-owner a proportion of a joint debt recovered against the plaintiff. The verdict of the jury has settled all the questions of fact. There is no error in the form of the charge given by the judge to the jury.

I. As to the points of law arising in the case. The charge given by the judge to the jury regards two subjects: 1. That the letter of the 16th of March was, in connection with the other evidence, a guarantee for five-ninths of the debt due to Smith & Co.; and 2. That Clarke, having received upon his five-ninths of the ship and cargo, more than his proportion, ought to refund.

1. As to the letter of 16th of March. It clearly binds Clarke to do, in regard to that ship and cargo, and to the adventure, whatever Greene & Barker would have been bound to perform, had they continued owners. There cannot be a doubt, that Greene & Barker, as joint-owners with Carrington, would have been bound to reimburse to Carrington five-ninths of the debt due to Smith & Co., which Carrington had been compelled to pay. It is clear also, that Clarke understood his liability as going to that extent. This is to

be inferred from his silence as to the letter of the 22d of April 1801, which Carrington wrote to him in reply to his of the 16th of March; from the sanction which Clarke gave to the subsequent voyage to London, by his *letter of 15th of May 1802; from his having charged himself in account with five-ninths of the outfit for that voyage; from his having joined in another adventure as to part of the cargo left at Guadaloupe; from his letter of the 9th of July 1801; from his having conducted the defence of the suit of Smith & Co. against Carrington; from his affidavit made to obtain a continuance of that suit; and finally, by agreeing to refer this cause to arbitrators, to ascertain the amount for which the judgment should be rendered, thereby admitting a good cause of action against him. [*316

If all the part-owners are not named in a suit, and if those who are named, do not plead that fact in abatement, and judgment be obtained against them, they may compel the others to contribute. Abbott 71, § 13 (1st London edition); 2 Bos. & Pul. 268, 270; 1 East 30.

But Clarke was liable as a joint-owner, independent of the express undertaking contained in his letter of the 16th of March. And even if he is to be considered as the mere assignee of Greene & Barker, he must stand in their place, and take their interest *cum onere*. No person claiming under a partner, or joint-owner, can claim more than such partner or joint-owner could have claimed, if he had not assigned his interest. *Fox* v. *Hanbury*, Cowp. 449.

2. The second opinion of the judge was, that if Clarke had received the proceeds of five-ninths of the ship and cargo, he was bound to refund five-ninths of the debt which Carrington had paid to Smith & Co., and that Carrington had a right to recover the same in this suit, upon the money counts. In this opinion also, he was correct. If a person has received money, which by subsequent events he ought in equity and justice to refund, it is money had and received for the use of the plaintiff. He might also, in this case, recover on the count for money paid, laid out and expended for the use of the defendant. He paid the whole of the joint debt of which the defendants ought to have paid five-ninths.

The plaintiff was also entitled to recover on the special count. The only question, on the point of pleading, *is, whether the contract in the letter be materially variant from the count? The only variance alleged is in regard to the bringing of the ship to Providence; but the count is as general as the letter. The only question then is, whether the return of the vessel to Providence was a condition precedent of the contract contained in the letter? The word "here" is satisfied, if the vessel came into the United States. This was a question properly submitted to the jury. Could it mean, that the plaintiff was bound, at his peril, and at all events, to bring the vessel into Providence? Shall nothing excuse him? capture? nor tempest? nor the clear interest of the concern? As a partner, and especially, as husband of the ship, he had a discretion to act for the common benefit of all concerned. Abbott 58, 59. The condition was substantially performed. If not, it was dispensed with by Clarke. Time and place are not of the essence of the contract. If a horse be sold, to be delivered at a certain place, on a certain day, and the purchaser, before the day, receive the horse at another place, the contract is fulfilled. Clarke made no objection to the delivery of the ship at Norfolk, but agreed to a new voyage from thence to London, [*317

and received the proceeds of that voyage, without objection. He is bound by his acquiescence.

II. Then, as to the admission of evidence. 1. It is objected, that the record of the case of Smith and Co. *v.* Carrington, ought not to have been admitted in evidence, because it was *res inter alios acta.* This objection admits of three answers.

1. It does not apply to this case, because Clarke, although not an ostensible party, was a party in interest. Where the parties are substantially the same, the record is evidence. Gilb. 35 ; *Kinnersley* v. *Orpe,* 2 Doug. 517 ; 4 Dall. 120.

2. The second answer is, that this is either a case of indemnity or warranty ; and there is a privity between the person indemnified and the person indemnifying. The root of the principle is found in the common-law doc-
*318] trine of warranty. If the party were called to warrant, *the judgment was conclusive against him ; and when the writ of *warrantia chartæ* yielded to covenant, the same principle applied. 4 Reeves 167. Where a person indemnified gives notice to the person indemnifying, that a suit is brought against him, the judgment is conclusive against the latter, in a suit by the former against him for indemnity. *Duffield* v. *Scott,* 3 T. R. 374 ; *Blasdale* v. *Babcock,* 1 Johns. 517. So, in an action of covenant on sale of land, the plaintiff must show an eviction, which he can only do, by the record of the suit against him. 6 Johns. 158.

The principle of *res inter alios acta* never applies to a case of indemnity. Clarke not only had notice, but actually defended the suit.

3. The third answer is, that a judgment ascertaining a precise fact, character or privilege, is always evidence, whenever that fact, character or privilege comes in question between other parties. 2 Str. 1109 ; 5 Burr. 2601 ; 1 Ibid. 146 ; 9 Mod. 66.

It is objected also, that the letter from Clarke to Smith & Co., of 30th of June 1800, was irrelevant, and therefore, ought not to have been read in evidence. But it clearly refers to the subject-matter. It is also said, that the letter from Greene & Barker to Smith & Co. was a letter between others, and ought not to have been admitted as evidence against Clarke. But it was a letter from those under whom Clarke claims, and by whose acts he is bound, so far as those acts relate to the property assigned to him. It was also evidence of the engagements of Greene & Barker, which Clarke had undertaken to perform.

But it is said, that Carrington ought not to recover, because the loss of the premium upon the insurance was owing to his negligence in not giving earlier notice of the alteration of the voyage. The answer is, that this was a matter left to the jury, and properly in issue between the parties. There is no evidence of negligence in the record.

Hunter, on the same side.—The letter of the 16th of March, was in itself
*319] a guarantee. *And all the acts of Clarke show that such was his understanding of it.

The judgment of Smith & Co. *v.* Carrington was admitted only as evidence of the amount recovered. All the cases on this subject are collected in the American edition of Peake's Law of Evidence, p. 45, 47.

As to the count for money had and received. This was money paid by

mistake, in supposing that the debt claimed by Smith & Co. could not be recovered. Or it was a case of trust, Clarke having received the money, upon the understanding that he would pay his proportion of whatever Smith & Co. might recover.

The premium of insurance was paid by Smith & Co., before it was possible that they could have received notice of the change of the voyage.

If Carrington was an agent, his acts have been sanctioned by Clarke. If he was guilty of misconduct, Clarke has waived it. The agent is discharged, if the principal adopt his acts. *Lyle* v. *Clason*, 1 Caines 323; *Codwise* v. *Hacker*, Ibid. 526; *Towle* v. *Stephenson*, 1 Johns. Cas. 110.

Jones, in reply.—The real question is, whether Clarke made himself liable for the debt of his debtors, Greene & Barker. The whole expedition resulted in loss. It is not probable, that Clarke meant to take all the risks of the voyages which Carrington might have undertaken under his agreement with Greene & Barker. In order to make Clarke a partner, the evidence must be very clear. But here was no account of stock taken—no ascertainment of debts, &c., all of which precautions would be taken by a prudent man, before he engaged in a copartnership. Clarke was merely an assignee of the property, and the account rendered shows that he took Greene & Barker's share at a certain price. Clarke could not be liable for any losses which happened before the assignment. He was never considered as a partner, either *by himself or by any of the other parties. He [*320 was only considered as an assignee, for his own security. Carrington gave up the property to Clarke, without any engagement on his part to pay the debts of the concern; showing thereby his construction of the nature of the assignment to Clarke. There is no evidence to support the counts for money had and received, and for money paid, laid out and expended. Nor did the evidence support the special counts. They do not state the condition that the property was to be delivered at Providence, nor do they aver a delivery anywhere.

The record in the case of Smith & Co. *v.* Carrington, was admitted in evidence, without any preparatory evidence to show its connection with this case. The declaration was general and extensive. The account filed did not show the cause of action. Community of interest does not authorize the admission of a record in evidence. There must be either privity of estate or of title. Clarke did not claim either under Carrington or Smith & Co.

All the cases of warranty cited apply to land or specific property, where the title to the thing was in question. They are exceptions to the general rule. The case in 3 T. R. is a case of indemnity against actions, and came on upon demurrer. But if it had come on before the jury, the plaintiff must have shown that it was a suit for a debt against which he was to be indemnified. 1 Esp. Rep. 162. The other cases cited are of public rights—such as common, prescription, custom, &c.

February 13th, 1813. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This cause comes on now to be heard, 1st. On exceptions to the opinion of the circuit court, permitting certain exhibits produced by the defendants in error, to go to the jury. 2d. On exceptions to the charge delivered by the judge, to the jury.

*The first exhibit, to which the plaintiffs in error objected, was a [*321

letter written by their testator to George Smith & Co., of Hamburg, which respects the transaction on which the present suit is founded. This letter is said to be irrelevant.

The second is a letter written by Greene & Barker (whose interest the testator of the plaintiffs held as assignee), to George Smith & Co., making themselves responsible for the contract of Carrington. This letter is said to be inadmissible, because it is between other parties, and relates to a contract between Carrington and George Smith & Co.

The third is a judgment obtained by George Smith & Co. against Edward Carrington, the defendant in error, on his transactions as a copartner with Greene & Barker, which were guarantied by them. The objection to this exhibit also is, that it is the record of proceedings in a suit between other parties.

The court is unanimous and clear in the opinion, that neither of these exceptions is sustained. The letter of John I. Clarke to George Smith & Co. is admissible, because it is part of the correspondence relative to the transactions out of which the present suit has grown, and because it affords a strong implication that the writer was acquainted with the obligation of Greene & Barker, whose interest he claims, to comply with the engagements of Carrington, their copartner and supercargo. It cannot, therefore, be deemed irrelevant.

The letter of Greene & Barker to George Smith & Co. is admissible, because it tends to show the obligation of Greene & Barker (whose interest in the Abigail and her cargo, is claimed by John Innes Clarke) to perform the engagements of Carrington, and is a proper link in that chain of testimony which was adduced to prove that those engagements passed, with the interest of Greene & Barker in the Abigail and her cargo, to John Innes Clarke.

*322] *The judgment obtained by George Smith & Co. was admissible, because it was founded on the contracts of Carrington with George Smith & Co., for which Greene & Barker were liable. It was a material document to ascertain the amount to which George Smith & Co. were entitled, as against Carrington, and was, therefore, a part of the testimony which would be required to show for how much Greene & Barker were responsible when they assigned to John Innes Clarke. It was certainly admissible, for these purposes, because Greene & Barker were in truth copartners with Carrington, and because, if they were not, it is a case of warranty and indemnity; and in such case, a judgment against the person to be indemnified, if fairly obtained, especially, if obtained on notice to the warrantor, is admissible, in a suit against him on his contract of indemnity. Whether it was admissible against John Innes Clarke, depends on the degree of his liability for the money for which that judgment was rendered. If the obligation to indemnify passed to him with the interest of Greene & Barker, either on his express undertaking, contained in his letter of March 1801, or in consequence of any equitable lien on the vessel and cargo, or on the money produced by them, which attached, while the property of Greene & Barker, and was not affected by the assignment, then these proceedings were admissible in a suit against him. If no such liability existed, then, the action could not be sustained, and the judgment would be reversed on the charge of the judge. This point, therefore, will be considered in that part of the case.

In his charge, after summing up the testimony offered by both parties, the judge proceeds to say, "I conceive that Mr. Clarke's letter, bearing date March 16th, 1801, at Providence, and directed to Mr. Carrington, at Havana, and received by him, the 22d of April 1801, taken in connection with the other evidence in the case, ought to be considered as a letter of guaranty, and binding Mr. Clarke to pay five-ninth parts of the debt due to George Smith & Co., as ascertained by the judgment in their favor against Mr. Carrington. I am also of opinion, that Mr. Clarke having received of Mr. Carrington, a large sum of money under and by virtue of the assignment from Greene & Barker, of their interest *in the ship Abigail and [*323
cargo, was bound, under the circumstances of this case, as made out and established by the evidence, to refund the same, or so much thereof as would amount to five-ninth parts of the debt due to George Smith & Co. What sum Mr. Clarke received, is a question of fact, proper for you to decide."

The declaration in this cause contains five general counts, and three special counts, founded on the letter of March 16th, 1801, which the judge considered as a letter of guaranty, binding John Innes Clarke to pay five-ninth parts of the debt due to George Smith & Co.

The first part of the charge is supposed, by a part of the court, to apply to the special counts, and to determine the right of the plaintiff below to recover under them; the latter part of the charge, to the general counts, and to determine his right to recover under them. If the letter of the 16th of March 1801, bound John Innes Clarke to perform the contract of Greene & Barker, then he was liable to the extent of Greene & Barker's liability, and was bound to pay whatever they were bound to pay, although it might exceed the proceeds of the Abigail and cargo. If that letter did not support the special counts, if with the other circumstances of the case, it did not amount to such a contract as was stated in the declaration, then Carrington could only recover on his general counts, and could obtain a judgment for no more than had been received by Clarke. Others of the court are of opinion, that the charge does not import that, in any state of the accounts, Clarke was bound to pay more than he had received.

A decision of this point is rendered unnecessary by the opinion of the court on the letter of the 16th of March 1801. The important part of that letter is in these words. "With respect to the ship, notwithstanding I have a bill of sale from Greene & Barker of two-thirds, I *shall view you (if [*324
you return here with her) as the owner of such proportion as agreed upon between you and them, and I give you my word, that you shall receive from me any aid and support, in settling the business to mutual satisfaction, that is in my power. Mr. John Corlis, who has undertaken to conduct the business for Mr. John C. Nightingale, writes you by this opportunity, and will assure you in his behalf, of one-sixth of one-third from him, that is to say, to make you an owner in the whole ship Abigail and appurtenances of one complete sixth, and the same proportion in the cargo; and Greene & Barker's contract with you shall in every respect be fully complied with, the same as it would have been done with them, had they continued owners."

What was Greene & Barker's contract with Carrington? It is observa-

ble, that neither in this letter, nor in any other part of the proceedings, is there any evidence that Greene & Barker had made with Carrington more than one contract respecting this voyage. A part of this contract, as is apparent from the letter of Mr. Clarke, entitled Carrington to one-sixth part of the Abigail, and of the cargo to be taken on board at Hamburg. The letter of the 12th of July 1800, addressed by Greene & Barker to George Smith & Co., states Carrington to be a part-owner of the vessel which was sent to Hamburg on freight, wishes them to render Carrington the necessary aid he may require, and adds, "we shall consider ourselves responsible for all contracts Mr. Carrington may make in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfilment of them."

It seems a necessary inference from the condition and object of the parties, that this letter was written in pursuance of, and conformity with, the contract between Greene & Barker and Carrington, and that their responsibility, "for all contracts Mr. Carrington might make in the business of the ship," was as much a part of their engagement with him, as the agreement that he should be interested one-sixth in the vessel and cargo.

*325] *This undertaking was known to Mr. Clarke. His letter of the 30th of June 1800, introducing Carrington to George Smith & Co., recommends Greene & Barker and Nightingale as the persons on whom G. Smith & Co. were to rely for the fulfilment of the engagements made by Carrington. "I have ever found these gentlemen," says he, "persons of strict integrity, and I doubt not will punctually fulfil any engagements they may enter into with you." Clarke knew, then, that Greene & Barker had bound themselves to be responsible for the contracts of Carrington with George Smith & Co., and alluded to this residue of their contract with Carrington, when, after saying that he should consider Carrington as the owner of such proportion of the ship as was agreed on between him and them, and that Mr. Corlis, who represented Nightingale, would do the same, he adds "and Greene & Barker's contract with you shall in every respect be complied with."

The subsequent conduct of Clarke certainly proves that he never understood himself to be entitled to more, by the assignment of the Abigail and her cargo, than would remain after discharging the contracts entered into by Carrington. The record abounds with proofs of this position, which have been much pressed at the bar, of which the court will select only one. It is the letter from Carrington to Clarke, dated Havana, April 22d, 1801, in which he acknowledges the receipt of Clarke's letter of the 16th of March of the same year. He states the lien upon the ship and cargo, and adds, "but I presume, and doubt not, Messrs. Greene & Barker have acquainted you with the exact situation of them, and have only disposed to you that part of the ship and cargo that may remain after the bottomry-bond is settled and discharged." At this information, Mr. Clarke expresses no surprise, nor does he manifest any dissatisfaction at the conclusion Carrington had drawn, respecting the terms on which he had succeeded to the rights of Greene & Barker. This is considered as further explaining his meaning in using the terms, "and Greene & Barker's contract with you shall in every respect be complied with."

*326] *Upon these grounds, it is the opinion of the majority of the court,

that the letter of the 16th of March 1801, contains a contract, binding John Innes Clarke to perform the whole contract of Greene & Barker with Carrington, a part of which was to pay five-ninth parts of the debt contracted on account of the Abigail and her cargo, with George Smith & Co.; consequently, the plaintiffs in error were responsible to Carrington so far as Greene & Barker were responsible.

It has been contended, for the plaintiffs in error, that a considerable part of the debt to George Smith & Co. (the premium of insurance on a return-voyage to Hamburg), was incurred in consequence of the gross negligence of Carrington, in not countermanding the order for insurance, as soon as he determined to change the voyage. For this sum, it is contended, Greene & Barker could not have been liable to Carrington, and consequently, it cannot be recovered from John Innes Clarke.

One of the judges is of opinion, that the question of negligence is, in this case, a point of law, Carrington having been a copartner with Greene & Barker, and therefore, proper for the decision of the court; others think that the judge has left that question with the jury. In summing up the evidence, the judge says, "the defendants say, that for his (Carrington's) neglect in not giving such timely notice (of the change of the voyage), he ought himself to pay the whole of the premium. Of this, you will judge." This explicit declaration, is considered as not being overruled by the concluding part of the charge.

If the fact of negligence was left to the jury, they have decided it in the negative, and the question whether a partner would in such a case be responsible to his copartners, for negligence in failing to countermand an order for insurance, does not arise in the cause.

On that part of the charge which states John Innes Clarke to be responsible to Carrington to the amount of the money he had received, there is no difference of *opinion in the court. It is, however, unnecessary to [*327
state the reasoning on which this opinion is founded, since the construction given to the letter of the 16th of March 1801, decides the cause.

It is the opinion of the court, that there is no error, and that the judgment be affirmed.

Judgment affirmed.

Dickey *v.* Baltimore Insurance Company. (*a*)

Marine insurance.

A policy of insurance on a vessel, "at and from" an island, protects her in sailing from port to port of the island, to take in a cargo.[1]

Error to the Circuit Court for the district of Maryland, in an action on a policy of insurance upon the ship Fabius, "at and from New York to Barbadoes, and at and from thence to Trinidad, and at and from Trinidad, back to New York."

The ship proceeded to Barbadoes, and from thence to the port of Spain,

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(*a*) February 13th, 1813. Present, all the judges, except Todd, J.

[1] See Equitable Ins. Co. *v.* Hearne, 20 Wall. 497.

in the island of Trinidad, being the only port of entry in the island. Having taken in part of her return-cargo, she sailed from thence for Port Hyslop, in the same island, for the residue. In the way, she was lost by the dangers of the seas. On the trial below, the opinion of the court was in favor of the defendants, and the plaintiff took his bill of exceptions, and brought the case up by writ of error.

Harper, for the plaintiff in error, stated, that the only question was, whether the terms "at and from Trinidad," authorized the ship to sail from one port of the island to another port of the same island, to complete her *328] cargo? *To show that she was so authorized, he relied on the case of *Bond* v. *Nutt*, Cowp. 601, and *Thellusson* v. *Fergusson*, 1 Doug. 346; Marshall 255, 257 (Boston ed.).

Pinkney, Attorney-General, contrà.—The opinion of the court below was founded upon the reason of the thing, and upon the idea that the late English cases were not authority. The vessel was not within the policy, while sailing from port to port in the island. She was lost on the high seas, and was not protected by the policy, unless she was justified by some usage of trade: but no such usage was proved. In the case of *Bond* v. *Nutt*, the vessel was a general ship, and the usage of the trade was to take goods for several different ports in the island of Jamaica. That island has many ports of entry—Trinidad has only one. There is no case in which a vessel has been permitted to depart from a port, and return to it again, under such a policy. She was not literally at the island. Analogy is against the doctrine, and so is the reason of the thing.

Harper, in reply.—In the cases cited by Marshall, there is no allusion to the course or usage of the trade. Nor does the court lay any stress upon the fact, that there were many ports of entry in Jamaica. Although there was only one port of entry in Trinidad, yet there were other ports at which they might, in fact, take in a cargo.

February 17th, 1813. Marshall, Ch. J., delivered the opinion of the court, as follows:—This action was brought on a policy, insuring the Fabius, at and from New York to Barbadoes, and at and from thence to the island of Trinidad, and at and from Trinidad, back to New York. The Fabius arrived at the port of Spain, in the island of Trinidad, on the 21st of October, in the year 1806, where she remained until the 5th of December, when she sailed, under a special license from the proper authorities, for Fort *329] Hyslop, another port in the island, for the purpose of procuring *and taking in a part of her return-cargo, and with a view of returning to the port of Spain, that being the only port in the island of Trinidad at which vessels, arriving from other places, were permitted to enter, or from which those destined on foreign voyages were permitted to clear. While on her voyage to Fort Hyslop, the Fabius was lost by the danger of the seas; and the question is, whether this loss is within the policy?

Were this a case of the first impression—were it to be decided for the first time, on the intention of the parties, to be collected solely from the words of the contract, some contrariety of opinion might undoubtedly be looked for, and it is uncertain, what might be the opinion of the court. Strictly speaking, a vessel is not at an island, while sailing from one port to

another of the same island; yet it is difficult to resist the persuasion, that something more is meant by an insurance at and from an island, than by an insurance at and from a port. The words, at and from an island, and at and from a port, are not synonymous, and yet, in effect, the same meaning would often be given to them, if the privilege of sailing from one port to another, for the purpose of completing the cargo, should not be granted by the policy. An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel insured may first arrive; but it seems difficult to put any other construction on an insurance, at and from an island, or to assign any other motive for the risk being so described, than that it is a license to use the different ports of the island, for the purpose of obtaining the return-cargo.

This particular policy furnishes strong reason for this construction. It is difficult to read it, without feeling a conviction that the intention of the contract was to insure the whole voyage from and to New York, and to have the liberty of the islands of Barbadoes and Trinidad. There being but one port in the island of Trinidad, at which a vessel was permitted to enter or clear, takes away every inducement for inserting in the policy the words, at and from the island of Trinidad, rather than the words at and from the port of Spain, in the island of Trinidad, unless those words secure the liberty of going to other *ports, for the purpose of completing the cargo, and of returning to the port of Spain, to clear out for New York. [*330

But the words of this policy are not now to receive their first construction. In *Camden* v. *Cowly*, mentioned 1 Marshall 166, a ship was insured from London to Jamaica, generally, and by a subsequent policy, she was insured at and from Jamaica to London. The ship having touched and stayed for some days at one port of Jamaica, was lost, in coasting the island; but before she had delivered all her outward cargo at the other ports of the island. In an action on the homeward policy, the claim of the insured on the underwriters was resisted, not on the principle that the words "at and from" did not imply a permission to use all the ports of the island, not on the principle that sailing from one port to another was a deviation, but on the principle that the risk on the outward policy had not terminated, and that, consequently, the risk on the homeward policy had not commenced when the loss happened. A verdict was found against the underwriters, and a new trial was refused.

In *Bond* v. *Nutt*, the insurance was made on a ship, at and from Jamaica to London, warranted to sail before the first of August 1776. The ship sailed from St. Anns, in Jamaica, on the 26th of July, for Bluefields, also in Jamaica, in order to join a convoy there. She was detained at Bluefields by an embargo, until the 6th of August, when she sailed with the convoy, but being separated from it, was captured. On this policy, a verdict was given in favor of the underwriters, under the direction of Lord Mansfield, and a motion for a new trial was resisted on two grounds. 1st. That a departure from St. Anns, was not a departure from Jamaica. 2d. That going to Bluefields was a deviation, that being out of the course of the voyage from St. Anns to London. *After great consideration, the court was unanimously of opinion in favor of the motion. Lord Mansfield, in giving his opinion, said, "as neither party knew from what part of the [*331

island the ship would sail, they used the words, at and from Jamaica, which protected her in going from port to port, till she sailed." He also said, "had the insurance been at and from St. Anns," the going round the island to Bluefields, would have been a deviation."

In *Thellusson* v. *Fergusson*, an insurance was made "at and from Guadaloupe to Havre, warranted to sail on or before the 31st December." The vessel took in her cargo at Point Petre, in Guadaloupe, and for the purpose of obtaining convoy, sailed on the 24th of October, to Basseterre, where there is no port, but only an open road. She was there detained till the 10th of January, when she sailed with convoy, but was captured on the return-voyage. The plaintiffs obtained a verdict. A motion was made for a new trial, which was refused. Lord MANSFIELD said, "under an insurance" at and from such a place as Guadaloupe, or Jamaica, the word "at" comprises the whole island, and under that word, the ship is protected in going from port to port, round the coast of the island. The underwriters not being satisfied with this decision, another action was afterwards brought on the same policy against Staples, also an underwriter: but upon that action, the only point insisted on, was that the vessel had not sailed by the stipulated day.

It appears, then, to be the settled doctrine of the courts of England, that an insurance "at and from an island" such as those in the West Indies, generally, insures the vessel while coasting from port to port of the island, for the purpose of the voyage insured. It is dangerous to change a settled construction on policies of insurance.

It is the opinion of this court, that the circuit court erred, in not giving
*332] the instruction prayed for by the *counsel for the plaintiff, and that the judgment be reversed, and the case remanded to that court with directions, to give the instructions prayed for by the plaintiffs, as stated in the bill of exceptions filed in the cause.

Judgment reversed.

MARINE INSURANCE COMPANY OF ALEXANDRIA *v.* HODGSON.

Marine insurance.— Valued policy.—Misrepresentation. (*a*)

Upon an action on a valued policy, if a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, be a defence, it is at law, and not in equity.

THIS was an appeal from the decree of the Circuit Court for the district of Columbia, sitting at Alexandria, in a suit in equity, brought by the Marine Insurance Company of Alexandria against Hodgson, to enjoin so much of a judgment at law, obtained by the latter against the former, as exceeded the value of the brig Hope, as found by the jury in a special verdict upon a valued policy. [1]

It was contended in the bill, that the age and tonnage of the vessel was misrepresented, and that such misrepresentation induced the complainants to value the ship at $10,000, when in fact she was worth only $3300, as speci-

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(*a*) February 15th, 1813. Present, all the judges, except TODD, J.

[1] See 5 Cr. 100, and 6 Id. 206.

ally found by the jury on the trial at law. She was represented to be about 250 tons burden, when she was only 161 tons, and to be from six to seven years old, when she was between nine and ten years old.

The bill also alleged as a ground for relief, the refusal of the court below to receive two pleas offered by the complainants on the trial at law, the rejection of which pleas had been assigned for error in this court when the cause was here last (6 Cr. 206) ; but this court thought the rejection of a plea no ground for a writ of error, and therefore, gave no opinion as to the propriety of admitting them. *The first of those pleas stated the above misrepresentation as to the age, tonnage and value of the vessel, and averred it to be material in regard to the risk of the voyage. The other plea stated, in general terms, that the policy was obtained by fraud, with intent to defraud the complainants of the difference between the true and the represented value of the vessel, which difference it averred to be more than $4000. [*333

Upon the answer of Hodgson, and the other evidence in the cause, the court below dissolved the injunction, and dismissed the bill.

E. J. Lee, for the appellants, relied principally upon the evidence of the over-valuation, which he said was so excessive as to amount to proof of fraud. But even if it were only a mutual mistake it is sufficient to avoid the policy. Park 12, 196, 225 ; Millar 39, 43, 97.

As to the equity of the case, he contended, that the pleas rejected by the court of law, and which charged fraud, being made part of this bill, are to be considered as a charge of fraud, which is a ground of equitable jurisdiction. The rejection of the pleas, is of itself a ground for a court equity to relieve, for the complainants have not yet had an opportunity to show the fraud. A court of equity will relieve against mistakes upon which contracts are founded All that the defendant is entitled to upon a policy is indemnity. He ought, in equity, to recover only the value and interest.

To show that equity will relieve against error at law, he cited *Ambler* v. *Wyld*, 2 Wash. 36 ; *Kent* v. *Bridgman*, Prec. in Ch. 233 ; *Graham* v. *Stamper*, 2 Vern. 146 ; *Robertson* v. *Bell*, Ibid. 146 ; Finch 472 ; *Burrow* v. *Jemino*, 2 Str. 733 ; 2 P. Wms. 425 ; 1 Ves. jr. 417 ; 2 Ves. 155 ; *Hodgson* v. *Marine Ins. Co.*, 5 Cr. 110.

Swann and *Jones*, contrà.—The bill contains no charge of fraud. Straas and Leeds, who were the persons insured, are not made *parties. The pleas which are referred to in the bill, are not to be considered as containing an allegation of fraud, which is to be answered. It is not a bill for the discovery of any fact which the complainants could not have proved at law. The object is to get rid of the over-valuation. It is to try the case over again. The answer shows that there could be no fraud ; for the insured lost a cargo, worth $7000, which was not insured. The bill contains no equity. Their remedy was at law. In cases of insurance, there is the same remedy at law as in equity. [*334

But there was no misrepresentation. It was only the opinion of Maxwell, that the vessel was about six or seven years old, and about 250 tons burden. A representation must be the positive affirmation of some material fact. There was no representation as to value—Hodgson only proposed

that the vessel should be valued at $10,000: he never affirmed that she was of that value.

On the question of jurisdiction, and to show that the alleged defence, if it were a defence at all, was a defence at law, they cited 2 Marshall 679. The court did right in rejecting the pleas because they were complex, and offered after the law had been decided against the complainants. 2 Burr. 717. A valued policy is conclusive, unless it be a cover to a gaming contract, or be made with a view to a fraudulent loss. *Woodward* v. *Guile*, 2 Vern. 119; 3 Bl. Com. 435; 1 Marsh. 123, 287; *Lowe* v. *Peers*, 4 Burr. 2228; *East India Co.* v. *Blake*, Finch 119; Prec. in Ch. 102; 6 Bro. P. C. 417, 470; 1 Fonbl. 167. Misrepresentation as to the age and tonnage was not material to the risk: it was guarded against, by the implied warranty of seaworthiness. No previous representation as to seaworthiness is necessary. 1 Marsh. 475.

C. Lee, in reply.—The real value of the vessel is conclusively fixed by the verdict of the jury. But if it were not, there is evidence *enough to show that she was not worth one-half the sum insured. The value thus fixed has shown the amount which will be an indemnity to the defendant.

*335]

By the refusal of the court to receive the pleas, the complainants were precluded from a just defence. This court has decided the refusal to be no ground for a writ of error at law. But we contend, it is a ground for relief in equity. It is also a sufficient ground of relief, that the rule of indemnity has been violated.

The valuation in the policy is only *primâ facie* evidence, and throws the burden of proof on the underwriter. It shall be taken to be so fixed as to be an indemnity. An over-valuation is of itself evidence of fraud. If it is intended to be an interest policy, it amounts only to a contract for indemnity. *Kent* v. *Bird*, Cowp. 583. Even if the defendant was mistaken, and both parties were equally ignorant, yet the complainants are not liable for more than an indemnity. *McFerran* v. *Taylor*, 3 Cranch 270. There is no difference in principle between insuring double the value at one office, and making double insurance at two offices. The reason against both is the same, viz., that the insured shall have only one indemnity. The law of liquidated damages does not apply.

The defendant might have had a return of part of the premium, upon proving the mistake of the value.

February 18th, 1812. (Absent, Duvall, J.) MARSHALL, C. J., delivered the opinion of the court, as follows:—This suit was brought in the circuit court, sitting in chancery, for the purpose of obtaining a perpetual injunction to a judgment rendered against the plaintiffs in favor of the defendant, on a policy of insurance effected by him, as agent for G. F. Straas and others, of *Richmond, on the brig called the Hope. The allegations of the bill are entirely unsupported by testimony, except those which relate to the value of the vessel insured. The Hope was valued in the policy at $10,000, and $8000 were insured upon her. She is stated to have been in fact worth less than $4000.

*336]

The underwriters contend, that they were in the practice of refusing to insure on any vessel more than four-fifths of her value, and that they were

led to make this insurance, by a misrepresentation respecting the value of the Hope. They, therefore, pray to be relieved from so much of the verdict and judgment rendered thereon as exceeds that value.

On the part of the defendants, it is contended, that the plaintiffs have not made out a case which entitles them to the aid of a court of equity.

Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.[1]

On the other hand, it may with equal safety be laid down as a general rule, that a defence cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of that court, that the defence ought to have been sustained at law.[2]

In the case under consideration, the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defence which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law.

It will not be said, that a court of chancery cannot interpose in any such case. Being capable of imposing *its own terms on the party to whom it grants relief, there may be cases, in which its relief ought [*337 to be extended to a person who might have defended, but has omitted to defend himself at law. Such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself. The court is of opinion, that this is not such a case.

William Hodgson, as agent for the insured, applied for insurance on the brig Hope, on a voyage from St. Domingo to her port of discharge in the Chesapeake, and laid before the board, the following certificate:

"This may certify, that I was master of the schooner Sophia, of this place, and Alexander Burot, supercargo: that while we were at the city of St. Domingo, in July last, Mr. Burot purchased the brig Hope, of Boston, and I was called on, with a carpenter, to examine her, and found her to be a stout well-built vessel of about 250 tons, in good order, and well found with sails, rigging, &c., was built in the state of Massachusetts, and is from six to seven years old. I left the city of St. Domingo, on the 27th of July, and Mr. Burot expected to sail from there about the 15th or 20th of August, up the coast, to take in mahogany. James Maxwell."

"Sept'r 24th, 1799."

Upon view of this certificate, the vessel was valued at $10,000, and the insurance made at $8000. On the voyage, the vessel was captured.

In fact, the Hope was of 160 tons burden, and was from eight to nine years old. There is reason to believe, that she was not worth more than

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[1] Ocean Ins. Co. *v.* Fields, 2 Story 59; Kibbe *v.* Benson, 17 Wall. 628; Crim *v.* Handley, 94 U. S. 658.

[1] Hendrickson *v.* Hinckley, 17 How. 443; Brown *v.* Buena Vista County, 95 U. S. 159.

$3000. It does not appear, that the loss was fraudulent, or that the cargo was insured.

The plaintiffs contend, that this misrepresentation led them to value the *338] vessel much higher, and to insure a *much larger sum on her than they would have done, had a true description been given of her size and age. To support this allegation, they state their practice never to insure on any vessel more than four-fifths of her real value, and their rule, which was known to Hodgson (he being himself one of the directors), to require that every order for insurance should be in writing, and should contain, among other things, "as full a description of the vessel and voyage as can be given."

The answer asserts, that when the certificate was laid before the board of directors, Hodgson was asked, if he would vouch for its truth, which he refused to do, whereupon, the board agreed to value the vessel at $10,000, and to make the insurance required. He himself believed the certificate to be accurate, and is persuaded, that the assured entertained the same opinion. He does not think that the tonnage of the vessel weighed much with the parties. It is not mentioned in the policy.

Straas and Leeds, whose agent Hodgson was, and for whom the insurance was made, are not parties to the bill. No fraud is proved on them, other than what is to be inferred from the error in the certificate given by Maxwell, nor ought their conduct to be decided on, or their interests affected, in a suit to which they are not parties, although they might have been made defendants.

The court will not undertake to say, what influence this certificate might have had, or ought to have had, at law. But since the plaintiffs were not prevented from using it at law, by the act of the defendants, or by any positive rule which disabled them from doing so, they have not made out a case of such clear equity—a case in which it would be so obviously against conscience for the defendant to enforce the judgment at law—as to justify the interposition of a court of chancery. The judgment is to be affirmed, with costs.

Judgment affirmed.

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*339] *Locke *v.* United States. (*a*)

Revenue law.—Information.—Probable cause.

In a count in a libel upon the 50th section of the collection law of March 2d, 1799, for unlading goods without a permit, it is not necessary to state the time and place of importation, nor the vessel in which it was made; but it is sufficient to allege that they were unknown to the attorney.

"Probable cause" means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion.[1]

Error to the sentence of the Circuit Court for the district of Maryland, which condemned the cargo of the schooner Wendell, belonging to Locke, the claimant, as forfeited to the United States. The libel contained eleven counts.

(*a*) February 16th, 1813. Absent, Todd, J.

[1] The Thompson, 3 Wall. 155; Averill *v.* Smith, 17 Id. 92.

The 1st count charged, that the goods, between the 1st of June 1808, and the day of filing the libel, at Boston, with intent to transport them to Baltimore, without a permit from the collector and naval officer of the port of Boston, were clandestinely laden on board the schooner Wendell, a vessel enrolled and licensed according to statute, whose employment was not then confined to the navigation of bays, sounds, rivers and lakes within the jurisdiction of the United States, nor exempted from the obligation of giving bond according to the provisions of the statute (the embargo law).

The 2d count charged, that the goods, being of foreign growth and manufacture, and subject to the payment of duties, between the 1st of May 1808, and the day of filing the libel, were unladen, without the authority of the proper officers of the customs, from on board some vessel to the attorney unknown, after she had arrived within four leagues of the coast of the United States, the said vessel being then bound from some foreign port or place (to the attorney unknown), to the United States.

*The 3d count charged, that the goods, being of foreign growth and manufacture, and subject to duties, were, without any unavoidable accident, necessity or distress of weather, unladen, without the authority of the proper officers of the customs. [*340

The 4th count charged, that the goods, being of foreign growth and manufacture, and subject to the payment of duties imposed by the laws of the United States, between the 1st of May 1804, and the day of filing the libel, were imported from some foreign port or place, to the attorney unknown, into some port of the United States, to the said attorney unknown, in a certain vessel, to the said attorney unknown, and were, afterwards, and before filing the libel, unladen at the said last-mentioned port, from the said vessel, without a permit from the proper officers of the customs of the last-mentioned port.

The 5th count charged, that the goods were imported into Boston, and were falsely, and by a false name and denomination entered at the custom-house of the port of Boston.

The 6th count charged, that they were imported into a port of the United States, to the attorney unknown, and were falsely, and by a false name and denomination, entered at the custom-house of such port.

The 7th count stated, that the goods were of the manufacture of Great Britain, and were imported into New York, between the first of March 1808, and the day of filing the libel, from some foreign port or place, to the attorney unknown. The 8th count stated, that they were so imported into Boston. The 9th count stated, them to have been so imported into Philadelphia. The 10th count averred them to have been so imported into Baltimore. The 11th count stated them to have been so imported into some port of the United States, to the attorney unknown.

The first count was under the embargo law. The 2d, 3d, 4th, 5th and 6th counts were under the collection law. The other counts were under the non-importation acts *of 18th April 1806 (2 U. S. Stat. 379), and 19th December 1806 (Ibid. 411). [*341

Harper, for the appellant.—The 2d, 3d, 4th, 5th and 6th counts are under the general collection law of 2d March 1799 (1 U. S. Stat. 648). The

5th and 6th however, charge acts not forbidden by the law; so that the charges are reduced to those contained in the 2d, 3d and 4th counts.

The 7th, 8th, 9th, 10th and 11th counts, are under the non-importation acts of 18th April, and 19th December 1806. There is no evidence of the importation of the goods since the 2d Monday in December 1807, the time when those laws began to operate. The first count, under the embargo act, is understood to be abandoned.

The 2d and 3d counts are under the 27th section of the collection law (1 U. S. Stat. 648). These counts are defective in not averring that the unlading was before the vessel had "come to the proper place for the discharge of her cargo," which is an essential ingredient in the offence described in that section. And all the counts are defective in not stating where, how, when, and from what ship the goods were unladen. These defects are as fatal in a libel, as in an indictment or declaration. There is no authority for making a distinction. But if some latitude be allowed in a libel, yet it ought to be certain to a common intent in these respects.

If the libel be sufficient, yet it is not supported by proof. There is no evidence of the time when the goods were landed, so as to show it to be contrary to law.

But it was said in the court below, that the *onus probandi* was on the claimant by the express provision of the statute (1 U. S. Stat. 678, § 71), the words of which are, "If the property be claimed by any person, in every such case, the *onus probandi* shall be upon such claimant; but the *onus probandi* shall lie on the claimant only where probable cause is shown *342] *for such prosecution." Probable cause is *primâ facie* evidence, and whenever that is shown, the *onus probandi* falls, of course, upon the other party. A contrary construction would be against the common principles of law. What you charge, you must prove. Innocence is always to be presumed, until there be at least *primâ facie* evidence of guilt. This construction is fortified by the 43d section of the collection law (Ibid. 660), which provides, that if distilled spirits, wines and teas be found unaccompanied by a certificate of importation, it shall be presumptive evidence that the same are liable to forfeiture. This presumptive evidence can be no other than probable cause of seizure; and probable cause must mean presumptive evidence. In the present case, there is no such probable cause. The circumstances which are supposed to excite suspicion, are: 1. That there was a variance in the manifest: 3. That the names of the shippers and consignees were fictitious: 2. That there was no proof of their entry into Boston: and 4. That the original marks had been effaced upon many of the packages.

It is not stated where this manifest was found. The variance is very trifling. There could have been no fraud upon the United States intended, by using fictitious names, because the goods were as liable to seizure, as if they had been shipped in the name of the claimant. It was done to screen the goods from his creditors, he being in embarrassed circumstances at that time; as appears from the deposition of W. French. The want of a certificate of entry is only evidence that they might have been improperly imported, not that they were. The erasure of the original marks could not screen the goods from seizure; part of the original marks remained. None of these circumstances constitutes that *primâ facie* evidence

which throws the burden of proof upon the claimant. But this provision respecting the *onus probandi* applies only to the importer himself; and as to him, it is not unreasonable—he knows where to look for the evidence of their correct importation. But it is unreasonable to apply the rule to a purchaser. It would, in many cases, be impossible for him to obtain the necessary evidence. There is no evidence that the claimant was the importer of these goods.

**Pinkney*, contrà.—There is some ground to say, that these goods ought to be condemned under the non-importation act of 1806. [*343 It is clearly proved, that they are of British manufacture; they must, therefore, have been imported; and some of the articles appeared to be of a very recent fabric. These circumstances, connected with the total want of proof on the part of the claimant, create very strong suspicions, if they do not amount to positive proof.

But under the collection law, especially upon the 4th count, which is founded on the 50th section of that act, the case is quite clear.

It is not necessary in a libel for unlading contrary to law, to state from what vessel, nor at what time, nor in what place, the goods were unladen. It would generally be impossible to prove the circumstances; and if averred, they must be proved. Suppose, that the claimant had confessed, that the goods were smuggled, but had not said in what vessel, nor when, nor where—the evidence of his confession would have been sufficient to condemn the goods, although he had omitted to state these immaterial circumstances. It is sufficient, to aver that they were landed from some vessel, and at some place, within the United States, unknown to the prosecutor, and within the time when the law was in force. The claimant has sufficient notice that the United States mean to rely on the general ground of suspicion, and on the shifting the *onus probandi*, and must come prepared to remove the suspicion. Of what use is the provision respecting the *onus probandi*, if the law was so before? It is perfectly nugatory, if probable cause means *primâ facie* evidence. It must mean something less than evidence; it means reasonable grounds of suspicion.

Another objection as to form is, that the libel does not aver negatively that the vessel had not arrived at her port of delivery. It is not necessary to show this, even by intendment; but it does necessarily appear from the facts stated in the count. It is sufficient to set forth the great leading facts of the case, and to aver them to be done contrary to the statute. By referring to the statute, he is informed as to the particulars alleged against him.

*The variance in the manifest is immaterial; but the use of fictitious names for shippers and consignees is a circumstance of strong [*344 suspicion. It was probably done to blind the eyes of the custom-house officers, by dividing the ownership into 13 or 14 parts.

Harper, in reply.—If the United States are permitted to state the time and place so vaguely, yet they ought to state all the circumstances which constitute the offence. It must be stated, that the fact was committed within some district of the United States. The offence is unlading before she came to her port of delivery. Whatever is necessary to be averred, must be positively averred; it cannot be made out by inference or intendment. It is not sufficient to state, that it was done contrary to the statute.

It must be shown, how it was done, that the court may judge whether the act was unlawful or not.

February 19th, 1813. MARSHALL, Ch. J., delivered the opinion of the court, as follows :—This is a writ of error to a judgment of the circuit court for the district of Maryland, affirming a judgment of the district court, which condemned the cargo of the Wendell, as being forfeited to the United States.

The first point made by the plaintiff in error, is, that the information filed in the cause, is totally insufficient to sustain a judgment of condemnation. The information consists of several counts, to all of which exceptions are taken. The court, however, is of opinion, that the 4th count is good, and this renders it unnecessary to decide on the others. That count is founded on the 50th section of the collection law, and alleges every fact material to the offence.

It is, however, objected to this count, that the time and place of importation, and the vessel in which it was made, are not alleged in the information, but are stated to be unknown to the attorney. *These circumstances *345] are not essential to the offence, nor can they, from the nature of the case, be presumed to be known to the prosecuting officer. The offence is charged in such a manner as to come fully within the law, and is alleged to have been committed after the passage of the act, and before the exhibition of the information. This allegation, in such a case, is all that can be required.

The 4th count of the information being sufficient in law, the court will proceed to examine the testimony adduced to support it. It is proved incontestibly, that the goods are of foreign manufacture, and consequently, have been imported into the United States. The circumstances on which the suspicion is founded, that they have been landed without a permit, are, 1st. That the whole cargo, in fact, belongs to the claimant, and yet was shipped from Boston, in the names of thirteen different persons, no one of whom had any interest in it, or was consulted respecting it, and several of whom have no real existence. 2d. That no evidence exists of a legal importation into Boston, the port from which they were shipped, to Baltimore, where they were seized. 3d. That the original marks are removed, and others substituted in their place.

The counsel for the claimant has reviewed these circumstances, separately, and has contended, that no one of them furnishes that solid ground of suspicion which can create a presumption of guilt and put his client on the proof of his innocence. That they are either indifferent in themselves—mere casualties—or are reasonably accounted for.

To the employment of fictitious names as shippers, he says, that if the circumstance be not totally immaterial, it is sufficiently accounted for, by the deposition of William *French, who says, "he understood that *346] the claimant in the cause was in embarrassed circumstances, some time before the shipment of these goods, and that he has understood and believes, from general report, that, for the purpose of preventing his property from being attached, he was in the habit of shipping his property in the names of other persons." The court is of opinion, that the circumstance is far from being immaterial. It is certainly unusual for a merchant to cover

his transactions with a veil of mystery, and to trade under fictitious names. The manner in which this mysterious conduct is accounted for, is not satisfactory. It does not appear, that his creditors were in Baltimore, or would be more disposed to attach his property in that place than in Boston, and it does not appear, that in Boston the names of others were borrowed to protect his property from his creditors. The fact itself, if true, might be proved by other and better testimony. This habit might have been proved by his clerks.

An attempt is made to account for the circumstance that the goods were not regularly entered at the custom-house of Boston, by the testimony of the same William French, who deposes, that goods to a large amount are transported by land to Boston, and if intended for domestic consumption, are generally unaccompanied by certificates of having paid the duties. The inference is, therefore, considered as a fair one, that these goods may have paid the duties, at some other port, where they were purchased by Mr. Locke, and transported by land to Boston. The court is not satisfied with this inference. Goods in packages, unaccompanied by certificates of having paid the duties, are always liable to be questioned on that account. Large purchasers, therefore, even where re-exportation is not intended, would choose to be furnished with this protection. It is a precaution which costs nothing, and which a prudent merchant will use. The presumption, therefore, is always against the person who is in possession of goods in the original packages, without these documents. This presumption ought to be removed, and may be removed, not by proving *that cases have existed, where a purchaser of goods, that have been regularly entered, [*347 has omitted to furnish himself with certificates, but that the particular case may reasonably be supposed to be of that description. The actual importation, or the actual purchase of the very goods, or of goods of the same description, may be proved, and ought to be proved by a person who has been so negligent as not to obtain certificates that would exempt them from forfeiture.

The alteration of the original marks has been treated as an immaterial circumstance because no criminal motive can be assigned for it. This alteration, it is said, was not calculated to impress the revenue-officers with the opinion, that the duties had been paid, and is, therefore, not to be considered as made with that motive. Certainly, the alteration was not made without a motive. Men do not usually employ so much labor for nothing. If they use mystery, without an object, they must expect to excite suspicion. To do away that suspicion, they ought to show an object. In the present case, it is not improbable, that the motive was, to relieve the goods from the suspicion of being imported in violation of the then existing prohibitory laws. One witness, who deposes that the goods were of British manufacture, also deposes, that he never saw goods imported from Great Britain with such marks as those which were found on the goods of Mr. Locke. In the absence of other motives, the mind unavoidably suggests this.

If these circumstances were even light, taken separately, they derive considerable weight from being united in the same case. If these goods have really paid a duty, it is peculiarly unfortunate, that they should have been shipped without certificates of that fact, under fictitious names, from a port where they were not entered, and that the marks of the packages

should have been changed. It is peculiarly unfortunate, that these circumstances cannot be explained away, by showing that the goods have been
*348] entered elsewhere, or even *that the claimant has purchased such goods from any person whatever.

These combined circumstances furnish, in the opinion of the court, just cause to suspect that the goods, wares and merchandise against which the information in this case was filed, have incurred the penalties of the law.

But the counsel for the claimant contends, that this is not enough to justify the court in requiring exculpatory evidence from his client. Guilt, he says, must be proved, before the presumption of innocence can be removed. The court does not so understand the act of congress. The words of the 71st section of the collection law, which apply to the case, are these: "And in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall be upon such claimant." "But the *onus probandi* shall be on the claimant, only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is had."

It is contended, that probable cause means *primâ facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress.

The court is of opinion, that there is no error, and that the judgment be affirmed, with costs.

Judgment affirmed.

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*349] *The Good Catharine. (*a*)

The Schooner Good Catharine *v.* United States.

Foreign vessel.—Forfeiture.

A vessel of the United States, captured, condemned, sold, and purchased by her former master, a citizen of the United States, who obtains a Danish burgher's brief, and who cleared out of a port of the United States, as a Dane, is a foreign vessel, within the 5th section of the act of 9th January 1808, supplementary to the embargo act, although she was really owned by a citizen of the United States.[1]

This was an appeal from the sentence of the Circuit Court for the district of Maryland, which condemned the schooner Good Catharine, as a foreign vessel, for a violation of the 5th section of the act of January 9th, 1808, supplementary to the embargo act (2 U. S. Stat. 453), which declares, "that if any foreign ship or vessel shall take on board any specie, or any

(*a*) February 19th, 1813. Absent, Livingston and Todd, Justices.

[1] The Sally and Cargo, 1 Gallis. 58.

goods, wares or merchandise, other than the provisions and sea-stores necessary for the voyage, such ship or vessel, and the specie and cargo on board, shall be wholly forfeited."

She was originally an American vessel, but had been captured and condemned as prize, and purchased by Hurst, her former master, an American citizen. She took on board goods other than the provisions and sea-stores necessary for the voyage, and cleared out as a Dane.

Martin, for the appellant, contended, that notwithstanding these circumstances, the vessel, being really American, could not be condemned under that section of the law; for in criminal cases, there can be no estoppel. A man may prove the truth of the case against his own averment.

Pinkney, Attorney-General, relied upon the capture, condemnation and sale, and the Danish burgher's brief, which the master had obtained, to show that she was a foreign vessel.

The sentence of the circuit court was affirmed.

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*Bond and another *v.* Jay. (*a*) [*350

Statute of limitations.

The exception, in the Maryland statute of limitations, in favor of "such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant-creditor, residing out of Maryland, and a debtor residing in Maryland.

And in order to take the case out of the exception, it is not sufficient to aver, that the creditor returned to, came, and was within the state of Maryland, after the cause of action accrued, and more than three years before bringing the suit.

Error to the Circuit Court for the district of Maryland, in an action of *assumpsit*, brought by Bond & Brooks against Jay, surviving partner of Samuel Jay and Gabriel Christie, trading under the firm of Samuel Jay & Company, upon an account for merchandise sold and delivered.

The defendant, Jay, pleaded the statute of limitations of Maryland, 1715, c. 23, which limits actions of *assumpsit* to three years after the cause of action shall have accrued. To this plea, the plaintiffs replied, "that at the time when the several sums of money in the declaration mentioned grew due, viz., on the 20th of March 1799, and long before, to wit, on the 27th of November 1797, and from thence until the said 20th of March, and from the said last-mentioned day until the suing forth the original writ in this suit, the plaintiffs were merchants, carrying on trade and merchandise under the name and firm of Bond & Brooks, and residing and carrying on trade without the limits of the district aforesaid, and of the state of Maryland, viz., at Philadelphia, in the state of Pennsylvania; and that at the several times aforesaid, the said Jay and Christie were merchants, trading under the firm of Samuel Jay & Company, and residing and carrying on trade at and within the district aforesaid, and that on the said several days, and on sundry days from the first of those days to the second of those days, the plaintiffs were engaged in mutual trade and merchandise with the said Jay

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(*a*) February 20th, 1813. Absent, Todd, Justice.

and Christie, by reason of which trade, and of and concerning the same, the said several sums of money in the declaration mentioned grew due to the plaintiffs, and this they are ready to verify ; wherefore," &c.

To this replication, the defendant rejoined, that the plaintiffs ought not to have and maintain their said action by reason of anything alleged in their replication aforesaid ; because, protesting, that the said several sums of money *351] in the declaration aforesaid mentioned, *do not concern the trade and merchandise between merchant and merchant ; and also protesting that the plaintiffs have not continued to reside without the state of Maryland and district aforesaid, since the contracting and growing due of the said several sums of money, and until the suing out the original writ in this cause ; yet, for answer to the said replication, the said Samuel Jay says, that true it is, that at the time of the contracting and growing due of the said several sums of money, he, the said Samuel and the said Christie, were merchants and residents within the state and district of Maryland aforesaid, and continued to reside therein, until the decease of the said Christie, and the said Samuel has continued to reside therein ever since ; and that the several sums of money in the declaration mentioned had become due and were payable on the 20th of March 1799, to wit, at the district aforesaid ; and that afterwards, to wit, on the 20th of May 1799, the plaintiffs returned to, came, and were within the state aforesaid, to wit, at the district aforesaid ; and that afterwards, to wit, on the 18th day of October 1799, the said Joshua B. Bond came to, and was within the said state, viz., at the district aforesaid ; and that the original writ in this cause was sued forth on the 19th day of May 1809, and not before ; and so the said Samuel Jay saith, that three years and more had elapsed and expired, after the return of the plaintiffs and of the said Joshua B. Bond to, and after their being within, the said state and district, and after the contracting and growing due of the said several sums of money, and before the suing out of the said original writ in this cause, viz., at the district aforesaid ; and this the said Samuel is ready to verify, wherefore," &c. To this rejoinder, there was a general demurrer and joinder.

The court below overruled the demurrer, and adjudged the rejoinder to be good ; whereupon, judgment was rendered for the defendant, and the plaintiffs sued out their writ of error.

The act of assembly of Maryland, 1715, c. 23, enacts, " that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, sur-trover, or replevin for taking away goods or chattels, all actions of account, con- *352] tract, debt, book, or upon the case, other *than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province, all actions of debt for lending," &c., " shall be commenced or sued within the time and limitation hereafter expressed, and not after," &c. The third section contains a clause saving to persons within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond seas, the right of suing within the respective times limited, after the removal of their several disabilities.

The cause was argued by *Harper*, for the plaintiffs in error, and *Pinkney*, Attorney-General, for the defendant in error.

February 22d, 1813. MARSHALL, Ch. J., delivered the opinion of the court as follows :—This suit was brought by the plaintiff, a merchant of Pennsylvania, against the defendant, a merchant of Maryland, upon an account which grew out of their trade with each other as merchants. The defendant pleaded the statute of limitations, to which the plaintiff replied that the plaintiff, who resided in the state of Pennsylvania, and the defendant, were employed in mutual trade and merchandise, of and concerning which the said several sums of money in the said declaration mentioned grew due. The defendant rejoined, that the plaintiff came within the state of Maryland, in 1797, and that the original writ in this cause issued on the 5th of July 1808, and not before. The plaintiff demurred, and upon argument, the demurrer was overruled, and the bar adjudged to be good.

A writ of error has been sued out to the judgment of the circuit court, and the questions in the cause are, 1. Is the replication good in itself? 2. Does the rejoinder avoid the replication and sustain the plea?

These questions depend on the act of limitations passed in 1715 by the legislature of Maryland. The *material part of that act is in these words: "Be it enacted, that all actions, &c., other than such accounts [*353 as concern the trade of merchandise between merchant and merchant, their factors and servants which are not residents within this province," &c., "shall be commenced or sued within three years ensuing the cause of such action, and not after." By the plaintiffs, it is contended, that if either party reside without the province, the case is within the exception: by the defendant, that to bring the case within the exception, both parties must reside without the province.

It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that courts can never be justified in putting such a construction on their words, if they admit of any other interpretation which is rational and not too much strained.

This, it is thought, may be done in the case now to be decided. The words "which are not residents" refer, it is said, to both parties, plaintiff and defendant. They comprehend all the persons previously enumerated. Let this be conceded. Then, read the exception as if the word "both" or "all" were inserted. It will stand thus: "other than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants which are not, both or all, residents within this province." The plain meaning of the sentence so read would be, that accounts between merchant and merchant, either of whom resided out of the province, would come within the exception. It is admitted, that without the word "both" or "all" the more obvious meaning of the sentence is that for which the defendant contends. Yet it will bear the same construction, without, as with, either of those words, and the subject-matter of the law so clearly requires this interpretation, that the court thinks it may be made.

The rejoinder is founded on the third section of the *act which [*354 contains the usual exception in favor of infants, &c., and allows three years after the removal of the impediment, to bring their suit.

It is contended, that since the act of limitations runs against a person beyond sea, from the time of his coming into the country, so, from analogy,

it ought to run against a non-resident merchant, from the time of his coming, though for a mere temporary purpose, within the country. The court cannot assent to the correctness of this reasoning. To render it applicable, the rejoinder ought to have averred that the plaintiff had become a resident of the state of Maryland, more than three years before the institution of the suit. Not having done so, the words of the exception have never ceased to be applicable to the plaintiff; and consequently, the statute has never commenced to run.

It is the opinion of this court, that the circuit court erred in overruling the demurrer of the plaintiff to the rejoinder of the defendant in this cause, and that the judgment be reversed and annulled, and the cause remanded, with instructions to render judgment on the said demurrer in favor of the plaintiff, and that further proceedings may be had therein according to law.

Judgment reversed.

Preston *v.* Tremble. (*a*)

Merger.

If an equitable title be merged in a grant, the party has no relief in equity, although the grant be void, as being contrary to law.

Error to the Circuit Court for the district of East Tennessee, who had dismissed the plaintiff's bill in chancery, upon demurrer, for want of equity.

The bill stated, that Preston, the complainant, had title to a tract of land, in the state of Tennessee, but the defendant, Tremble, fraudulently and deceitfully entered into it, and holds him out. *In setting forth the title, it stated, that the land formerly lay within the state of North Carolina, during which time, one Ephraim Dunlop made an entry for the land, in regular form, paid the purchase-money to the state, and performed every other requisite to complete the contract; but before a patent was obtained, the legislature of North Carolina passed a law, defining the limits of the Indian boundary, declaring all entries and surveys already made within those limits, to be null and void, and directing the entry-takers to refund all moneys received therefor. That Dunlop never received back the purchase-money, nor consented to annul the contract. That the law of North Carolina, rescinding the contract, was void. That Dunlop afterwards obtained a warrant to survey the land, and obtained a patent therefor, from the state of North Carolina, and afterwards, conveyed the land to John Rhea, who conveyed to Preston, the plaintiff.

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P. B. Key, for plaintiff in error, contended, 1. That the land was within the territorial limits of North Carolina, who had a right to grant it. 2. That the entry and payment of the purchase-money, vested in Dunlop an equitable estate in fee in the land. 3. That the act of May 1778, was void and inoperative, so far as it attempted to rescind the contract, and destroy the equitable estate of Dunlop. 4. That although the patent which was issued in 1793, in contravention of the law of May 1778, was declared void and inoperative, to convey the legal title, yet the equitable estate existed and remained in Dunlop. 5. That no legal title to the land having passed to

(*a*) February 23d, 1813. Absent, Todd, Justice.

Dunlop, the plaintiff could not maintain an ejectment. 6. That when no adequate relief exists at law, a court of equity will interpose its authority, to protect an equitable estate, and by analogy, will give such full relief as a court of law would, had the title been legal. *7. That the demurrer ought to be overruled. [*356

Marshall, Ch. J.—If your title is good at law, you have no case in equity. If you have any title, it is at law. If you have no title at law, you can have none in equity. The equitable estate is merged in the grant. This is an attempt to substitute a bill in equity for an action of trespass.

Decree affirmed.

The Penobscot. (*a*)

The Brig Penobscot *v.* United States.

Non-intercourse law.

Under the non-intercourse law, a vessel, in March 1811, had no right to come into the waters of the United States to inquire whether she might land her cargo.

This was an appeal from the sentence of the Circuit Court of the district of Georgia, which affirmed that of the district court, condemning the brig Penobscot, and her cargo of salt, for a violation of the acts of congress, interdicting commercial intercourse with Great Britain and her dependencies (viz., the acts of March 1st, 1809, 2 U. S. Stat. 528; May 1st, 1810, Ibid. 605; the president's proclamation of November 2d, 1810, and the act of 2d March 1811, Ibid. 651).

By the 4th section of the act of March 1st, 1809, it was not lawful to import into the United States, or the territories thereof, any goods, wares or merchandise whatever, from any port or place situated in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain, nor from any port or place in the actual possession of Great Britain; nor to import into the United States, &c., from any foreign port or place whatever, any goods, wares or merchandise of the growth, produce or manufacture of Great Britain or Ireland, &c. By the 5th section, such goods so imported (or put on board any vessel, &c., with intent of importing, &c.), as *well as all other articles on board, belonging to the same owner, are liable to forfeiture, and by the 6th section, the vessel is subject to forfeiture, if the goods are laden on board, with the knowledge of the owner or master of the vessel. [*357

The act of May 1st, 1810, and the president's proclamation of November 2d, 1810, announcing that France had so revoked the edicts of Berlin and Milan, as that they ceased to violate the neutral commerce of the United States, and the act of March 2d, 1811, are only referred to, as reviving and enforcing against Great Britain, the provisions of the act of March 1st, 1809.

The claim of the owners of the vessel and cargo stated, that the vessel sailed from Antigua, on the 12th of February 1811, and being crank and not sea-worthy, put into Turk's Island, for ballast, where she took in a load of

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(*a*) February 22d, 1813. Absent, Todd, Justice.

salt, being informed, by an American vessel, that there was no law to prohibit it. That she sailed from Turk's Island, for the port of Savannah, intending to stand off and on, to get information to know whether she might be permitted to come in or not. That on her approach to the harbor, a gale of wind prevented boats coming to her, and forced her, for the safety of the lives of the crew and the vessel, to make a harbor at Cockspur Island. That before she got a harbor, she was boarded by a revenue-cutter, who took possession of her, and forcibly carried her into port. That the salt was not taken in, with intent to violate the laws of the United States, but with the express intention and determination, if they found the importation into the United States to be unlawful, to bear away to some foreign port. She sailed from Castine, in the province of Maine, for Antigua, in December 1810, and arrived off Savannah, on the 15th of March 1811.

There was evidence that the vessel might have called at Amelia Island, in the course of her voyage, where she might have gotten information of the non-intercourse law being in force. That she spoke a vessel of the United States, just before she came in, but made no inquiry as to the law. That the agent of the owners wrote several letters, to be delivered to the master at sea, informing him of the law, and warning him to go to some foreign port, but they were not delivered. The evidence respecting *the necessity of coming in, by reason of stress of weather, did not seem to be sufficiently proved.

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The cause was argued by *P. B. Key*, for the appellants, and *J. R. Ingersoll*, for the United States. (*a*)

It was contended by *Key*, for the appellants, 1. That the cargo was not taken on board, with intention of importing the same into the United States. 2. That the vessel was forced into Cockspur Harbor, by stress of weather, to save the vessel and the lives of the crew; and while so making the harbor, she was boarded by a revenue-cutter, and seized, and forced into the port of Savannah. 3. That she had a right to come into the waters of the United States, to make inquiry whether she could be permitted to enter, and before a reasonable time had expired, she was forcibly seized and carried in. 4. That coming into the waters of the United States, under either of the above circumstances, does not constitute an importation, without other and further voluntary acts on the part of the vessel.

February 23d, 1813. MARSHALL, Ch. J., stated the opinion of the court to be, that the vessel came at her peril; that she was bound to get information; but was negligent in not calling at Amelia Island, and in not inquiring of the vessel which she spoke off the port of Savannah.

Sentence affirmed.

(*a*) The Reporter was absent.

Caze & Richaud *v.* Baltimore Insurance Co. (*a*)

Liability of underwriters for freight.

The underwriters upon a cargo are not liable for freight *pro rata itineris*, to the owner of the vessel, who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss, and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters.[1]

Freight *pro rata itineris* is not due, unless the owner of the cargo voluntarily agree to receive it, at a place short of its ultimate destination.

Error to the Circuit Court for the district of Maryland, in an action of *indebitatus assumpsit* for freight *of goods by the ship Hamilton, from Bordeaux to Halifax. In the court below, a case was agreed [*359 by the parties, which was, in substance, as follows:

On the 28th of July 1805, Mr. John Ducorneau, of Bordeaux, the agent of the plaintiffs, shipped for them, there, on their account, on board the ship Hamilton, of which they were owners, a cargo of the value of $22,986, on a voyage from Bordeaux to New York, where the plaintiffs resided. On the voyage, she was captured by a British vessel of war, and carried into Halifax, where the ship and cargo were condemned. Within due time after the plaintiffs heard of the capture, they abandoned as for a total loss, to the defendants, who accepted the abandonment and paid the amount insured. From the sentence of condemnation in the vice-admiralty court, as to the vessel and cargo, but not as to freight, there was an appeal, upon which the sentence was reversed and the proceeds of the vessel and cargo were restored. The proceeds of the cargo were paid over to the underwriters; but the sum they received was less than the sum they had paid upon the policy.

The question, upon this case, was, whether the plaintiffs, who were owners of both vessel and cargo, were entitled to recover from the underwriters upon the cargo, freight from Bordeaux to Halifax.

Harper, for plaintiffs in error, contended, that they were so entitled. The underwriters who became the owners of the cargo, at Halifax, were benefited by the transportation from Bordeaux. The cargo was liable for its freight. The underwriters received the whole proceeds. So much thereof as amounted to the value of the freight was received by them to the use of the plaintiffs, as owners of the ship.

Pinkney, Attorney-General, contrà.—This action certainly cannot be maintained upon an insurer's liability for freight, under a policy on cargo. *The case of *Baillie* v. *Modigliani*, 2 Marsh. 728, is decisive to that [*360 effect; and even if an insurer were liable for freight, under the policy, he must be sued upon that, and could not be made to answer for it in this form of action.

But it is said, that this claim does not rest on the policy; but is founded upon the idea, that as the underwriters became proprietors (by the abandon-

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(*a*) February 20th, 1813. Absent, Todd, Justice.

[1] Re-affirmed in Marcardier *v.* Chesapeake Ins. Co., 8 Cr. 50; and Columbian Ins. Co. *v.* Catlett, 12 Wheat. 396. But if the insurers accept an abandonment, and take possession of the cargo injured, at an intermediate port, they are liable for freight *pro rata itineris* on the goods so accepted. The Mohawk, 8 Wall. 153.

ment and acceptance) of the cargo, or rather of the proceeds of the cargo, at Halifax, they succeeded to the burden as well as to the benefit, and must, consequently, pay freight *pro rata itineris* to the plaintiffs, as owners of the ship. To this it may be answered, that if any freight was due, it was due from the plaintiffs themselves, because it was earned, while they were the owners of the goods, and because the abandonment could not throw upon the underwriters a responsibility for freight for which the assured were already liable. There could be no privity of contract between the insurers and the ship-owners with reference to such freight; and the ship-owners could have no lien on the proceeds arising from the sales under the condemnation.

But no freight was due. The goods belonged to the owners of the ship, and of course, the bill of lading did not call for freight. On the contrary, it declared, that no freight was to be paid, "the cargo being owner's property." To imply a contract between the owners of the cargo and themselves, to pay freight to themselves, and that too against the bill of lading, would be absurd. It follows, that at the time of the abandonment, the plaintiffs had no right, either complete or inchoate, to freight upon the goods insured. If it were even admitted, then, to the utmost extent contended for, that the insurers, accepting the abandonment, took the cargo *cum onere*, they could not be charged with freight in this case, since the thing insured was, when they succeeded to it, free from such a charge. If they became liable for freight, they did not take simply *cum onere;* for the *onus* relied upon by the plaintiff's counsel did not exist, when the subject-matter came to them by abandonment. The abandonment and acceptance must have created, *361] not passed, it. If, indeed, the ship had afterwards performed *any service to the underwriters, with respect to these goods, an *assumpsit* might be implied *pro tanto* against them; but this demand is for freight supposed to have been earned, while the goods belonged to the plaintiffs, and were expressly, as well as from the nature of the transaction, exempt from freight.

The doctrine of lien which has been spoken of by the plaintiffs' counsel cannot serve his cause; for the plaintiffs could have no lien for freight which was not due; even if there could be a subsisting lien upon these proceeds, for freight which was due.

But freight was not due, for other reasons. It may be conceded, that freight is in some cases due *pro rata itineris*, where the voyage being intercepted, the owner of the cargo consents to receive it at a place short of its destination. But he must be a volunteer. A forced receipt, as on this occasion, has never been adjudged to give a title to *pro rata* freight. Besides, this cargo was lost; and even if the proceeds had covered the value, it may well be questioned, notwithstanding the *dictum* in *Baillie* v. *Modigliani*, whether, by taking the proceeds, the owner gives a right to *pro rata* freight.

But however that may be, it can scarcely be maintained, that a forced acceptance (by the owner, or by an insurer to whom an abandonment has been made) of proceeds far short of the value (as was the fact here), will give such a right.

Harper, in reply.—The case in Marshall wants the essential ingredient of ownership in the person making the abandonment. It was, too, a case of

partial loss. The defendants in the present case are sued, not as underwriters, but as owners of goods liable for freight. The benefit they receive from the transportation of the goods is a good foundation for an implied promise. The decision in Burrow's reports, of consent to receive the cargo liable *pro rata itineris* has never been questioned.

February 24th, 1813. STORY, J., delivered the opinion of the court, as follows :—*The present action is brought to recover freight *pro rata itineris*, under the following circumstances: The plaintiffs were the [*362 owners of the ship Hamilton and cargo, and effected insurance of her cargo on a voyage from Bordeaux to New York. The sum of $11,000 was underwritten by the defendants—the sum of $10,000 at Philadelphia, and the residue of the value of the cargo ($1986) was left uninsured. During the voyage, the ship and cargo were captured, carried into Halifax, and there condemned. The plaintiffs abandoned to the underwriters, and received payment for a total loss. An appeal from the sentence of condemnation was interposed, and the sentence finally reversed, and the proceeds of the cargo, which had been previously sold by order of court, were paid over to the underwriters, in proportion to the sums underwritten by them respectively.

We are all of opinion, that the plaintiffs are not entitled to recover in the present action. In the first place, the court are satisfied, that as between the assured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo, against which he does not undertake to indemnify the owner; and if authority be necessary to support the position, it is fully borne out by the doctrine of Lord MANSFIELD in *Baillie* v. *Modigliani*, Marsh. 728.

In the next place, we are all of opinion, that no freight whatsoever was, under the circumstances of this case, due. Freight, in general, is not due unless the voyage be performed. Here, the ship and cargo never arrived at their port of destination, and of course, the whole freight could not be due. Was a *pro rata* freight due? We think not. The whole class of cases resting on the authority of *Luke* v. *Lyde* (2 Burr. 882), proceed on the ground, that there is a voluntary acceptance of the goods themselves, at an intermediate port; and not, as in the present case, a compulsive receipt from the hands of the admiralty, after capture and condemnation, and ultimate restoration upon the appeal. There is, in our judgment, no equity to support such a claim; and although *it receive countenance from some [*363 remarks incidentally thrown out in *Baillie* v. *Modigliani*, the current of more recent authority, as well as of principle, clearly points the other way.

It may be further added, that as between the assured and the underwriter, the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo, after an abandonment. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

The Jane. (*a*)

The Schooner Jane *v.* United States.

Evidence.

In a prosecution against a vessel, for violation of a law of the United States, it is not necessary to adduce positive testimony of the identity of the vessel. It is sufficient, if there be enough to satisfy the judicial mind.

This was an appeal from the sentence of the Circuit Court for the district of Maryland, reversing that of the district court, which condemned the schooner Jane for violation of the non-intercourse act.

Nicholson, for the appellant, contended that there ought to have been positive proof of the identity of the vessel.

Pinkney, Attorney-General.—If these cases are to be likened to criminal prosecutions, and if the same strictness be required, it will be impossible to execute the laws. No proof was offered on the part of the claimant. But there is sufficient proof of identity: she is the same kind of vessel, has the same name, belongs to the same port, has a master of the same name, had the same cargo, and the time of her sailing from Port au Prince, corresponded with the time of her arrival at Baltimore, allowing the usual time for performing the voyage.

*364] *Harper*, in reply.—The United States are bound to make out full proof. If the fact be so, much better proof might have been had on the part of the United States.

February 24th, 1813. Washington, J., delivered the opinion of the court, as follows:—This was an information filed in the district court of the United States for the district of Maryland, against the schooner Jane and her cargo, for a breach of the law interdicting commercial intercourse between the United States and Great Britain and France, and their dependencies. The particular charge alleged in the information is, that this vessel had imported into the port of Baltimore, from some place in the island of St. Domingo, a dependence of France, 1920 bags of coffee, in violation of the above law. To establish this charge, two witnesses were examined on the part of the United States, who concurred in testifying that they were at Port au Prince, in the island of St. Domingo, from about the middle of August, to the middle of September, in the year 1809, and that they saw lying there a schooner called the Jane, of Baltimore, Vezey, master. That her cargo consisted of flour, which she discharged at that place and took in a quantity of coffee in bags, and that she sailed from Port au Prince about the 10th of September. One of these witnesses thinks that the name "Jane" was painted on the stern of the vessel, but is not positive as to that fact; nor can either of the witnesses say, that the vessel they saw at Port au Prince was the same which was seized by the collector of the port of Baltimore. The seizure of the vessel and cargo, which are the subject of this controversy, was made between the 1st and 18th of October 1809.

Upon the above evidence, the district court dismissed the information,

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(*a*) February 17th, 1813. Present, all the judges, except Todd, J.

and ordered restitution of vessel and cargo. This writ of error is taken to the sentence *pronounced by the circuit court, which, upon an appeal, reversed that of the district court and condemned both the vessel and [*365 cargo. For the claimants, it is contended, that the evidence in this case is merely presumptive, and is much too light to establish the fact, necessary to be made out, that the vessel seized by the collector of Baltimore is the same vessel which was seen by the witnesses at Port au Prince. If the latter part of the objection to the evidence be well founded, it is fatal to the sentence, because, although presumptive evidence is clearly admissible, and may, of itself, be sufficient to support, in many instances, even a criminal prosecution, yet the circumstances proved ought not only to harmonize with each other, but they ought in themselves to be so strong as fully to satisfy the mind of the fact they are intended to establish.

In this case, there is such a coincidence in the circumstances proved in relation to the vessel, the cargo and the voyage, as to impress the mind with a conviction, almost irresistible, that the schooner Jane, seen by the witnesses at Port au Prince, is the identical vessel against which this prosecution is carried on. That vessel was a schooner, the reputed name of which at Port au Prince was the Jane, of Baltimore, Vezey, master; which took in, at that port, coffee in bags, and sailed from thence about the 10th of September. The vessel in question is a schooner, bears the same name, was commanded by a captain Vezey, her cargo, coffee in bags, and she arrived at Baltimore between the 1st and 10th of October, about the time when a vessel which had left Port au Prince on the 10th September might reasonably have been expected to arrive. It is barely possible, that the facts proved in this case should apply to any other vessel than the one in question; and in the absence of all explanatory evidence, which it was so entirely in the power of the claimants to have produced, is sufficient to deprive him of this slight ground to stand upon.

It is true, that the proof of identity might have been strengthened by evidence that this vessel sailed from Baltimore, of the time when she sailed, the port for which she cleared, and the cargo she took out with her. But it does not appear in this record, nor *does it necessarily follow, that she sailed from Baltimore on her outward voyage, or that it was in the [*366 power of the United States to prove any of the above facts. On the other hand, nothing could have been more easy than for the claimants to have proved them, and still further to have proved, if their case would have admitted it, that the evidence on the part of the United States did not apply to this vessel.

The court is of opinion, that there is no error in the sentence pronounced by the circuit court, and that the same should be affirmed, with costs.

Sentence affirmed.

Lee *v.* Munroe and Thornton. (*a*)

Declarations of agent.

The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such declaration.[1]

This was an appeal from the decree of the Circuit Court for the district of Columbia, in a suit in chancery, brought by Lee against Thomas Munroe, superintendent of the city of Washington, and William Thornton, the survivor of the late board of commissioners for that city. The object of the bill was to obtain a discount of $3000 upon a judgment, which Munroe, as superintendent, had obtained against Lee upon his bond. The ground upon which this set-off was claimed, was this:

Morris & Nicholson were indebted to Lee in that sum, by promissory notes, and offered payment in certain city lots, the title whereof was in the commissioners of the city. Morris & Nicholson having paid money in advance to the commissioners, were, as they supposed, entitled to demand from them the conveyance of the lots in question, under existing contracts between the commissioners and themselves. Whereupon, Lee applied to the commissioners, to know of them whether they would convey the lots to him, upon the order of Morris & Nicholson. This they promised to do, and made an entry of it in their journal. Lee then agreed with Morris & Nicholson to receive the lots in payment, and upon receiving their order to the commissioners to convey them to him, gave up to Morris & Nicholson their notes for $3000, which were the *evidence of the debt. On present- *367]
ing this order to the commissioners, they refused to convey the lots, unless he would pay them the purchase-money due thereon to them from Morris & Nicholson, alleging that the balance was against Morris & Nicholson in their account with the commissioners. Morris & Nicholson shortly afterwards became insolvent.

C. Lee, for the appellant.—This case cannot be distinguished from that of a mortgagee, who knowing another person is about to lend money upon the mortgaged premises, informs him that his mortgage is satisfied. If it be not, he shall be postponed to the second mortgagee. *Ibbottson* v. *Rhodes*, 2 Vern. 554; *Mocatta* v. *Murgatroyd*, 1 P. Wms. 394; *Levy* v. *United States Bank*, 4 Dall. 234.

The commissioners were acting within the scope of their authority. It was their business to keep the accounts with Morris & Nicholson, and to know the balance; it was also their business to convey the lots. It is immaterial, what was the real state of accounts at the time. They acted at their peril. The question is, who shall bear the loss? Not he who was in no fault, but he whose duty it was to know the truth, and who by his negligence has brought this loss upon the plaintiff.

Jones, contrà.—This case does not depend upon the principle of first and second mortgagee. The bill does not seek relief personally against the superintendent, or the surviving commissioner, but is intended to charge

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(*a*) February 4th, 1813. Absent, Johnson and Todd, Justices.

[1] Whiteside *v.* United States, 93 U. S. 247; Hawkins *v.* United States, 96 Id. 691.

the public with this loss. The commissioners were public officers; they had no interest in the business. It was a simple mistake of a fact on their part, which cannot bind the United States. It is an attempt to set off unliquidated damages incurred by these public officers, against a public debt.

February 26, 1813. LIVINGSTON, J., delivered the opinion of the court as follows:—*This is a bill seeking relief against public officers, [*368 nominally, but against the United States, in fact, for a mistake of the former in a representation made by them to the appellant, by which it is alleged, that he has sustained a loss, for the redress of which, in damages, this suit is brought. It has been contended in this case, that the defendants having, in their public character as commissioners of the city of Washington, misinformed the plaintiff as to the state of the accounts between them and Morris & Nicholson, and thereby induced him to relinquish a demand which he had against the latter, he is now entitled to have discounted from a judgment, which they have obtained against him for the use of the United States, a sum equal to the principal and interest of the debt which he lost by the confidence which he placed in them; and this is supposed to be like the case of a party, who being about to lend money on real estate, applies to one who holds a prior mortgage, to ascertain whether he has any incumbrance on it. There is no doubt, in such a case, that if the person making the application discloses that he is about lending money on the estate, he will be preferred to the first mortgagee, should the latter deny his having a mortgage, or assert that it is satisfied; and it seems agreeable to the dictates of reason and good conscience, that his claim should be postponed to that of a person whose confidence was inspired by the misrepresentation of one, who was acting for himself, and every way competent to inform him of the truth.

But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practised by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct, therefore, ought to be conclusive on him, when the rights of third persons come in question. It is, however, not known to the court, that the same rule of decision has been extended, so as to affect the interests of principals, and particularly of the public, in consequence of similar mistakes made by an agent, nor is it reasonable, that such extension should take place, unless it most manifestly appear, that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on as the ground of relief.

In the present case, the defendants were employed and authorized by the public to *sell, and make contracts for the sale of, certain [*369 lands lying within this district. In pursuance of these powers, they had made contracts with Morris & Nicholson, who having advanced a considerable sum of money, were in the habit of directing the defendants, from time to time, to convey certain of the lots which they had contracted for, to the persons named in such orders. The commissioners, supposing that Morris & Nicholson had not yet received titles to land, equal in value to the sum which they had advanced, told the plaintiff, that if he would obtain an order from them for certain lots, they should be conveyed to him. But in a day or two after, they discovered that Morris & Nicholson had already

received deeds for lots to the whole amount of the sum which they had advanced, and give notice of this fact to the plaintiff, offering however to convey to him the lots in question, on his paying for them at the rate expressed in their contract with Morris & Nicholson.

The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he lost his remedy against Morris & Nicholson (of which very serious doubts may well be entertained), but a majority of the judges are of opinion, that the communication made by the commissioners to the plaintiff, was altogether gratuitous, and that not being within the sphere of their official duties, the United States cannot be injured by it, and that the defendants could not, without rendering themselves personally liable to the public, have made a title to the plaintiff, after a discovery of the mistake which they had made, but on the terms proposed by them; or in other words, that the United States could not, by any declaration of the commissioners, proceeding from a mistake, lose the lien which was secured to them by the contract with Morris & Nicholson, for the stipulated price of this property.

If the commissioners acted fraudulently, which is not pretended, they may be personally liable in damages to the plaintiff; but if it were a mistake, and such it is represented to be, the court has already said, that the interests of the United States cannot, and ought not to be affected by it. Were it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very *valuable and large tracts of real estate, and even produce alien- *370] ations of them, without any consideration whatever being received, It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself. It is the opinion of this court that the decree of the circuit court be affirmed.

Decree affirmed.

Herbert and others *v.* Wren and wife, and others. (*a*)

Dower.

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially, where partition, discovery or account is prayed; and in cases of sale, where the parties are willing that a sum in gross should be given in lieu of dower.[1]

If a devise of land, in Virginia, to the widow, appear, from circumstances, to be intended in lieu of dower, she must make her election, and cannot take both.[2]

If a wife join her husband in a lease for years, she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in a suit in chancery, brought by Richard Wren and Susanna, his

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(*a*) February 15th, 1813. Present, all the judges, except Justice Todd.

[1] Powell *v.* Manufacturing Co., 3 Mason 347; Badgley *v.* Bruce, 4 Paige 98.

[2] See Duncan *v.* Duncan, 2 Yeates 302; Hamilton *v.* Buckwalter, Id. 389; United States *v.* Duncan, 4 McLean 99; Savage *v.* Burnham, 17 N. Y. 561; Tobias *v.* Ketchum, 32 Id. 319; Vernon *v.* Vernon, 53 Id. 351.

wife, who was the widow of Lewis Hipkins, deceased, and John and Westley Adams, her trustees, against W. Herbert, T. Swann, R. B. Lee and W. B. Page (trustees of Philip R. Fendall, deceased), and E. J. Lee, Joseph Deane and F. Green.

The case was stated by MARSHALL, Ch. J. (in delivering the opinion of the court), as follows: This suit was brought by Richard Wren and Susanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seised, and which has since been sold and conveyed to the defendant, Joseph Deane, or that a just equivalent in money may be decreed her in lieu thereof.

The material circumstances of the case are these: Lewis Hipkins being seised as tenant in common with Philip Richard Fendall, of one-third of a tract of land lying in the county of Fairfax, by his deed, executed *by himself and wife, leased the same to Philip Richard Fendall for the [*371 term of thirteen years, to commence on the first of September, in the year 1794, at the annual rent of 140*l.* In the year 1794, Lewis Hipkins departed this life, having first made his last will and testament in writing, in which he devised both real and personal estate to his wife: the real estate for her life, with remainder to his three daughters.

To his two sons, he devised the premises in question, and added, that if, during the minority of his sons, Philip R. Fendall should erect thereon another water-mill or water-mills, his desire was, that his sons, or the survivor of them, should, at the expiration of the lease for years made to the said Philip, pay one-third part of the value of such mill or mills, and in default of payment, that P. R. Fendall should be permitted to hold the same at the present rent, until the value should be received. He directed his two tracts of land, in London, to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall, to the education and maintenance of his children.

The testator then adds the following clause: "If it should so happen, that the remaining part of my estate, not herein bequeathed, should prove insufficient to pay all just demands against my estate, then my will and desire is, that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be, in proportion to the property bequeathed to them and each of them."

On the 13th day of December, in the year 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question, and also in the land devised to her for life, by her deceased husband, to the plaintiffs, John Adams and Westley Adams, in trust for her use.

*In the year 1803, P. R. Fendall and Walker Muse instituted a [*372 suit against the executors and children of Lewis Hipkins, deceased, and in the month of June, in that year, the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold and the money brought into court. The report of the sale does not appear on the record, but an entry was made, that the report was made and confirmed by the court. Under this decree, the premises were sold and conveyed to the defendant, E. J. Lee, who purchased in trust for

P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance, is a memorandum, stating that the property was sold subject to dower.

Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed, conveying to them the other two-thirds of the same estate on certain trusts in the deed recited. The trustees sold and conveyed to the defendant, Joseph Deane. The bill stated, that the defendant, Joseph Deane, had not paid the purchase-money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof.

Soon after the trust deed from Susanna Hipkins to John and Westley Adams, she intermarried with the plaintiff, Richard Wren.

Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one-third part of the rent accruing on the premises devised to him by Hipkins and wife, until the year 1803 ; since which, he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having depart-
*373] ed this life previous to the institution of this suit, insist, *1. That the remedy of the plaintiffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause. 2. That the provision made by the will of Louis Hipkins for the plaintiff, Susanna, not having been renounced by her, bars her right of dower in his estate.

The defendant, Joseph Deane, has put in no answer, and as against him the bill is taken as confessed.

The circuit court determined that the claim of the plaintiff, Susanna, to dower, was not barred, and decreed her a sum in gross, as an equivalent therefor. From this decree, the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses them rent on the premises, and have, therefore, taken out likewise a writ of error.

E. J. Lee, for the plaintiffs in error.—1. If the complainant, Susanna, has any right of dower, her remedy was in a court of law. In a suit in chancery, if a question of dower arise, and the right of dower be denied, a court of equity will send it to a court of law to be tried. The courts of the United States are forbidden by law, to exercise chancery jurisdiction, in a case in which there is a remedy at law. A court of equity takes cognisance of no case of dower which does not involve some peculiar ground of equity : such as discovery, partition, account, &c. Here was no prayer for discovery, nor partition, and although an account was prayed, yet it was unnecessary. 1 Fonbl. 19; 1 Bro. C. C. 326; *Dormer* v. *Fortescue*, 3 Atk. 130; 2 Bro. C. C. 631; 2 Ves. jr. 124.

2. She had no right to dower. Her husband, Hipkins, had devised to her an estate for life, which appears, by the various provisions in his will, to
*374] have been intended to be in lieu of dower. The lands out of *which dower is now claimed, he devised to his sons, and also devised them for payment of his debts. He specifically devised away all his lands. In the case of *Ambler* v. *Norton*, 4 Hen. & Munf. 23, the devise was not expressly in lieu of dower, but the fact was collected from the whole context of the will.

3. But if she had a right of dower, the court had no authority to make a decree for part of the purchase-money, without the consent of all parties concerned. 1 Inst. 33.

R. I. Taylor, contrà.—None of the facts upon which the claim of dower is founded, is denied by the answer. The denial of the right is founded on particular facts therein stated.

1. As to the jurisdiction. At the present day, courts of law and equity have a concurrent jurisdiction in dower, if the facts are not denied upon which the claim of dower is founded; such as seisin, &c. In general, a court of chancery is the proper tribunal. A discovery is almost always sought; partition is frequently required, and an account is generally taken. Comyn Dig. tit. Chancery, E; Mitford 109, 129; 1 Fonbl. 22; 6 Bac. Abr. 417; 2 Ves. jr. 122, 124. There is no case in Virginia where the jurisdiction has been denied. In this case, a partition was necessary, and that is a special ground of equitable jurisdiction.

But the property had been sold by order of court, expressly subject to dower, and the deed to Deane contained a covenant to indemnify him against the claim of dower. A court of chancery can call all parties before it, and by decreeing a compensation in lieu of land, prevent circuity of action. The widow and the purchaser had consented to such a decree. An account of rents and profits was also necessary. The act of congress prohibiting the resort to chancery where there is a remedy at law, is only an affirmance of a principle of the common law.

*But it is said, that by joining in the lease for thirteen years, she barred her dower during the lease. This is not so. Her husband [*375 still had a freehold of inheritance in the land, and died seised thereof. And the widow is entitled to dower in all lands of which the husband was seised of the freehold of inheritance, during the coverture. 1 Inst. 32; Com. Dig. tit. Dower, A. 6.

But the most formidable objection arises upon the devise to her by the will. That devise was not expressly in lieu of dower, nor is there such averment as the statute of Virginia requires. There is no averment that she accepted the lands devised in lieu of dower; nor that her husband was seised of such an estate in those lands as would be a bar, if she had accepted them. The decree of the court was for a sale of the whole real estate of her husband. It does not appear, that the land devised to her was not sold as well as the rest. If it was, she is not barred of her dower. Co. Litt. 18 *b*, Harg. note; *Dormer* v. *Fortescue*, 3 Atk. 130; Ridg. temp. Hardw. 184; Fonbl. 22; 6 Bac. Abr. 417.

But there is an error in favor of the plaintiff in error, and if the cause should be sent back, it ought to be corrected. There was no allowance made for arrearages of rent.

As to the decree for money in lieu of land. The widow was willing to receive it, and the defendant, Deane, to pay it. If there had not been a decree for money, Deane would have been obliged to pay the whole purchase-money to the trustees, and then sue them for a breach of covenant, and recover back in damages the value of the dower, to be assessed by a jury. By ascertaining that value, in the first instance, this circuity of action and loss of time are prevented. Whether the court below ought themselves to

have fixed the value of the dower, or left it to be ascertained by a master in chancery, or by a jury, we do not pretend to say. We do not wish the decree to be affirmed. We hope the bill will not be dismissed; but sent back, with instructions to allow us the arrearages of rent, with the profits thereon, and that an account be taken accordingly.

*376] *C. *Lee*, in reply.—The essential point of the case is, that she is barred of her dower by her acceptance of a jointure under the will. The act of assembly (Rev. Code 180, § 11) says, "that if any estate be conveyed by deed or will, either expressly, or by averment, in lieu of dower," &c., "such conveyance shall bar her dower of the residue," &c. She has accepted her jointure and resides upon it. All the circumstances of the will show the intent to be in lieu of her dower. By averment, means by allegation and proof dehors the will. 1 Inst. 36 *b*, note; Wooddeson, tit. Dower; Hargrave Co. Litt. 36 *b*, note; *Pearson* v. *Pearson*, 1 Bro. C. C. 292. The court had no right to decree money in lieu of the land, without consent of the creditors. No arrearages of dower can be recovered for the time preceding the demand.

February 26th, 1813. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—The material questions in the cause are: 1. Has a court of equity jurisdiction in the case? 2. Is the plaintiff, Susanna, entitled to dower? 3. If these points be in her favor, what decree ought the court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist, in England, in favor of this jurisdiction: one of which is, that partitions are made and accounts are taken in chancery, in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate, as well as of assignment of dower in the part of which Lewis Hipkins died seised.

*377] *An additional reason, and a conclusive one, in favor of the jurisdiction of a court of equity, is this: The lands are in possession of a purchaser, who has not yet paid the purchase-money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law, and compel her to receive her dower in the lands themselves. This is, therefore, a proper case for application to a court of chancery.

2. It is perfectly clear, that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower, for several reasons, of which it will be necessary to mention only two. 1. It is not expressed to be made in lieu of dower. 2. It is not averred, that she has accepted the provision and still enjoys it.

3. It remains to inquire, what decree the court ought to make in the case? The first question to be discussed is this: Is the plaintiff, Susanna, entitled both to dower and to the provision made for her in the will of her late husband? The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to

support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books, there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which *she has been [*378 permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity, not to permit the same person to hold under and against a will. If therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed, that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold* v. *Kempstead and wife* (Amb. 466), of *Villareal* v. *Lord Galway* (Ibid. 682), and of *Jones* v. *Collier and others*, (Ibid. 732), are all cases in which, upon the principle that has been stated, the widow was put to her election. In the case under consideration, neither party derives any aid from extrinsic circumstances, and therefore, the case must depend on the will itself.

The value of the provision made for the wife, compared with the whole estate, is not in proof: but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify. The only fund provided for the maintenance and education of his five children is the rent of 140*l.* per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower. That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill, and not receiving from the sons of the testator their half of its value, to hold the premises, until the rent should discharge that debt, indicates an intention that, in such case, the whole rent should be retained. *The clause, [*379 too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property, without any regard to the incumbrance of dower. Upon this view of the will, it is the opinion of the majority of the court, that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court, that she has accepted the provision of the will, nor that she enjoys it. Indeed, there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life

from its operation, nor is the court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence, that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her, in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is, therefore, apparent, that she never intended to abandon her claim to dower.

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower? It is unnecessary to decide, whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case, the plaintiff was in the actual enjoyment of dower. She received one-third of the rent accruing from the premises, for nine years; she was, therefore, in full possession of her dower estate; and when, after-
*380] wards, the land was sold under a decree of a *court, P. R. Fendall was one of the executors who made the sale, and was himself, in effect, the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of 140*l.* per annum, for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of the profits on that estate. An account, therefore, must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire, whether the allowance of a sum in gross, in lieu of dower in the land itself, or of the interest on one-third of the purchase-money, might legally be made? This must be considered as a compromise between the plaintiffs and the defendant, Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist, that instead of a sum in gross, one-third of the purchase-money shall be set apart, and the interest thereof paid annually to the tenant in dower, during her life. If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still it is uncertain, on what principle seven years were taken as the value of the life of the tenant in dower. It is, probably, a reasonable estimate, but this court does not perceive on what principle it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion, that there is error in the decree of the circuit
*381] court, in not requiring the plaintiff, *Susanna, to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate, if she shall elect to take dower. The decree is

to be reversed and the cause remanded for further proceedings in conformity with the following decree:

This Court is of opinion, that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins died seised, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought, therefore, to have made her election, either to adhere to her legal rights and renounce those under the will, or to adhere to the will, and renounce her legal rights, before a decree could be made in her favor.

This court is further of opinion, that the plaintiff, Susanna, having been in possession of her dower by the receipt of rent, for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession, from the time when he ceased to pay the same, until the sale was made to the defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon, since the same was sold and conveyed to him; to ascertain which, an account ought to be directed. And the court is further of opinion, that an account ought also to be directed, to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will: all which must be deducted from her claim for dower.

The court is further of opinion, that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one-third part of the purchase-money, given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive, during life, the interest accruing thereon, *and shall apply to the circuit court to reform its decree in this respect, the same ought to be done. [*382

It is the opinion of this court, that there is no error in the decree of the circuit court for the county of Alexandria, in determining that the plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This court doth, therefore, reverse and annul the said decree; and doth remand the cause to the said circuit court, with instructions to reform the said decree according to the directions herein contained.

Johnson, J., dissented from the opinion of the court, but did not state his reasons.

The Cargo of the Brig Aurora, Burnside, claimant, *v.* United States. (*a*)

Contingent legislation.—Pleading.

The legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation.[1]

When an act of congress is revived by a subsequent act, it is revived precisely in that form, and with that effect, which it had at the moment when it expired.

The non-intercourse act of March 1st, 1809, was, by force of the act of May 1st, 1810, and the president's proclamation of November 2d, 1810, revived on the 2d of February 1811.

In a libel, it is not necessary to state any fact which constitutes the defence of the claimant.

This was an appeal from the sentence of the District Court for the district of Orleans, condemning the cargo of the brig Aurora, for having been imported from Great Britain, in violation of the 4th and 5th sections of the non-intercourse act of March 1st, 1809 (2 U. S. Stat. 529), which it was contended, were in force against Great Britain, on the 20th of February 1811 (when this cargo was seized), by virtue of the act of May 1st, 1810 (Ibid. 605), and the President's proclamation of November 2d, 1810.

By the 4th section of the act of March 1st, 1809, it is enacted, "that from and after the 20th day of May next, it shall not be lawful to import into the
*383] United States *or the territories thereof, any goods, wares or merchandise whatever, from any port or place situated in Great Britain or Ireland, or in any of the colonies or dependencies of Great Britain, nor from any port or place situated in France, or in any of her colonies or dependencies, nor from any port or place in the actual possession of either Great Britain or France." By the 5th section of the same act, it is enacted, "that whenever any article or articles, the importation of which is prohibited by this act, shall, after the 20th of May, be imported into the United States or the territories thereof, contrary to the true intent and meaning of this act," "all such articles" "shall be forfeited." By the 11th section of the same act, it is provided, "that the President of the United States be, and he hereby is authorized, in case either France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation; after which, the trade suspended by this act and by the act laying an embargo," &c., "may be renewed with the nation so doing."

(*a*) February 23d, 1813. Present, all the judges, except Todd, Justice.

[1] There are many conflicting decisions as to the constitutionality of acts, which are to be submitted to a popular vote, before they have the force of laws, that are utterly irreconcilable; many of them bear the stamp of political expediency upon their face, and the judges of the courts that decided them have, in general, decided according to their political predilections. The statute in question may be supported, on the ground stated by Judge Sharswood, in Locke's Appeal, 72 Penn. St. 508, as a mere act of executive administration. In the People's Railroad *v.* Memphis Railroad, 10 Wall. 50, Judge Clifford says, "The power to make laws is vested in the legislature, under the constitution of the state, and it is very doubtful, whether the legislative department can delegate to any other body or authority, the power to grant such a franchise (as the one in question), as the exercise of that power involves a high trust, created and conferred for the benefit of those who granted it; and as the trust is confided to the legislature, it must remain where it is vested, until the constitution of the state is changed." And in Locke's Appeal, *ut supra*, p. 504, Chief Justice Read very truly remarks, that if the legislature can delegate the law-making power to a majority of the voters, they can also confer it upon the minority. For a review of the authorities on this vexed question, see Cooley on Constitutional Limitations, 116–25.

This act was to continue in force only to the end of the then next session of congress, but the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 17th and 18th sections were, by the act of June 28th, 1809, continued to the end of the next session.

On the 19th of April 1809, in consequence of the arrangement with Mr. Erskine, the President issued his proclamation, declaring that Great Britain had so revoked her edicts, &c., whereby the law ceased to operate against her. But in consequence of the disavowal of Mr. Erskine's arrangement by the British government, that proclamation was afterwards revoked.

The act of 1st of March 1809, expired with the session of congress, on the 1st of May 1810, on which day, congress passed an act (2 U. S. Stat. 604), the 4th section of which enacted, "that in case either Great Britain or France shall, before the third day of March *next, so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the [*384 United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not within three months thereafter so revoke or modify her edicts in like manner, then the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 18th sections of the act, entitled 'an act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes,' shall, from and after the expiration of three months from the date of the proclamation aforesaid, be revived, and have full force and effect, so far as relates to the dominions, colonies and dependencies of the nation thus refusing or neglecting to revoke or modify her edicts in manner aforesaid. And the restrictions imposed by this act, shall, from the date of such proclamation, cease and be discontinued in relation to the nation revoking or modifying her decrees in manner aforesaid."

On the 2d of November 1810, the President issued his proclamation, declaring that France had so revoked or modified her edicts, as that they ceased to violate the neutral commerce of the United States.

By the act of March 2d, 1811, § 1 (2 U. S. Stat. 651), it is enacted, "that no vessel owned wholly by a citizen or citizens of the United States, which shall have departed from a British port, prior to the 2d day of February 1811, and no merchandise owned wholly by a citizen or citizens of the United States, imported in such vessel, shall be liable to seizure or forfeiture, on account of any infraction, or presumed infraction, of the provisions of the act to which this is a supplement" (the act of May 1st, 1810). The 2d section provides, that in case Great Britain should so revoke or modify her edicts, &c., the president shall declare the same by proclamation. The 3d section enacts, that until the proclamation aforesaid "shall have been issued, the several provisions of the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th and *18th sections of the act, entitled 'an act to interdict,' &c. (the act of [*385 March 1st, 1809), shall have full force, and be immediately carried into effect against Great Britain, her colonies and dependencies.'"

The Aurora cleared out from Liverpool on the 11th of December 1810, sailed on the 16th, and arrived at New Orleans, between the 2d and the 20th of February 1811. The President's proclamation of 2d of November 1810, was known in Liverpool on the 13th of December.

Joseph R. Ingersoll, for the appellant.—Here was no intent to violate the

law. The vessel cleared out before the proclamation was known in Liverpool, and a knowledge of that fact is not brought home to her. But if it had been, it was impossible for her to know whether Great Britain would not, before the 2d of February, revoke her obnoxious orders in council, so that the law would never come into operation, even if the president could, by proclamation, call it into existence. And the law, if it should take effect, was not to go into operation until "the 20th of May next." When was the 20th of May next? If the law was revived by the proclamation, it could not be revived until the 2d of February 1811. It was to be considered as being re-enacted on that day. The 20th of May next, therefore, meant to the 20th of May 1811. The words of the act of May 1st, 1810, are, "shall, from and after the expiration of three months from the date of the proclamation aforesaid, be revived, and have full force and effect." The provision that it should begin to operate on the 20th of May next, was as much a part of the law as any other of its provisions. It was the intention of the legislature, that some warning should be given to the citizens of the United States, so that they might, by possibility, avoid forfeiture under it. But if that provision be not adopted as well as the others, it was impossible to avoid the penalties of the law; for until the 2d of February, it would, at all events, be lawful to import, and until after that day, it would be impossible to know that Great Britain had not revoked her edicts, so that if the
*386] law was to take effect on that *day, it would be impossible for the most innocent and most wary to escape punishment.

This could not have been the intention of the legislature. Effect ought, if possible, to be given to the words, after the 20th of May next; and the most matured construction is, that the legislature meant the 20th of May next following the day when the act should become absolute, by the happening of the contingency on which its existence was to depend. A contrary construction would attribute to the legislature the most flagrant injustice; that of punishing a man under a law of which it was impossible he should have had a knowledge. Whoever heard of a conditional penal law, the condition of which was to be decided by the party, and which it was impossible for him to decide, until after the law became absolute? The president was not authorized to decide it. Every man was to ascertain the fact for himself.

But congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law. Congress meant to reserve to themselves the power of ascertaining when the condition should have been performed. This is to be inferred from the act of March 2d, 1811, by which it is enacted, that until Great Britain shall so revoke her edicts, &c., and until that fact shall be proclaimed by the President, the enumerated sections of the act of March 1st, 1809, interdicting, &c., "shall have full force, and be (*i. e.*, shall be) immediately carried into effect." These expressions strongly imply that those sections of the act were not already in full force, and had not been carried into effect.

But the 1st section of the act of March 2d, 1811, protects from forfeiture all American vessels and goods, which sailed from Great Britain before the 2d of February. The information in this case does not deny that the goods are *bonâ fide* American property; and the answer of Burnside calls the

Aurora an American brig—speaks of the return voyage, and states himself to be of New Orleans. The bill of lading is also on account *and risk [*387 of an American citizen. It is, therefore, to be inferred, that the property was American, and therefore, not liable to forfeiture.

John Law, contrà.—The proclamation was known in Liverpool, three days before the Aurora sailed, and must be presumed to have been known by the master.

The 20th of May referred to in the act, was the 20th of May 1809, which had passed when the law of May 1st, 1810, was enacted, and when the act of March 1st, 1809, expired. The legislature meant to revive the law as it existed on the day of its expiration. The words, after the 20th of May next, were at that time of no effect, and were as inoperative as if they had been expunged from the law.

The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.

The evidence is not sufficient to show the cargo to be American property.

February 26th, 1812. JOHNSON, J., delivered the opinion of the court, as follows:—This is an appeal from a decision of the district court of Orleans, on a libel preferred against the goods in question, under the non-intercourse acts of March 1st, 1809, and May 1st, 1810. These goods were claimed by Robert Burnside, a citizen of Orleans, as his property, and the material questions in the cause are, 1st. Is the property American, in which case, it is exempted from forfeiture, by a subsequent law, viz., of March 2d, 1811? *2d. Was the act of 1st March 1809, revived by the president's pro- [*388 clamation at all, and if revived, did it commence its operation on the 2d February, or on the 20th May following, the time of issuing that proclamation?

On the question of fact, the court are of opinion, that the evidence is not sufficient to prove the property American. The national character of the property the claimant might easily have established, by his correspondence, and the examination of witnesses in Europe. No such evidence is resorted to. The bill of lading alone is resorted to, on which it is said to be shipped on account of a citizen of the United States, and consigned to Burnside, but the name of the owner is not inserted. Here again, the defect of evidence may have been supplied by evidence who this citizen was, but no such evidence is adduced.

In the examination of the two clerks of John Rason & Co., of Liverpool, it is simply stated, that these goods were shipped by John Richardson, of Liverpool, but on whose account, they do not state, nor does it appear that they were examined to that point. Upon the whole, we are of opinion, that the absence of proof which might so easily have been supplied, will authorize a conclusion, that the property was not American.

On the second point, we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation,

without limitation upon the occurence of any subsequent combination of events.

On the question when the operation of the 4th section of the act should commence, we are of opinion, that by reviving an act, the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment when it expired. *And that *389] a suspended operation to the 20th May, would be wholly inconsistent with the words made use of in the 4th section of the act of May 1810, viz: "shall be revived and have full force and operation," and therefore, that its operation commenced on the 2d February 1811.

Some objections have been made to the sufficiency of the libel, because it does not negative the fact of American property. But on that subject, we are of opinion, that in no case can it be necessary to state in a libel, any fact which constitutes the defence of the claimant, or a ground of exception of the operation of the law on which the libel is founded.

Sentence affirmed.

The Hoppet. (*a*)

The Schooner Hoppet and Cargo *v.* United States.

Non-intercourse law.—Information for forfeiture.

Wines, the produce of France, imported into the United States, before the non-intercourse act, re-exported to a Danish island, there sold to a merchant of that place, and thence exported to New Orleans, during the operation of that act of congress, were liable to forfeiture, under that law.

An information in the admiralty for a forfeiture, must contain a substantial statement of the offence. A general reference to the provisions of the statute, is not sufficient.[1]

If the information be defective in that respect, the defect is not cured, by evidence of the facts omitted to be averred in the information.

The decree must be *secundum allegata*, as well as *secundum probata*.[2]

This was an appeal from the sentence of the District Court for the district of Orleans (exercising the jurisdiction of a circuit court of the United States), condemning the schooner Hoppet and her cargo, as forfeited to the United States, under the act of congress of March 1st, 1809 (2 U. S. Stat. 529), entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes." The 4th section of that act makes it unlawful "to import into the United States or the territories thereof, from any foreign port or place whatever, any goods, wares or merchandise whatever, being of the growth, produce or manufacture of France, or of any of her colonies or dependencies," or of any country in the possession of France. By the 5th section, it is enacted, "that whenever any article or articles, the importation of which is prohibited by this act, shall, after the 20th of May, be imported *into the United States, or the territories thereof, contrary to the true *390] intent and meaning of this act," such articles, as well as all other

(*a*) February 19th, 1813. Absent, Livingston and Todd, Justices.

[1] The Little Charles, 1 Brock. 347.

[2] United States *v.* Crates of Earthenware, 3 Wheat. 232; The Clement, 2 Curt. 363; The Eddy, 5 Wall. 481; Pettingill *v.* Dinsmore, 2 Ware 208; The Uncle Sam, 1 McAllister 77; The Fashion, 6 McLean 195; The Rhode Island, Olcott 505; Davis *v.* Leslie, 1 Abb. U. S. 123.

articles on board the same ship or vessel belonging to the owner of such prohibited articles, shall be forfeited." And by the 6th section, it is enacted, "that if any article or articles, the importation of which is prohibited by this act, shall, after the 20th of May, be put on board of any ship or vessel," "with intention to import the same into the United States, or the territories thereof, contrary to the true intent and meaning of this act, and with the knowledge of the owner or master of such ship or vessel," "such ship or vessel shall be forfeited."

The information against the vessel did not aver that the goods were put on board the vessel with intention to import the same into the United States, or the territories thereof, contrary to the act, with the knowledge of the owner or master of the vessel; nor did the information against the cargo state that such of the goods as were not prohibited belonged to the owner of the prohibited goods; but both informations averred generally that the goods were imported contrary to the 4th, 5th and 6th sections of the act.

It appeared from the evidence and admissions in the case, that the wines, which constituted the principal part of the cargo, were the produce of France, and had been shipped from New York to the Danish island of St. Bartholomews, where they were purchased by a merchant of that place and shipped to New Orleans. It did not appear certainly, whether they had been imported into New York, since the 20th of May, referred to in the act of congress.

Harper, for the appellants, contended, that it was probable, from all the circumstances, that the wines had been imported into the United States, before the prohibition, and if so, they had become incorporated with the general commerce of the country, and had lost their national character as French produce. He also insisted on the defect in the informations, as stated above.

**Pinkney*, Attorney-General, and *Law*, contrà.—The letter of the law is too plain to admit of construction. These wines never could [*391 cease to be the produce of France. They were imported from a foreign place, into a territory of the United States, during the prohibition by law. If they had acquired an American character, it was lost, by receiving the drawback. It does not appear, that they were imported into New York before the prohibition. If they had been, the proof was so easy, that the want of it creates the strongest presumption that the fact was not so.

The intent is only to be known by the act of the owners. They were bound to know the laws of the country to which they were trading. It is sufficient for the United States, to prove a knowledge that the goods were put on board for that voyage.

February 27th, 1813. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This is an appeal from a sentence of the court for the district of Orleans, condemning the schooner Hoppet and her cargo, as forfeited to the United States, for violating the non-intercourse law.

In the district court, two informations were filed by the attorney for the United States, one claiming the ship as being forfeited, and the other claiming the cargo. Objections have been made to each of these informations, which will be separately considered.

The information against the vessel charges, in substance, that while the act, entitled "an act to interdict commercial intercourse," &c., was in force, certain goods, of the growth, produce or manufacture of France, were imported into the United States, to wit, into the port of New Orleans, in the said vessel, from some foreign port or place, to wit, from St. Bartholomews, contrary to, and in violation of the 4th, 5th and 6th sections of the act. By reason of which, and by virtue of the act of congress, entitled "an act," &c., the said vessel, her tackle, apparel and furniture have become forfeited to the United States.

*392] *The charge contained in this information, and the only charge it contains is, an importation into the United States of certain prohibited articles, while the prohibitory act was in force. How far does this crime affect the vessel? This question must be answered by the law. The 6th section of the act enacts, in substance, that if any article, the importation of which is prohibited, shall be put on board of any ship, &c., with intention to import the same into the United States, or the territories thereof, contrary to the true intent and meaning of this act, and with the knowledge of the owner or master of such ship, &c., such ship, &c., shall be forfeited.

This is the only section of the act which imposes a forfeiture on the vessel. It will be perceived, that the crime consists in the prohibited articles being laden on board a ship, with intent to be imported into the United States, and with the knowledge of the owner or master of the vessel. A union of a lading, with the intention to import, and with the knowledge of the owner or master, is necessary to constitute the crime. Without these essential ingredients, the particular offence, which alone incurs a forfeiture, cannot be committed. In the information under consideration, neither of these offences is charged. It is neither alleged that the prohibited goods were put on board the ship, with intention to be imported into the United States, nor with the knowledge of the owner or master.

The information against the cargo charges, in substance, that certain prohibited articles, and certain other articles, not stated to be prohibited, were brought into the United States, to wit, into the port of New Orleans, while the act, entitled "an act to interdict commercial intercourse" &c., was in force, from some foreign port or place, by reason of which, and by virtue of the act, the whole cargo of the Hoppet has become forfeited. The 5th section of the act under which this prosecution was sustained, inflicts forfeiture on the prohibited articles imported contrary to law, and also on

*393] "all other articles on board the same ship or vessel, boat, *raft or carriage, belonging to the owner of such prohibited articles. The innocent articles are liable to forfeiture only where they belong to the owner of the prohibited articles. It is this association, and this alone, which constitutes their crime. Their being in the same vessel exposes them to no forfeiture, unless they belong to the same person. In the case under consideration, the information does allege that the innocent and the prohibited articles did belong to the same person.

The first question made for the consideration of the court is this: will this information support a sentence of condemnation pronounced against the vessel and the innocent part of the cargo? That the information states a case by which no forfeiture of the ship or the innocent part of the cargo has been incurred, unless its defectiveness be cured by the allegation that

the act was done contrary to, and in violation of the provisions of the statute, has been already fully shown. It is not controverted, that in all proceedings in courts of common law, either against the person or the thing, for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independently of this allegation, a case be stated, which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offence. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offences against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession. Does this rule apply to informations in a court of admiralty?

*It is not contended, that all those technical niceties, which are unimportant in themselves, and standing only on precedents of which the [*394
reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offence upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents, to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offences against municipal law.

It is, upon these and other reasons, the opinion of the court, that the information is not made good by the allegation that the offence was committed against the provisions of certain sections of the act of congress.

Is it cured by any evidence showing that, in point of fact, the vessel and cargo are liable to forfeiture? The rule that a man shall not be charged with one crime, and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced. The reasons for this rule are, 1st. That the party accused may know against what charge to direct his defence. 2d. That the court may see with judicial eyes that the fact, alleged to have been committed, is an offence against the laws, and may also discern the punishment annexed by law to the specific offence. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is, therefore, a maxim of the civil law, that a decree must be *secundum allegata* as well as *secundum probata*. It would *seem to be a maxim essential to the due admin- [*395
istration of justice in all courts.

It is the opinion of the court, that this information will not justify a sentence condemning the schooner Hoppet and that part of her cargo which is not alleged to be of the growth, produce or manufacture of either France or Great Britain, or the dependencies of either of those powers, whatever the fact may be.

There are certain wines imported in this vessel, alleged to be of the

growth, produce, or manufacture of France. These wines were exported from the United States to St. Bartholomews, where they were purchased by the consignee and shipped to New Orleans. It is contended, that having been imported into the United States, previous to the passage of the non-intercourse law, their exportation and re-importation does not subject them to the penalties of that law. But the court is unanimously of opinion, that they come completely within the provisions of the act of congress. It is the opinion of the court, that there is no error in that part of the sentence of the district court of Orleans, which condemns the wines in the information mentioned as forfeited to the United States, but that there is error in that part of the sentence which condemns the schooner Hoppet and the residue of her cargo.

This court doth, therefore, adjudge and order, that so much of the sentence of the district court as condemns the schooner Hoppet and the thirty-five hogsheads of molasses, five barrels of molasses, twelve dozen of cocoa-nuts and twelve pounds of starch, part of the cargo of the said schooner, be and the same is hereby reversed and annulled; and the said sentence, as to the residue of the cargo, is in all things affirmed.

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*396] *Mutual Assurance Society *v.* Korn and Wisemiller. (*a*)

Mutual insurance company.

The proprietors of buildings in Alexandria, insured by the society, were bound, by the act of assembly of Virginia, passed in 1805, and the subsequent regulations of the society, to pay an additional premium upon the increased rate of hazard, according to the new regulations of 1805.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

The Mutual Assurance Society against fire, &c., was incorporated by an act of the legislature of Virginia, in 1795. According to the original plan of the institution, the houses in the towns and country were blended together in one general mass, and were mutually pledged to each other, to make good the losses which might be respectively sustained by fire. In January 1805, the legislature of Virginia, at the request of the society, passed a law changing the original plan of the institution, by separating the town buildings from those in the country, and making the town buildings liable only for town losses, and the country buildings for country losses. This law directed that there should be a re-valuation of the buildings which had been previously insured; and authorized the society, as in the first instance, to fix the rates of hazard, and make such by-laws, rules and regulations as they might think proper. The society was authorized to recover its debts, by motion, in a summary manner.

Under the act of 1805, the society made a new tariff of rates of hazard. The houses of the defendants were re-valued under the act. The re-valuation was less than the original valuation; but the rate of hazard, or in other words, the premium for the insurance, was increased under the new regulation.

*397] *By the third section of a by-law of the society, made in January 1805, under the authority of their original act of incorporation and of

(*a*) February 16th, 1813. Absent, Washington, Justice.

the act of 1805, it is enacted, "that if the re-valuation of any building shall prove it to be of less value than that at which it was insured, there shall be no demand against the society of restitution of any part of the premium which may have been paid, and the proprietor of such building shall pay the additional premium (if the materials of which his building be erected, or its contiguity require it) which, according to the new rates of hazard, ought to be paid."

In July 1805, the defendants, Korn and Wisemiller, agreeable to a form prescribed by the society, made a declaration, under their hands and seals, as follows: "We do hereby declare and affirm, that we hold the above-mentioned buildings, with the land on which they stand, in fee-simple, and that they are not, nor shall be insured elsewhere, and that we will abide, observe and adhere to the constitution, rules and regulations, which are already established, or may hereafter be established by a majority of the insured, present in person or by representatives, or by the majority of the property insured, represented either by the persons themselves, or their proxy duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society; or which are or hereafter may be established by the president and directors of the society." To this declaration, were annexed a plat, description and new valuation of the buildings insured. The buildings had been originally insured by the defendants in the year 1796.

The sum now claimed of the defendants was for the additional premium arising out of the increased rates of hazard, according to the new regulations, made in January 1805.

Swann, for the plaintiffs in error.—This case differs from that of *Atkinson* (6 Cr. 202), which was for an additional premium occasioned *by the increased valuation of the building—this is for the additional premium upon the new rates of hazard. [*398

In the former case between these same parties (6 Cr. 192), it was decided by this court, that the proprietors of houses in Alexandria, still continued members of the society, notwithstanding their separation from the state of Virginia, and were bound by all the by-laws and regulations of the society.

The only remaining question, is, whether the defendants are liable for the new rates of premium? It was just, that the old members and the new should stand on the same ground, and pay the same rates of premium, where the risk was the same. This point has never been disputed in Virginia.

C. Lee, contrà.—The former case has settled the point, that the defendants are bound by their original contract in 1796. The legislature had no right to alter or vacate that contract. There was nothing unjust or hard in the case. The additional premium ought to be confined to cases of excess upon re-valuation.

Swann, in reply.—The act of assembly of 1805 was passed at the request of the society, of which the defendants were members, and bound by the acts of the majority.

March 3d, 1813. JOHNSON, J., delivered the opinion of the court, as follows:—In the case decided between Atkinson and these plaintiffs, February term 1810, the question arose on the construction of the 7th section of

the act of 1805, and the additional premium in that case was imposed upon a re-valuation, without relation to a change in the rates of premium, but resulting from the increased valuation. In this case, the sum demanded arises from the changes made in the rates of premium, arising from a *399] *variation of risk; to equalize which the 8th article of the present rules of the society requires an additional per-centage to be paid by the present members of the company, in conformity to what is to be imposed upon subsequent applicants for insurance. And it is contended, that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance.

In general, this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided between these same parties in February 1810. It is there laid down, and on reflection we are confirmed in the opinion, that in the capacity of an individual of the body corporate, the defendants are bound by the by-laws of the society, so far as is consistent with the nature of its institution. This case is within the 4th section of the 8th article of those by-laws, and therefore, the judgment below ought to have been for the plaintiffs.

Judgment reversed.

Webster and Ford *v.* Hoban. (*a*)

Auction.—Defaulting purchaser.

Upon a sale of land at auction, if the terms be, that the purchaser shall, within thirty days, give his notes, with two good indorsers, and if he shall fail to comply, within the thirty days, then the land to be resold on account of the first purchaser, the vendor cannot maintain an action against the vendee, for a breach of the contract, until a re-sale shall have ascertained the deficit, although the vendee should instruct an attorney to draw a deed, and insert his name as purchaser.

Error to the Circuit Court for the district of Columbia, in a special action on the case, by the plaintiffs in error, against the defendant in error, for not paying the purchase-money for a house sold by the plaintiffs to the defendant, at public auction.

The premises were publicly advertised, and set up at auction, by a licensed auctioneer. On the day of sale, certain written articles, purporting to exhibit the terms, were read aloud by the auctioneer, in the presence and hearing of the defendant and others assembled upon that occasion, and the paper was also handed round and read by those present. Of those articles, three only require notice.

*400] *Art. 1st declares that the highest bidder shall be the purchaser. Art. 3d requires that the purchaser should secure the purchase-money, with interest included, by his promissory notes, with two approved indorsers, payable in six and twelve months. Art. 5th declares that the purchaser shall be allowed "thirty days to comply with the 3d article, at which time (in case of compliance) he shall receive a good and complete title to the property. On failing to comply, within the thirty days, the property then to be resold on account of the first purchaser."

(*a*) February 24th, 1813. Present, all the judges, except Todd, Justice.

The premises were struck off to the defendant, as the highest bidder, at the price of $4000 ; whereupon, the auctioneer, in the presence of the defendant, signed a certificate, at the foot of the articles of sale, declaring him to be the purchaser at that price.

An attorney was employed to draw a deed of bargain and sale, and received instructions for that purpose, both from the plaintiffs and defendant ; the draft of the deed, with blanks for the date and the name of the grantee, was presented to the defendant, and left with him for inspection ; after examining it, he returned it to the attorney, requesting him to insert his, the defendant's, name in the proper blanks, which he accordingly did. This draft of the deed recited the title of the plaintiffs, and that the defendant, being the highest bidder, had purchased the premises at the sum of $4000, which he had secured to be paid to the plaintiffs, according to the terms of sale.

The breach of the agreement alleged in the declaration, was, that the defendant had failed to give his promissory notes, within the thirty days, or at any time afterwards. The court below decided, that the plaintiffs could maintain no action upon the contract, without first resorting to a resale, and ascertaining the *deficit*.

Jones, for the plaintiffs in error, contended, 1. That the remedy by a resale, was cumulative, *and did not take away the right of action for a breach of the original contract. 2. That the draft of the deed [*401 (as to its collateral effect, as written evidence of the agreement) having been authenticated by an act equivalent to signing, imported a substantive and positive agreement to go on with the contract, and to complete the purchase, and was not subject to be explained or controlled by the original terms.

The authority to contract, he said, might be by parol, although the contract must be in writing. Roberts on Frauds 112 ; Sugden on Vendors 56. Hoban gave the attorney verbal authority to draw the deed, which amounts to an agreement in writing signed.

There was no argument for the defendant in error.

March 3d, 1813. Livingston, J., delivered the opinion of the court, as follows :—If there ever existed a valid agreement between these parties, in relation to the house in question, on which the court gives no opinion, the terms of it must be sought for in the articles exhibited by the auctioneer, at the time of sale. Of these, two only bear on this case. These were, "that the purchaser should secure the purchase-money, with interest, by his promissory notes, with two approved indorsers, payable in six and twelve months :" —and "that the purchaser should be allowed thirty days to comply with these terms, at which time, in case of compliance, he was to receive a good and complete title to the property, and on failure to comply, within the thirty days, the property was then to be resold on account of the first purchaser.

The plaintiffs offered no evidence of any resale, or of any deficiency arising thereon, but contended, that the remedy by a resale was merely cumulative, and did not take away the right of action against the defendant, for his violation of the contract. Such is not the opinion of this court.

The vendee, by the terms of sale, had an option of taking the estate, after
*402] it was bid off to him, and in case of refusal, of having it sold again *on his account. It might have produced more than on the first sale, in which case, the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have sold for less, and then, by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be, if this action proceeds, to have damages assessed against him, by some uncertain and arbitrary or unsatisfactory rule, which might be adopted by a jury. Of these advantages, which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him. The court is further of opinion, that nothing which was done after the sale, at all varied the right of the parties. The judgment below is affirmed, with costs.

Judgment affirmed.

Maryland Insurance Company *v.* Wood. (*a*)

Blockade.

The letter of Mr. Merry to the secretary of state, of the 12th of April 1804, extended to the island of Curaçoa, the order of the lords commissioners of the admiralty, of the 5th of January 1804, respecting the blockade of Martinique and Guadaloupe.

March 3d, 1813. Error to the Circuit Court for the district of Maryland, in an action of covenant on a policy upon the schooner William and Mary, "at and from Baltimore to Laguira, with liberty of one other neighboring port, and at and from them, or either of them, back to Baltimore:" "warranted by the assured to be an American bottom, proof of which to be required in the United States only."

The former judgment of the circuit court, in this case, having been reversed (6 Cr. 29), and the cause remanded for a new trial, the verdict and judgment were again in favor of the original plaintiff.

The defendants took only one bill of exceptions, which stated the execution of the policy, the sailing of the vessel, with proper documents as an American bottom, from Baltimore, on the 8th of March 1805, upon the voyage insured; her arrival off Laguayra on the 24th of the same month, where she remained three days, laying off and on, vainly endeavoring to
*403] obtain permission to enter the port, and on the 31st, sailed towards the port of *Amsterdam, in the Island of Curaçoa, by the direct and accustomed route, with a view and intention of ascertaining, by inquiry of British ships of war, or other vessels, whether the port of Amsterdam was then in a state of blockade, and to enter it, if it should not be blockaded, but if it should be blockaded, not to attempt to enter it, but to proceed to St. Thomas or Porto Rico. That Amsterdam was a neighboring port to Laguayra, being distant about 147 miles. That when she approached Amsterdam, being distant about 30 miles, the master discovered a British vessel, at the distance of 21 miles, whereupon, he altered the course of the schooner, and stood directly towards the British vessel, for the purpose of inquiring whether Amsterdam was still in a state of blockade; that while so standing for the British vessel, which was a frigate then actually supporting the blockade of the port of Amsterdam, the schooner was captured by the

frigate, and sent into Jamaica, and there condemned for breach of the blockade of the port of Amsterdam, whereby she was wholly lost to the plaintiff. That on the 16th of May 1805, the plaintiff having received intelligence of the capture, abandoned the vessel, in due time, to the underwriters, who refused to accept the abandonment.

That on the 27th of October 1803, the government of the United States made to the British government, through its *chargé d'affaires* in the United States, a representation on the subject of a blockade, then recently notified, of the islands of Martinique and Guadaloupe; which representation is set forth at large in the bill of exceptions, being a letter from Mr. Madison, then secretary of state, to Mr. Thornton, the British *chargé d'affaires*, dated the 27th of October 1803.

That on the 5th of January 1804, the British government, in consequence of that representation, issued an order to its commanding naval officer in the West Indies, and to its courts of vice-admiralty there, relative to the blockade of Martinique and Guadaloupe; which order is as follows:

"Admiralty office, 5th January 1804.

"SIR:—Having communicated to the lords of the admiralty Lord Hawkesbury's letter of the 23d ult., inclosing the *copy of a dispatch, which his lordship had received from Mr. Thornton, his majesty's *chargé* [*404 *d'affaires* in America, on the subject of the blockade of the islands of Martinique and Guadaloupe, together with the report of the advocate-general thereupon, I have their lordships' commands, to acquaint you, for his lordship's information, that they have sent orders to Commodore Hood not to consider any blockade of those islands as existing, unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them; and that they have also sent the necessary directions on the subject to the judges of the vice-admiralty courts in the West Indies and America. I am, &c. EVAN NEPEAN."

"George Hammond, Esq."

That on the 12th of April 1804, the British government, by its minister plenipotentiary in the United States, communicated the aforesaid order to the government of the United States, who caused it to be immediately published in the public newspapers.

That on the same 12th of April 1804, the said British minister plenipotentiary officially made known to the government of the United States, that the siege of the island of Curaçoa had been converted into a blockade, which communication was as follows:

Mr. Merry to Mr. Madison.

"Washington, April 12th, 1804.

"SIR:—I have the honor to acquaint you, that I have just received a letter from Rear Admiral Sir John Duckworth, commander-in-chief of his majesty's squadron at Jamaica, dated the second of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for his majesty's service, to convert the siege, which he lately attempted of Curaçoa, into a blockade of that island.

*I cannot doubt, sir, that this blockade will be conducted conformably to the instructions which (as I have the honor to acquaint you in another letter of this date) have been recently sent on this subject, to the commander-in-chief of his majesty's forces, and to the judges of the vice-admiralty courts in the West Indies, should the smallness of the Island of Curaçoa still render necessary any distinction of the investment being confined to particular ports. I have the honor to be, &c. ANT. MERRY."

That Travers, the master of the schooner William and Mary, heard a report at Baltimore, before he sailed, that Amsterdam was in a state of blockade; and that he was informed, before he sailed from Baltimore, by the master of an American vessel, that about four months before the time of giving that information, he arrived with his vessel, near the port of Amsterdam, and there met with a squadron of British ships of war, then blockading that port, and was warned off by the commander of the squadron, with his register indorsed in the usual manner. That Travers, in the course of his voyage fell in with a strong French squadron in lat. 15, long. 63, which was sailing westward. That the port of Amsterdam is in lat. 11 deg. 55 min., long. 68. That while laying off Laguayra, to endeavor to obtain permission to enter the port, or to anchor his vessel, he was informed by a merchant at Laguayra, to whom he had been introduced by a letter, and through whom he made application for permission as aforesaid, that the port of Amsterdam was then free from blockade; and was advised by the said merchant to proceed thither with his vessel—that the port of Laguayra and all the ports on the Spanish main were then shut against foreigners, whereby he was prevented from going on shore and from making inquiries, otherwise than by writing from his vessel to some person on shore.

That the island of Buenos Ayres was then a dependency of Curaçoa, distant from it about twenty miles east, and *is a small island having
*406] no port, except a road-stead about the middle of its length, on the east side, where there was a small battery and military post. That the cruising ground of vessels blockading Curaçoa, was between that island and Buenos Ayres, which latter was included in the blockade, as were also all the other ports of the island of Curaçoa. That Travers did not attempt to enter the port of Amsterdam, nor sail towards it, with an intention of entering it, if blockaded, but merely for the purpose of ascertaining, by any lawful and proper means in his power, whether it was still in a state of blockade, of entering it, if it was not, and of proceeding elsewhere, if it was.

That when he sailed from Laguayra as aforesaid, he had, from the facts and circumstances above mentioned, reasonable ground of belief that the blockade had ceased, and had no means of obtaining any further information on the subject at any neighboring port or place.

Whereupon, the plaintiff prayed the court to instruct the jury, that if they believed the matters so given in evidence by him, then his right of recovery in this action is not affected by the conduct of Travers in proceeding as aforesaid from Laguayra towards Amsterdam, for the purposes aforesaid, which instruction the court gave, and also the further direction, that if they should believe that Travers intended, while at Laguayra, to violate the blockade of Amsterdam, and attempted it, by sailing towards that port, and within the limits of the cruising ground; in such case, his conduct was unlawful;

and the defendants were thereby discharged from any responsibility upon the policy. To this instruction, the defendants excepted, and brought their writ of error.

Martin, for plaintiffs in error.—When this case was here before, it was erroneously supposed, that the order of the 5th of January 1804, applied to the island of Curaçoa, as well as to those of Guadaloupe and Martinique. It was not until the 12th of April following, that the blockade of Curaçoa was notified to our government by Mr. Merry, who gives *his opinion that the former order would be extended to this blockade. But it is [*407 merely his opinion; he had no authority to bind his government upon that subject; and his opinion could not justify the master of this vessel in going to the blockading squadron for information. If he acted upon the information of the minister, he acted at his peril. 5 Rob. 74, 234; 1 Ibid. 144; *The Neptunus*, 2 Ibid. 92. He ought to have called at Buenos Ayres for information. Park 408–9; Marshall 321.

Livingston, J., thought this case could not be distinguished from the one which was here before. It appears to be only an application to this court to reverse its own decision.

Story, J., thought the letter of Mr. Merry was conclusive upon the subject.

Johnson, J.—It does not appear to be so clear a case as the other.

Marshall, Ch. J., had formed no opinion upon this case. It seemed to him, to be different from the other.

Harper, for the defendant in error, requested that the opinion of the court might be given in writing.

Marshall, Ch. J.—I understand the opinion of the court to be, that the letter of Mr. Merry puts the case on the same ground as if the blockade had been of Martinique or Guadaloupe.

Harper.—That is, that it extended to this case the benefit of the order of the 5th of January 1804.

Marshall, Ch. J.—I so understand it.

Livingston, J., afterwards delivered the opinion of the court in writing, as follows:—It is the opinion of the court, that the communication of the British minister to the American government, on the 12th of April 1804, relative to the blockade of Curaçoa, furnished a sufficient excuse for the assured's proceeding *toward that island, for the purpose of inquiring [*408 as to its continuance, and that his doing so, was no violation of his neutrality. The court does not mean to be understood as giving any opinion on the effect of such conduct, if no such communication had been made. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

Ferguson *v.* Harwood. (*a*)

Exemplification of record.— Variance.—Pleading.

If the clerk of a court certify at the foot of a paper, purporting to be a record, "that the aforegoing is truly taken from the record of proceedings" of his court; and if the judge, chief justice, or presiding magistrate, certify that such attestation of the clerk is in due form of law, it is to be presumed, that the paper so certified is a full copy of all the proceedings in the case, and is admissible in evidence.[1]

But if the writing produced, do not purport to be a record, but a mere transcript of minutes extracted from the docket of the court, it is not admissible in evidence.[2]

A variance is immaterial, which does not change the nature of the contract declared on.[3]

If a bond of conveyance (then in suit) be assigned, and the assignor agree to refund to the assignee the value thereof, if the property should not be recovered on the bond, it is sufficient for the assignee, in a suit against the assignor, upon his promise to refund, to aver that the property was not recovered in the suit which was pending when the agreement was made to refund.

Error to the Circuit Court for the district of Columbia, sitting at Washington, in an action of *assumpsit*, brought by Harwood against Ferguson, to recover the value of three hogsheads of tobacco, upon the following agreement (after describing the hogsheads by their numbers, marks and weights), viz:

"Upper Marlborough, June 16th, 1808.

"Received of Walter W. Harwood, as one of the administrators of William Eversfield Berry, deceased, in part of my claim against said estate, the three hogsheads of crop tobacco as above stated, to be allowed p. ct. the highest six months' credit price at this place, during that time after the rescinding of the embargo. I have put into the hands of the aforesaid Walter W. Harwood a bond of conveyance, given by Elisha Berry to his son, William E. Berry, dated March 14th, 1798, for the purpose of recovering the property therein mentioned, now depending in a suit in Prince George's county court. If the property is not recovered in the aforesaid bond of conveyance, I hereby bind myself, my heirs, executors and administrators to return the above three hogsheads of tobacco, with legal interest, or the value thereof in money, to the aforesaid Walter W. Harwood, or to his heirs or assigns.

(Signed) Enos D. Ferguson."

*409] *Upon this agreement, the plaintiff declared, that whereas, the said Walter, as one of the administrators, &c., on ——, at ——, delivered to the said Enos, in part of his claim, &c., three hogsheads of crop tobacco (describing them), he, the said Enos, to be allowed per cent. therefor the highest six months' credit price, &c. And whereas also, the said Enos, at ——, on ——, put into the hands of the aforesaid Walter, a bond of conveyance, &c., for the purpose of enabling the said Walter to recover, and of recovering the property in the said bond mentioned, a suit for the recovery whereof was then depending in the county court of Prince George's county, in the state of Maryland, the said Enos, then and there, in consideration of

(*a*) February 24th, 1813. Absent, Todd, Justice.

[1] Edmiston *v.* Schwartz, 13 S. & R. 135; Reber *v.* Wright, 68 Penn. St. 471.

[2] Leveringe *v.* Dayton, 4 W. C. C. 698.

[3] Conant *v.* Wills, 1 McLean 427; Drake *v.* Fisher, 2 Id. 69; Harper *v.* Smith, 1 Cr. C. C. 495.

the premises, and the delivery of the three hogsheads of tobacco as aforesaid, promised and undertook, and bound himself, his heirs, executors and administrators, to return the three hogsheads of tobacco aforesaid, with legal interest, or the value thereof in money, to the aforesaid Walter, or to his heirs or assigns, if the property in the aforesaid bond of conveyance mentioned was not recovered in the suit then as aforesaid depending for the recovery thereof; and the said Walter avers, that the property in the said bond mentioned was not recovered from the said Elisha Berry in the suit so as aforesaid depending for the recovery thereof, but that judgment was given for and in favor of the said Elisha in said suit, whereof, and of all which premises, the said Enos afterwards had notice, whereby he became liable to return the said tobacco, with legal interest, or to pay the value thereof in current money of the United States, which value the said Walter avers to be $180, whereof the said Enos had notice, &c. There was also a count in the declaration for money had and received.

Upon the trial of the general issue, the defendant, Ferguson, took three bills of exception. The first bill of exception was to the admission in evidence of an exemplification of the record of a suit in Prince George's county court, which was certified as follows:

"I hereby certify that the aforegoing is truly taken from the record of proceedings of Prince George's *county court; and in testimony [*410 thereof, I do hereto subscribe my name, and affix the seal of the said county court, this third day of January, in the year of our Lord one thousand eight hundred and eleven.

JOHN READ MAGRUDER, Jr., Clk."

The seal of the county court was annexed, with the regular certificate of the chief judge of the court, that the attestation of the clerk was in due form of law.

The objection to this exemplification was, that it did not appear by the certificate of the clerk, to be a full copy of the record of all the proceedings in the case. The practice of the clerk of the circuit court for the county of Washington, in the district of Columbia, was to certify that the "foregoing is truly taken and copied from the proceedings," &c.

The second bill of exception stated, that the plaintiff having read to the jury the evidence mentioned in the first bill of exception, and which had been permitted by the court to be read, the defendant offered to read a copy of the docket-entries of Prince George's county court, which the clerk had also certified to be truly taken from the proceedings of that court. To this certificate, was annexed the seal of the court and a certificate by the chief judge of the court, that the attestation of the clerk was in due form of law.

The third bill of exception stated, that after the plaintiff had read the agreement to the jury, the defendant objected to its admissibility in evidence upon the first count in the declaration, because it varied from the agreement set forth in that count. But the court was divided in opinion, and the agreement was read.

The verdict and judgment were for the plaintiff, whereupon, the defendant brought his writ of error.

F. S. Key, for the plaintiff in error, contended, 1. That the record of Prince George's county court ought not to have been admitted as evidence in this cause, because the clerk of that court had not certified it to be a full record of all the proceedings in the case, *nor even that it was a copy *411] of anything, but had merely stated, that "the foregoing was truly taken from the record of proceedings in that court."

2. That the court ought to have admitted the copy of the docket-entries of Prince George's county court to be read in evidence, because they were certified by the clerk in the same manner to be "truly taken" from the same proceedings.

3. That the court ought not to have admitted the agreement in evidence, to support the first count in the declaration, because it varied from the agreement set forth in that count, in the following particulars.: 1. The agreement produced in evidence states that the defendant in error, Harwood, should be allowed the highest credit price, &c., for the tobacco, whereas, the agreement set forth in the count is, that the plaintiff in error, Ferguson, should be allowed the highest credit price, &c., for the tobacco: and 2. The agreement produced in evidence states that the plaintiff in error was to return the tobacco, if the property should not be recovered "in the aforesaid bond of conveyance;" but the count charges that the plaintiff in error, Ferguson, agreed to return the tobacco, if the property, in the bond of conveyance mentioned, should not be recovered in the suit then pending for the recovery thereof. In support of this bill of exceptions, he cited the following cases: 1 T. R. 240: 2 Bos. & Pul. 116; 4 T. R. 560; 2 East 2, 450.

J. Law, for the defendant in error, on the first exception, cited 2 Harris's Entries 221, 227, 263, to show that the clerk's certificate annexed to the transcript of the record of Prince George's county court, was in due form, according to the practice of the courts in Maryland.

On the second exception, he cited Peake's Law of Evidence, 34, 55, 66, to show that the docket-entries of one court were not evidence in another court.

On the third exception, to show how far it is necessary to set forth the agreement in the declaration, he *cited *Clarke* v. *Marsden*, 6 East 564; *412] *Frith* v. *Gray*, in the note to *Drewry* v. *Twiss*, 4 T. R. 558; *Richard* v. *Simonds*, 3 Wils. 40; *Bristow* v. *Wright*, 2 Doug. 640.

And to show that words of surplusage are to be rejected, he cited 2 H. Bl. 113; *King* v. *Pippett*, 1 T. R. 235; 4 Williams's Dig. 707. To show that omissions may be supplied, he cited *King* v. *Beach*, Cowp. 229; *King* v. *May*, 1 Doug. 183. And to show that a variance in an immaterial averment is not fatal, he cited *Peppin* v. *Solomans*, 5 T. R. 496; *Drewry* v. *Twiss*, 4 Ibid. 558.

March 5th, 1813. Story, J., delivered the opinion of the court, as follows:—Several exceptions have been taken in this cause. The first proceeds on the ground that the record was not authenticated by the clerk, in due form of law. The statute of the United States of the 26th of May 1790, declares, that the records and judicial proceedings of the courts of any state shall be proved and admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be

a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form of law. It is conceded, that such a certificate accompanied the record objected to. It is, therefore, a case within the words of the law, and the court below were precluded from receiving any other evidence to show that the attestation was not in due form of law. The record so authenticated was properly admitted in evidence. Even if the points had been open, the court are not satisfied, that any material variance existed between the attestations of the different clerks.

The court are also of opinion, that the second exception cannot be sustained. The writing produced did not purport to be a record; but a mere transcript of minutes extracted from the docket of the court. There is no foundation laid, to show its admissibility in the cause.

*The third exception has presented the chief difficulty which we have felt in deciding the cause. It is addressed to the variances between the declaration and the contract produced in evidence. The inducement of the declaration alleges, "that the said Walter, as one of the administrators of William E. Berry, deceased, on, &c., at, &c., delivered unto the said Enos, in part of his claim against the estate of the said William, three hogsheads of crop tobacco, &c., he, the said Enos, to be allowed per cent. therefor, the highest six month's credit price at the place aforesaid, during that time after rescinding the embargo." The contract produced in evidence is without the words "he the said Enos." There is, therefore, a literal variance, and its effect depends upon the consideration whether it materially changes the contract. [*413

In general, courts of law lean against an extension of the principles applied to cases of variance. Mistakes of this nature are usually mere slips of attorneys, and do not touch the merits of the case. Lord MANSFIELD has well observed, that it is extremely hard upon the party, to be turned round and put to expense from such mistakes of his counsel, and it is hard also upon the profession.

It will be recollected, that this does not purport, on the face of the declaration, to be a description of a written instrument, nor the recital of a deed or record *in hæc verbâ*. In respect to the latter, trifling variances have been deemed fatal: but as to the former, a more liberal rule has been adopted. In setting forth the material parts of a deed or other written instrument, it is not necessary to do it, in letters and words. It will be sufficient, to state the substance and legal effect. Whatever, however, is alleged should be truly alleged; a contract substantially different in description or effect would not support the averment of the declaration.

*In the case at bar, it is very clear, that the word "Enos" was by a mere slip inserted instead of "Walter." It is repugnant to the sense and meaning of the contract, that the creditor who received the tobacco at a stipulated price, in part payment of his debt, should allow to himself that price. From the nature of the transaction, the debtor must be entitled to the allowance. If the same words had been introduced into the written contract itself, they must have been rejected as nonsensical or repugnant, or have had imposed upon them a sense exactly the same as if the words had been "the said Walter." And a declaration which should altogether have omitted the words, or have given that legal sense, would have [*414

well supported an action. Can a different result take place, where the repugnancy is not in the contract, but in the declaration? A majority of the court are clearly of opinion, that it cannot. The words of a contract stated in a declaration, must have the same legal construction as they would have in the contract itself.

The context, manifestly, in this case, shows the repugnancy. It is impossible to read the declaration, and not to perceive, that the price is to be allowed to the debtor, and not to the creditor. Many cases have been cited, where the variance has been held fatal, but no one comes up to the present. The case of *Bristow* v. *Wright* (2 Doug. 665) is the strongest: there, the demise was alleged to be at a yearly rent, payable quarterly. The demise proved was without any stipulation as to the times of payment. The court held, that the demise laid and that proved were not the same. But if the demise had been truly laid, and the declaration had proceeded to allege that the rent was to be paid by the lessor to the lessee, we think that the action might well have been maintained, notwithstanding the repugnancy. That in effect would be the same as the present case.

In *King* v. *Pippet*, 1 T. R. 235, where the declaration set forth a precept, and improperly inserted the word "if," which made it conditional, the court rejected the word, and held the variance immaterial. The court said, it was impossible to read the declaration, and not to know what it should be. There are other cases to the like effect. We are, therefore, satisfied, that the variance is immaterial, because it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.

A second variance is supposed in the allegation that the promise was to
*415] return the tobacco or its value, if *the property in the bond of conveyance mentioned in the declaration was not recovered in the suit then depending for the recovery thereof; whereas, the contract produced in evidence contained no limitation to a recovery in that particular suit. We are satisfied, however, that the plaintiff has declared according to the true intent of the parties, as apparent on the contract. It could never have been their intention to postpone the right to a return of the tobacco or its value, beyond the time of a recovery or failure, in the suit then depending. Any other construction would have left the rights of the parties in suspense for an indefinite period, wholly inconsistent with the avowed objects of the contract. On the whole, it is the opinion of the court, that the judgment be affirmed, with costs.

Judgment affirmed.

Biays *v.* Chesapeake Insurance Company. (*a*)

Marine insurance.—Memorandum articles.—Salvage.

There cannot be a technical total loss of part of a cargo, consisting of memorandum articles, of only one species, such as hides.[1]

Nor are the underwriters liable for salvage upon such articles, under the clause which authorizes the insured to labor and travel for the preservation of the cargo, unless, perhaps, in a case where the salvage may have prevented an actual total loss of the cargo.

Error to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of insurance on hides, which, by the *memorandum* in the policy, were declared to be free from average, unless general. The policy contained the usual stipulation, "that in case of loss or damage, the assured shall labor, &c., for the preservation of the property, to the expenses of which the assurers will contribute." The voyage was to Amsterdam.

The vessel arrived at a place called "Niew Diep;" where, according to the usage of the trade, the hides were put into several lighters, to be sent to Amsterdam. One of these lighters sunk, but some of the hides contained in it were afterwards fished up and saved by the people of the place, for which a salvage of $3000 was allowed and paid. The rest were totally lost. This action was brought to recover for those totally lost, and for the salvage of those which were saved.

On a case stated, the judgment of the court below was for the defendants; on which the plaintiff brought his writ of error. [*416

Harper, for plaintiff in error, contended, 1. That where an insurance is made in gross, as in this case, upon a cargo consisting of a number of separate distinct things, there may be a total loss upon some of them, though the rest are saved; and 2. That as, consequently, the loss here upon the hides fished up would have been total, but for the labor and care of the assured, they are entitled to be reimbursed the expense, by the underwriters, under the stipulation in the policy on that subject; notwithstanding the declaration in the *memorandum*, exempting hides from particular average.

1. The obvious construction and meaning of the *memorandum* is, that where the cargo is divisible, there may be a total loss of part. The average loss mentioned is loss by deterioration. If one out of many bales of cloths should be lost, it would be a total loss of that bale. But if one piece in a bale should be damaged and lost, it would be an average loss, especially, as to *memorandum* articles. If a cargo should consist of 500 casks of wine, and 499 of them should be lost, one only being saved, this would be a total loss of the 499 casks. In the absence of all authority, we must resort to general principles. Such cases must have existed often; but no case is found in the books like the present. The inference is, that it must have been considered as a total loss.

2. The second point (as to the salvage), is, perhaps, a point of more difficulty; but it depends in part upon the first. Where the object of the expense is to prevent a total loss, the underwriters are liable. Here, the

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(*a*) February 24th, 1813. Absent, Todd, Justice.

[1] The authorities on this question are by no means uniform or consistent with each other, where the line of distinction is very narrow. They are reviewed by Mr. Justice Miller, in the Great Western Ins. Co. *v.* Fogarty, 19 Wall. 640.

salvage loss prevented a total loss. If a literal construction be given to the two stipulations in the policy, one would destroy the other. The *417] *assured are to labor to prevent a total loss; not for their own benefit, for they are insured, but for the benefit of the underwriters. The loss was of part of a lighter load of hides, some were fished up and saved, and salvage paid. No expense could arise respecting these hides, unless it would come under the name of average loss. The stipulation, therefore, to labor &c., would be void as to all these articles. The construction ought to be, that we will pay all expenses incurred, to prevent a greater than an average loss.

March 6th, 1813. LIVINGSTON, J., delivered the opinion of the court, as follows:—This is an insurance on hides, "warranted by the assured free from average, unless general." The declaration is for a total loss by perils of the seas, but it came out in evidence, that 3280 hides (the whole number insured being 14,565) were put on board of a lighter, to be transported from the vessel to their place of destination; that the lighter, in her passage to the shore, was sunk, by which accident, 789 of the hides, of the value of $4000, were totally lost, and the residue, to the number of 2491 more, were fished up and saved, at the cost of $6000, which was paid by the plaintiff. The hides thus saved were delivered to the plaintiff's agent, and sold on his account. The whole sum insured on the cargo of hides, by the defendants, was $25,000.

On this state of facts, it has been contended, that this insurance, although on perishable commodities, being in gross, on a cargo consisting of a distinct number of articles, there may be a total loss as to some of them, although others be saved, and that for the part of the cargo, thus totally lost, the underwriters are liable, notwithstanding the agreement respecting what are generally called *memorandum* articles. In support of this position, it is said, that the only intention of the parties, in coming to this agreement, was to obviate disputes concerning losses arising from the perishable nature of the goods insured, but that as this loss happened in another way, and is total as to the portion of the property in question, it ought not to be considered as excluded by the *memorandum*.

*418] *Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and, most probably, with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood, at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average.

It only remains, then, to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It has been considered as total, by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making, in

point of value, somewhat less than one-sixth part of the sum insured by this policy. If there were no *memorandum* in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once, that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of the cargo, consisting all of the same kind of articles, is lost, in any way whatever, and the residue (which in this case amounts to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that this must for ever be so, so long as a part continues to be less than the whole. This loss, then, being a particular loss only, and not resulting from a general average, the court is of opinion, that the defendants are not liable for it.

Having disposed of this point, it would seem as if much difficulty could not occur in deciding the other question, which has been made in this cause, and that is—whether the assured is not entitled to recover the *expenses which he was put to, in saving part of the hides which had [*419 sunk?

This liability is supposed to result from that clause in the policy, which authorizes the assured, "in case of any loss or damage, to sue, labor and travel for, in and about the defence, safeguard and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute, according to the amount of the sum insured." If this clause be construed with reference to what is most evidently its subject-matter, that is, a loss within the policy, and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable, that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy, to render them liable to contribute to such expenses. If a cargo be insured for a long voyage, against sea risks only, and a capture intervene the very day after the vessel leaves port, it is very clear, that the underwriter is not only not liable for such a loss, but that he derives an advantage from it, as his risk may be terminated thereby, and the whole premium be earned, and yet, if the construction now endeavored to be put on this clause should prevail, all the expenses of claiming a property, in which he had no interest, and which, if condemned, is a matter of indifference to him, and all the costs of pursuing it through an almost endless litigation, would be thrown, whether the pursuit were successful, or otherwise, on an insurer who had taken care to restrict his liability to losses by perils of the sea only. The court cannot subscribe to such an interpretation, when a more natural, rational and obvious one, and that, without departing from the letter of the instrument, presents itself, which is, that this clause can never apply but in such cases as would, if they happen, be losses (either partial or total) within the meaning *of the [*420

policy. We are, therefore, of opinion, that the underwriters not being answerable for the principal loss in this case, they cannot be so for the subsequent expenses which were incurred in recovering the property. The judgment of the court below is affirmed, with costs.

Judgment affirmed.

Stark *v.* Chesapeake Insurance Company. (*a*)

Naturalization.

It need not appear by the record of naturalization, that all the requisites prescribed by law for the admission of aliens to the rights of citizenship, have been complied with.[1]

Semble: That the judgment of the court, admitting the alien to become a citizen, is conclusive that all the pre-requisites have been complied with; or, that parol proof may be received in aid of the record.

Error to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of assurance, in which the goods insured were warranted to be American property, "proof of which to be required in the United States only." A loss by capture having taken place, the plaintiff offered an abandonment which was refused, wherefore, he brought this action:

To prove his citizenship, and support the warranty, he produced and read at the trial, an exemplification, duly authenticated, of the record of his naturalization, in the words following, viz:

"At a court of common pleas, held at York, for the county of York, on the third Monday of May, in the year of our Lord, one thousand eight hundred and four, before John Joseph Henry, Esquire, president, and his associate judges, &c., assigned, &c. The petition of John Philip Stark, late of Wetgenstein Berleburg, in the empire of Germany, was read to the court, setting forth that your petitioner has resided in the state of Pennsylvania five years, that he is now desirous of becoming a citizen of the United States, conformably to the act of congress in such case lately provided; your
*421] petitioner therefore prays of the *honorable court, that he may be admitted to citizenship, upon his complying with the requisites of the act aforesaid, and your petitioner will pray, &c.

John Philip Stark."

"Jacob Hostler appearing in court, and being duly sworn, says, that the petitioner above named has resided within the state of Pennsylvania five years and upwards; and during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

"Sworn and subscribed in open court, the 21st of May 1804. Jacob Hostler."

Charles W. Hartley."

(*a*) March 8th, 1813. Absent, Washington, Todd and Duvall, Justices.

[1] See Spratt *v.* Spratt, 4 Pet. 393; Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 245, Hunt, J.

"John Philip Stark, the above petitioner, appearing in open court, and being duly sworn, doth declare, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to Christein, the prince of Wetgenstein Berleburg, in the empire of Germany. JOHN PHILIP STARK."

"Sworn and subscribed in open court,
the 21st of May 1804.
CHARLES W. HARTLEY.'

"Whereupon, the court admitted the said John Philip Stark to become a citizen of the said United States, agreeably to the prayer of his said petition, and ordered all the proceedings aforesaid to be recorded by the clerk of the said court."

The plaintiff also proved, by parol evidence, that he, being a free white person, did reside within the limits and under the jurisdiction of the United States, to wit, in the state of Pennsylvania, at some time between the 18th day of June 1798, and the 14th day of April 1802, *viz., on the 1st day of October 1798, and there continued to reside, from that time until the 21st of May 1804. [*422

Whereupon, the court, at the prayer of the defendants, by their counsel, directed the jury, that the plaintiff had failed in proving the property insured under the policy, to be American property according to the warranty, and therefore, was not entitled to recover. To which instruction, the plaintiff took a bill of exception.

The act of congress of the 14th of April 1802 (2 U. S. Stat. 153), "to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject," requires, that the applicant should have made a previous declaration, before some court of record, of his intention to become a citizen, &c., three years before his admission; and that the court admitting such alien shall be satisfied, that he has resided in the United States five years at least, and within the state or territory where such court is at the time held, one year at least.

The act of 26th March 1804 (2 U. S. Stat. 292), dispenses with the previous declaration of intention, &c., as to such aliens, "being free white persons, as were residing within the limits, and under the jurisdiction of the United States, at any time between the 18th day of June 1798, and the 14th day of April 1802, and who have continued to reside within the same."

The objection made by the defendants' counsel to the record of naturalization of the plaintiff was, that it did not appear by the record, that the plaintiff had made a previous declaration of his intention to become a citizen, agreeable to the first provision of the act of 14th April 1802; nor that he was residing within the limits and under the jurisdiction of the United States, at any time between the 18th of June 1798, and the 14th of April 1802, and continued to reside therein, so as to be entitled to the benefit of the act of the 26th of March 1804. It was contended also, that parol evidence of these facts ought not now to be admitted, in aid of the record.

On the part of the plaintiff, it was contended: *1. That the decision of the court of common pleas for the county of York was con- [*423

clusive. That court had power and authority to admit aliens to the right of citizenship; and having admitted the plaintiff, the grounds of their decision cannot now be inquired into, nor the correctness of their judgment questioned. 2. That if the record of admission be not conclusive, yet it was competent for the plaintiff to prove now, by parol evidence, the facts which did, at the time he was admitted, entitle him to the benefit of the act of the 26th of March 1804.

Harper, for the plaintiff in error, and *Martin*, for the defendant in error, submitted the question arising in this case, without argument, to THE COURT, who, without giving a more particular opinion, pronounced the following judgment:—

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 circuit court erred, in directing the jury, that the plaintiff had failed in proving the property, insured under the policy, to be American property. It is, therefore, considered by the court, that the judgment of the circuit court be reversed and annulled, and the cause remanded to that court, to be further proceeded in according to law.

Judgment reversed.

The FORTITUDE. (*a*)

WILLIAM WILLIAMS and others, appellants, *v.* GEORGE ARMROYD and others, appellees.

Sentence of foreign tribunal.—Milan decree.

The sentence of a foreign tribunal, condemning neutral property, under an edict, unjust in itself, contrary to the law of nations, and in violation of neutral rights, and which has been so declared by the legislative and executive departments of the government of the United States, changes the property of the thing condemned.[1]

A sale by the authority of the captors, before sentence of condemnation, is affirmed by such sentence, and is good *ab initio*.[2]

A French tribunal, at Guadaloupe, had jurisdiction of property seized on the high seas, for breach of the Milan decree, and carried into the Dutch part of the island of St. Martins, and there sold by order of the Dutch governor of St. Martins, before condemnation, without any authority from the French tribunal at Guadaloupe.

The American owner cannot reclaim, in the courts of this country, his property which has been seized and condemned in a French court under the Milan decree.

THIS was an appeal from the sentence of the Circuit Court for the district of Pennsylvania, which dismissed the libel with costs.

*424] *The libel stated, that the schooner Fortitude, owned by Williams and others, citizens of the United States, having taken in a cargo of molasses, at Martinico, sailed, on the 20th of August 1809, for New London. That on the next day, she was piratically seized on the high seas by an armed schooner, showing no colors, but asserted to be from Guadaloupe, and carried into St. Martin's, where the master's papers were taken from him, and the vessel and cargo detained, as it was asserted, to await the event

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(*a*) February 25th, 1813. Absent, TODD, Justice.

[1] See Ex parte Watkins, 3 Pet. 206–7. [2] Jecker *v.* Montgomery, 13 How. 499, 517.

of a trial. That on the 9th of September, the prize-master left St. Martin's for Guadaloupe, with a copy of the schooner's papers, under pretence of causing proceedings to be instituted in the French court of admiralty in that island. That on the 23d of September, the master of the Fortitude went to St. Bartholomews, and on his return, was informed, that during his absence, the governor had ordered the vessel and cargo to be sold at public sale; which was done, and bought for the governor and one of his council, as the libellants believed. That immediately after the sale, the governor took possession of the vessel, and on the 2d of October, the cargo was landed, and 97 hogsheads of the molasses were shipped on board another vessel to Philadelphia, where they arrived, consigned to Armroyd and others, of whom the libellants demanded it, but they refused to deliver it, or to account for the value of it.

A claim was interposed by George Armroyd & Co., in behalf of Richardson & Carty and others, which stated, that on the 21st of August 1809, and long before, war existed between Great Britain and France; that the Fortitude, being an American vessel, at peace with the French empire, on her voyage from Martinico, a British colony, where she had been trading with the enemies of the French empire, during the war, in violation of the decrees and regulations of that empire, was seized by a French privateer, and carried to St. Martin's, as lawful prize to the captors; and her papers sent to a French tribunal, having competent jurisdiction, at Guadaloupe, under the sole and exclusive dominion and jurisdiction of the French empire; but the papers were captured, on the passage to Guadaloupe. That the vessel and cargo, being so carried into St. Martin's, were there *bonâ fide* sold, by order of the Dutch *governor at the island, to whom such right belonged, by the laws and constitutions of the said island; and [*425 the goods in question, part of the cargo, were *bonâ fide* purchased by a certain I. L. Lapierre, and by him *bonâ fide* sold to a certain Abraham Concheyter, from whom they were afterwards *bonâ fide* purchased by Richards & Carty, for account of themselves and others.

By consent of parties, a sentence was passed *pro formâ* in the district court, for the libellants. In the circuit court, upon the appeal, the claimants exhibited a further answer, stating, that by a decree of the registry of the commission for prize causes of the island of Guadaloupe, and its dependencies, duly constituted a court of prize by the Emperor of France, on the 12th of October 1809, the schooner Fortitude and her cargo were condemned, by a sentence set forth at large in the answer; the substance of which sentence is included in the following extract, viz:

"It results from the examination and from the analysis of the papers just mentioned, that the schooner Fortitude, captured by the French privateer, Le Fripon, is the property of a citizen of the United States of America; that she sailed from New London, bound to Martinico, at which place, she sold her cargo, and took in another of molasses for the said port of New London, and consequently, she has incurred the penalty, pronounced by the 3d article of the Imperial decree, which directs new measures against the maritime system of England, and was given at the Royal Palace of Milan, on the 17th of September 1807, inserted in the bulletin of the laws, No. 169, which article is as follows: 'Every vessel whatever, and whatever be her cargo, which shall have cleared from any English port, colony, or country

occupied by English troops, or which shall be bound to any English port, colony or country occupied by English troops, shall be good prize, as having infringed the present decree. Such vessels shall be captured by our men of war, and awarded to the captors.'

*426] "And after having heard the opinion of the inspector of marine, we have declared, and do declare, the American schooner Fortitude to have been well and duly captured by the French privateer Le Fripon, and to be forfeited to the owners and crew of the said privateer; consequently, the said schooner Fortitude, together with her cargo, is awarded to the captors, to be sold in the customary form, if the sale has not already taken place; and the proceeds shall be distributed conformably to the ordinance concerning captures," &c.

On the 19th of April 1811, the circuit court reversed the sentence of the district court, with costs; from which sentence of reversal, the libellants appealed to this court.

Lyman Law, for the appellants.—This condemnation was founded upon the Milan decree, which is admitted, on its face, to be in violation of the law of nations. It does not proceed on the ground of its being the property of an enemy, nor contraband of war, nor for violating a blockade. If it appear from the sentence itself, that the condemnation was not upon any ground recognised by the law of nations, nor upon the violation of any municipal right, acknowledged by that law, this court will not carry it into effect. France may, by her own municipal laws, regulate her own trade, but she has no right to control ours, beyond her territorial jurisdiction, further than to protect her own belligerent rights, acknowledged by the law of nations. If we violate no such right, and if we do not carry our property within her territorial jurisdiction, she has no right to regulate our trade. Her condemnation, grounded upon regulations which she has no right, according to the law of nations, to make, is void. But even if she had a right to condemn, her condemnation can transfer no title, unless the thing itself be in her possession, at the time of condemnation, so that the possession may pass with the title. Here, the property never was within the jurisdiction of the court at Guadaloupe. It had been sold and delivered by the Dutch governor, before the condemnation. It does not appear, that he had any authority either from the captors, or from the court, to make the sale. The purchaser

*427] cannot *derive from the governor a better title than the governor had at the time of sale.

J. R. Ingersoll, contrà.—It is acknowledged, that a tribunal, professing to be a court of admiralty, has condemned the property in question, and that the appellees possess it by virtue of a capture on the high seas. This is *primâ facie* evidence of the correctness of the title, and throws the *onus probandi* upon the appellants.

A court of admiralty is a court whose jurisdiction is co-ordinate with that of every other throughout the world. The admiralty law is "of all times and of all nations," and its decrees, so far as they affect the thing itself, and so long as they remain unreversed, can never be questioned. The end being gained, it is an immaterial question, what were the means, as they are sanctified by the end. Whether the proceedings are erroneous, or not, according to our notions of right and wrong; whether they are predicated upon a

mistake of the law, or of the fact, or are founded upon regulations consistent with, or repugnant to, the law of nations, are questions wholly immaterial. The sentence has sealed the proceedings, and those questions can never judicially come before this court.

In confirmation of these positions, it might be sufficient to refer to the decisions of this court, where the principles are settled. In the case of *Rose* v. *Himely*, 4 Cr. 292, this court refused to confirm the property of the alleged purchaser, because the court passing sentence, had neither the actual nor constructive jurisdiction nor power over the subject in controversy. The point upon which it was decided was, that the vessel and cargo were seized, out of the territorial jurisdiction claimed by the French government of St. Domingo, for a breach of municipal regulations, and were never carried within that jurisdiction, but were sold by the captor at a foreign port. Two judges (the CHIEF JUSTICE and Judge WASHINGTON), thought that, in order to give jurisdiction, the property *should have been taken as [*428
prize of war, and brought *infra præsidia*. Three (Judges CUSHING, CHASE and LIVINGSTON) were of opinion, that it would be conclusive, even under a municipal regulation, provided it were carried to the country of the captors. Judge JOHNSON considered it conclusive, at all events. But even in that case, the Chief Justice says, in p. 276, "if the court of St. Domingo had jurisdiction, the sentence is conclusive."

In the case of *Hudson and others* v. *Guestier*, and *La Font* v. *Bigelow*, 4 Cr. 293, it is decided, that in case of prize of war, a condemnation, while lying in a neutral port, will bind the property; and that the same principle applies to a seizure made within the territory of a state, for a violation of its municipal laws (p. 296). Judges CHASE and LIVINGSTON dissented, because the vessel was not carried into a French port for trial. Judge JOHNSON adhered to his former opinion, that it was immaterial, whether the capture was made in the exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or upon the high seas, where her authority is concurrent with that of other nations (p. 298).

In the case of *Croudson and others* v. *Leonard*, 4 Cr. 434, it was decided, that a sentence of condemnation for breach of blockade, was conclusive evidence of a violation of the warranty of neutrality in a policy of insurance.

In the case of *Rose* v. *Himely*, above mentioned, the incidental questions were decided in favor of our positions; for here it was prize of war, seized and condemned within the jurisdiction of the court; yet it may be said the issue of that case was adverse. If so, it was expressly overruled in *Hudson and Smith* v. *Guestier*, 6 Cr. 281. The court there unanimously decided, that the judge of the French court must have had a right to dispose of every question made in behalf of the owner of the property, whether it related to the jurisdiction of the court, or arose out of the law of nations, or out of the French decrees, or in any other way: and even if the reasons of his judgment should not be satisfactory, it would be no ground for a foreign court to rescind his proceedings, and to refuse to consider his sentence as conclusive on the property; and that, as the title was changed by the condemnation at Guadaloupe, the original *owner had no right to pursue it in the hands [*429
of a vendee.

But this is no new principle of law, originating with the present state of the world, which would seem rather to forbid it; since the rapacity of courts of admiralty on the one side, and their acknowledged subserviency to the governing power on the other, diminish the respect which would otherwise be due to their sentences.

The conclusive effect of a foreign sentence in changing the property seems to have been first judicially decided in the case of *Hughes* v. *Cornelius*, 2 Show. 242; Sir T. Raym. 473; Skin. 59; Lord Raym. 893, 935; 1 Vern. 21. The authority of this case has never been questioned. The only question has been as to the collateral effect between underwriters and the assured, in cases of warranty in a policy of insurance. And even there, whenever the condemnation has been upon the ground of its being the property of an enemy, the sentence has always been holden to be conclusive, without regard to the circumstances by which the court came to that result. The sentence is conclusive as to whatever it purports to decide. Park 355, 360, 361; *The Christopher*, 2 Rob. 173; *The Henrick and Maria*, 4 Ibid. 35; *The Comet*, 5 Ibid. 255; *The Helena*, 4 Ibid. 3; *Lothian* v. *Henderson*, 3 Bos. & Pul. 505; *Calvert* v. *Boville*, 7 T. R. 526; *Geyer* v. *Aguilar*, Ibib. 681; *Oddy* v. *Boville*, 2 East 473; *Baring* v. *Clagett*, 3 Bos. & Pul. 201; *Baring* v. *Royal Exch. Ins. Co.*, 5 East 99; *Bolton* v. *Gladstone*, Ibid. 155. Such also has been the course of decisions in the different American States. *Calhoun* v. *Penn. Ins. Co.*, 1 Binn. 295; *Cheriot* v. *Fausat*, 3 Ibid. 220; *Vandenheuvel* v. *United Ins. Co.*, 2 Johns. Cas. 451; s. c. Ibid. 127.

Such being the acknowledged effect of a foreign condemnation, the only remedy for the injured party is a resort to the court of the captors for redress. If that government will not afford it, he must apply to his own, which will make it a national concern, to be settled either by negotiation or war, if it be deemed a matter of sufficient importance. *Le Caux* v. *Eden*, 2 Doug. 614.

The fact that the Milan decree was a violation of the law of nations, and of our neutral rights, can make no difference. For if an unjust condemnation, professing *to be founded upon a just law, be conclusive, there is no reason why a condemnation, founded upon an unjust law, should not be equally conclusive. The question is not, whether this court will lend its aid to carry into effect the Milan decree, but whether it will reverse the sentence of a foreign court, and destroy vested rights acquired under such a sentence by a *bonâ fide* purchaser.

*430]

But it is said, the purchase was made before the sentence of condemnation was passed, and was, therefore, void. This, however, can make no difference. The effect of the condemnation is not to vest the property, but to sanctify a title which was vested by the capture; to confirm all intermediate acts, and to give a judicial sanction to that which was already sufficiently firm in point of fact. 1 Wils. 211; 2 Azuni 262; *Rex* v. *Broome*, 12 Mod. 134; s. c. Carth. 398. The condemnation does not give property, it only establishes the fact that the captor had a lawful title by the capture. These maritime sales in *market-overt* give an indefeasible title. *Grant* v. *McLachlan*, 4 Johns. 38–9. In cases of foreign attachment, if the attached goods are perishable, or from their situation are exposed to peculiar danger, the constant practice is, to order a sale, and such sales are valid, although the attaching-creditor may fail to support his claim. It is an established

principle, says the court of errors (2 Johns. Cas. 458) that any person purchasing will be secure.

Law, in reply, cited the cases of *Geyer* v. *Aguilar*, *Pollard* v. *Bell*, *Price* v. *Bell*, *Bird* v. *Appleton*, *Mayne* v. *Walter*, 1 Rob. 144; and *Havelock* v. *Rockwood*, 8 T. R. 268, to show that there must be a good cause for condemnation by the law of nations. He cited also, 4 Cr. 221; 2 Doug. 574, and 1 Rob. 139, to the same point, and to show the limitation of the general principle of conclusiveness of a foreign sentence. As to the extent of the power of France over neutral commerce, he cited Martens' Law of Nations 332; and to show that the Berlin and Milan decrees were in violation of our neutral rights, and were so declared by our government, he referred to the President's message to Congress of the *15th of December 1810, and [*431
cited *Rose* v. *Himely*, 4 Cr. 292; 3 Rob. 99, 333; 2 Ibid. 239.

To show that the court must have jurisdiction, before its decree can be conclusive, he cited 4 Cr. 471; 3 Rob. 96. To support the position that a sale before condemnation is not valid, he cited Martens 332; 4 Cr. 250; 1 Browne's Civil Law 254; 1 Rob. 139.

Dana, on the same side.—This is an appeal by a citizen of the United States to his government, for redress for a violation of his neutral rights by a foreign sovereign. This court exercises that branch of the government, which, in some countries of Europe, is exercised by the sovereign himself. The only question is, whether this court has power to declare void a condemnation founded upon a decree which the legislature and the executive of the United States have declared to be a violation of our neutral rights, and contrary to the law of nations. This is a question never before agitated in the courts of the United States.

This vessel has not violated the law of nations, nor the municipal law of any state or nation. The sovereign power of a nation cannot be exercised on the high seas, unless over its own subjects or pirates, or *jure belli*. It can affect hostile property only. A municipal regulation cannot rightfully affect neutral property, beyond the territorial jurisdiction. On the high seas, all nations are equal. This property, having never been within the French jurisdiction, can never have offended against French municipal law. The court had no jurisdiction, under the municipal law of France, in such a case. Suppose, in case of capture and re-capture, the first captors proceed to libel and condemn the property in a French court, while it is safe in a port of the United States, having never been within the jurisdiction of France. It can never be pretended, that such a condemnation would be valid. The title and possession must be delivered together at the same time, or the sentence will not be conclusive *in rem*.

*In the cases of *Rose* v. *Himely*, and *Hudson* v. *Guestier*, the prop- [*432
erty was sold by an agent of the court; but the Dutch governor of St. Martin's had no authority from the tribunal at Guadaloupe. It has been decided in the courts of the United States, that Holland is not a dependency of France. Captors cannot sell or dispose of the property captured, before the capture has been adjudged lawful by a competent court. It is the interest of all nations, to enforce this rule. The opposite practice would lead to incalculable evils.

March 8th, 1813.—MARSHALL, Ch. J., delivered the opinion of the court, as follows :—A vessel, with a cargo belonging in part to the appellants, was captured on the high seas, on the 20th of August 1809, by a French privateer, and carried to St. Martins, where the vessel and cargo were sold, by order of the governor, at public auction, and part of the cargo purchased and sent to the appellees in Philadelphia. After the sale, the vessel and cargo were condemned by the court of prize, sitting at Guadaloupe, professedly for a violation of the Milan decree, in trading to a dependence of England. On the arrival of the goods, they were claimed by the original owner, who filed a libel for them. In the district court, they were adjudged to him. The circuit court reversed that sentence, and from the judgment of the circuit court, there is an appeal to this court.

It appears to be settled in this country, that the sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision, in the case of *Hudson* v. *Guestier*, reported in 6 Cr. 281, is considered as fully establishing this principle.

It is contended, that the sentence, in this case, has not changed the prop-
*433] erty, because, *1st. The sale was made under the direction of the governor of St. Martins, before the sentence of condemnation was pronounced. 2d. The sentence proves its own illegality, because it purports to be made under a decree which the government of the United States has declared to be subversive of neutral rights and national law.

1. In support of the first objection, it has been urged, that the jurisdiction of the court depends on the possession of the thing ; that a sentence is a formal decision, by which a forcible possession is converted into a civil right ; and that the possession being gone, there remains nothing on which the sentence can operate. However just this reasoning may be, when applied to a case, in which the possession of the captor has been divested by an adversary force ; as in the cases of re-capture, rescue or escape ; its correctness is not admitted, when applied to this case. The possession is not an adversary possession, but the possession of a person claiming under the captor. The sale was made on the application of the captor, and the possession of the vendee is a continuance of his possession. The capture is made by and for the government ; and the condemnation relates back to the capture, and affirms its legality.

2. That the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case, in a court which cannot revise, correct or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less, because its error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it. It is true, that in this case, there is the less difficulty in saying, that the edict under which this sentence was pronounced, is a direct and flagrant violation of national law, because the declaration has already been made by the legislature of the Union. But what consequences attend this legislative declaration? Unquestion-

ably, the *legislature which was competent to make it, was also competent to limit its operation, or to give it effect by the employment of such means as its own wisdom should suggest. Had one of these been, that all sentences pronounced under it should be considered as void, and incapable of changing the property they professed to condemn, this court could not have hesitated to recognise the title of the original owner in this case. But the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void. It has not interfered with them. They retain, therefore, the obligation common to all sentences, whether erroneous or otherwise, and bind the property which is their object; whatever opinion other co-ordinate tribunals may entertain of their own propriety, or of the laws under which they were rendered. The sentence is affirmed, with costs.

Sentence affirmed.

Smith & Buchanan *v.* Delaware Insurance Company. (*a*)

Points reserved.

A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon, are stated on the record.[1]

Smith *v.* Delaware Ins. Co., 3 W. C. C. 127, reversed.

Error to the Circuit Court for the district of Maryland, in an action of covenant on a policy of insurance. The jury found a verdict "for the defendants, subject to the opinion of the court on the points reserved." And judgment was thereupon rendered "for the defendants accordingly."

The plaintiffs, by their counsel, moved the court below, that the points reserved (which the motion stated, without stating the facts out of which they arose), and the opinion of the court upon those points, should be entered on the record. *The court did not act on this motion; and, of course, the points did not appear, so as to enable this court to take notice of them. The defendants (it was said) would not agree to any arrangement by which the legal merits of the cause, as they appeared below, might come into discussion here. [*435

Pinkney, Attorney-General, for plaintiffs in error, contended that the verdict was imperfect, contradictory and void, and did not warrant the judgment pronounced upon it, nor any other judgment. 23 Vin. 397, pl. 10. It is neither a general nor a special verdict.

Harper, contrà, admitted, that it was in form an irregular proceeding, but he was instructed to insist on the judgment.

It is a general verdict for the defendants: and by consent of parties, it was referred to the court; and if they should be of opinion, that the verdict should not stand, they were to award a *venire de novo*. It was the

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(*a*) March 19th, 1813. Absent, Washington and Todd, Justices.

[1] S. P. Roberts *v.* Hopkins, 11 S. & R. 202; Edmonson *v.* Nichols, 22 Penn. St. 74; Lyons *v.* Divelbis, Id. 185; Clark *v.* Wilder, 25 Id. 314; Irwin *v.* Wickersham, Id. 316; Wilkinson *v.* The Tuscarora, Id. 317; Winchester *v.* Bennett, 54 Id. 510; Wilde *v.* Trainor, 59 Id. 439; Ferguson *v.* Wright, 61 Id. 258; Robinson *v.* Myers, 69 Id. 9; Banyer *v.* Ellice, 1 Hill 23.

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?

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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

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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 [*448 to an action upon it, in that state; and *à fortiori*, in another state. *Mc Clenachan* v. *Mc Carty*, 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
*449] ever foreclosed. *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 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 [*455

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

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

certain real estate in Baltimore. The facts of the case were stated by STORY, J., in delivering the opinion of the court, as follows:

On or about the 6th of February 1780, Daniel Barnitz died seised of the premises in the declaration mentioned, having, by his will, devised the same to his wife, Catharine Barnitz, in fee, and leaving issue, by his said wife, an only child and heir, Elizabeth Barnitz, who intermarried with one Charles McConnell, by whom she had an only child, John McConnell; after whose birth, and some time in 1781, Charles McConnell died. Afterwards, his widow, Elizabeth, intermarried with one John Hammond, by whom she had one child only, John Barnitz Hammond, and died on the 22d of April 1788. After her death, John Hammond intermarried with Elizabeth Anderson, and died on the 7th of April 1805, leaving issue by the last marriage, Jane B. Hammond and Henry Hammond, his heirs-at-law, still now alive, under whom the defendant in ejectment claimed.

On the 7th of April 1794, Catharine Barnitz died seised of the premises, *having first duly made her last will and testament. By that will, she devised to the said John McConnell, in fee, two certain parcels of land. She then devised another parcel of land, including her mansion-house, to the said John Barnitz Hammond, to the intent and uses following, viz: subject (as to the rents thereof) to certain trusts for the maintenance and education of the said John Barnitz Hammond, and for the payment of certain specific debts of the testatrix, "to the use of John Hammond, the father, for and during the minority of the said John B. Hammond, if he shall so long live, provided the said John Hammond shall maintain, clothe and educate the said John B. Hammond, out of the rents thereof, during his minority; and from and immediately after the said John B. Hammond shall arrive to the age of twenty-one years, or the death of the said John Hammond, his father, which shall first happen," then to the said John B. Hammond in fee. The testatrix then provided, "and if it should hereafter happen, that the said John McConnell should die, before he shall arrive to the age of twenty-one years, and without issue, then I give, devise and bequeath all the estate of the said John McConnell, which is hereby devised to him, to go immediately to the said John B. Hammond, his heirs and assigns for ever. And if it should hereafter happen, that the said John B. Hammond should die, before he shall arrive to the age of twenty-one years, and without issue, then and in such case, after the payment of my debts as above mentioned, I give, bequeath and devise," &c. (the same land and mansion-house before devised to John B. Hammond), to the said John Hammond, his heirs and assigns for ever; and also all the residue of estate herein before or after devised to the said John B. Hammond, and not hereby otherwise disposed of, I, then and in such case, give and devise the same to the said John McConnell, to hold to him, his heirs and assigns for ever, from and immediately after the death of the said John B. Hammond as aforesaid; and in case of the death of both of my grandsons, under age and without issue as aforesaid, then I give, devise and bequeath all that part of my estate which I have herein before given to the said John McConnell, to Charles Barnitz, of," &c., "to hold to him, his heirs and assigns for ever." [*457

*The testatrix then provided for the payment of her debts, by a sale, if necessary, of some of her lots of land, on or near Church-hill, in Baltimore, and then proceeded: "And I give and devise all the rest and [*458

residue of the said lots on or near Church-hill aforesaid, and all my estate therein (subject nevertheless to the devises aforesaid), to my said grandsons, John McConnell and John B. Hammond, their heirs and assigns for ever, to be equally divided between them, share and share alike, as tenants in common, and not as joint-tenants." After some immediate bequests, the testatrix devised "all the rest, residue and remainder of her estate, real and personal, to the said John McConnell and John B. Hammond, their heirs and assigns for ever, to be equally divided between them, share and share alike."

John McConnell attained his full age of twenty-one years, married, had issue, and afterwards, on the 7th of April 1802, died, without leaving any surviving issue. And John B. Hammond died on the 12th of February 1808, under the age of twenty-one years, and without issue.

The lessors of the plaintiff are the children and heirs-at-law of Charles Barnitz, who was the only brother of Daniel Barnitz, the testator. And upon the defect of lineal heirs, the said lessors claimed as next heirs in blood of John McConnell, on the part of his mother, Elizabeth Barnitz, the daughter of Daniel Barnitz. It was admitted, that the inheritable blood was extinct on the part of Charles McConnell, the father of John McConnell.

At the death of John B. Hammond, the property consisted of four descriptions; which it may be proper to enumerate. 1. The land specifically devised to John McConnell, with a limitation over to John B. Hammond. 2. The land specifically devised to John B. Hammond, with a limitation over in fee to his father. *3. The moiety of the Church-hill lots, and the residuary estate devised to John McConnell, in fee. 4. The moiety of the Church-hill lots, and the residuary estate devised to John B. Hammond in fee, with a limitation over to John McConnell.

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At the time of the death of Catharine Barnitz (as she survived her daughter), her two grandsons, McConnell and Hammond, were her heirs-at-law.

Harper, for plaintiff in error.—1. As to the devise to John McConnell, with limitation over, in case of his death under age, and without issue, to J. B. Hammond. This was a fee-simple in McConnell, with a conditional limitation, and not an estate-tail. 1 Fearne on Contingent Remainders, 9, 10 (Dublin ed. 1795); Ibid. 409; Powell on Devises 261; *Shears* v. *Jeffrey*, 7 T. R. 589; Plowd. 408; 3 Co. 10; Carth. 175; Dyer 127. Upon J. McConnell's arrival at full age, he had an absolute estate in fee, because, the condition never could happen which was to defeat his estate. As he took by purchase, and not by descent, and as at the time of his death, he left neither child, nor brother or sister of the whole blood, the estate descended, according to the statute of descents, in Maryland, to his brother of the half blood, John B. Hammond.

J. B. Hammond took it by descent, through his mother, and therefore, the estate descended to him "on the part of his mother," within the meaning of the statute. He certainly took by descent, and not by purchase; and the *commune vinculum*, which connected him with his brother, must be traced through his mother. The statute was intended to prevent escheats *pro defectu sanguinis*, and to provide for all cases. The legislature meant to comprehend all cases, in three classes. 1. Where the estate had descended to the intestate, on the part of the father. 2. Where it had descended on

the part of the mother: and *3. Where it had vested in the intestate by purchase, and not derived from or through any of his ancestors.

The court will not suppose, that the legislature has omitted to provide for the case where the estate has descended from a brother to a brother, but will rather place the present case in the second class. The legislature did not mean to limit the second class to cases where the estate had descended from the mother, because it provides, that if there be no child or descendant of the intestate, the estate shall go to the mother: and it would be absurd to say, that an estate which had descended from the mother, should descend again to the mother. So, if the estate had descended from the mother's father, directly to the mother's son, it would be an estate which had descended to the son on the part of his mother, and yet it had not descended either from or through his mother, for the estate had never vested in her. The statute must mean every case where the blood must be traced through the mother; every case where the mother is a link of the chain which connects the intestate with the person from whom the estate descended to him.

This estate, therefore, must be understood as having descended to J. B. Hammond, on the part of his mother; and therefore, inasmuch as, at his death, he left neither child nor descendant, nor mother, nor brother or sister of the blood of the mother, nor descendant of such brother or sister, nor grandfather on the part of the mother, nor descendant of such grandfather, nor father of such grandfather, and inasmuch as the lessors of the plaintiff are the descendants of the father of such grandfather, the estate must, by the provisions of the statute, descend to them.

2. The devise to John McConnell, in fee, of the moiety of the Churchhill lots, and of the general residuum, vested in him a fee-simple estate from the beginning: he took by purchase, under the will. It descended to J. B. Hammond by the same rule of descent as in the former case, and by the same construction of the statute, has descended from him to the plaintiffs.

3. The third case under this will, is that of the specific devise to J. B. Hammond, with limitation over, in *case of his death under age and without issue, to John McConnell. J. B. Hammond died under age [*461 and without issue, so that the fee devised to him was defeated, and would have vested immediately in John McConnell, if he had been alive, but he died in the lifetime of J. B. Hammond. In whom, then, did it vest? By the rules of the common law, John McConnell had such an interest in the devise, as was descendible to his heirs. Who were his heirs? Not they who were such at the time of his death, but they who answered the description of his heirs, at the time of the death of J. B. Hammond. 2 Fearne 529; Ibid. 535; *Goodright* v. *Searle*, 2 Wils. 29. John McConnell, if he had been alive at the time of the death of J. B. Hammond, would have taken the fee by purchase, and the lessors of the plaintiff were the only persons who could at that time entitle themselves as his heirs, there being no heirs of the paternal line then living.

Martin and *Pinkney*, Attorney-General, contrà.—The executory devises were void, because the contingency is the dying "without issue" indefinitely, and not limiting it to the case of dying without leaving issue alive at the time of his death. 1 Fearne 411; 2 Ibid. 74, 144–5, 154; *Cotterson* v. *Right*, 1 Sid. 148; 4 Bac. Abr. 251 (Gwillim's Ed.); 2 Fearne 187, 358;

Nichols v. *Hooper*, 1 P. Wms. 198 ; 2 Fearne 245 ; 2 Ibid. 206, 159, 154, 160 ; 2 H. Bl. 358. The limitations over being void, each took an absolute fee-simple in the lands devised to him.

Upon the death of John McConnell, the estate descended, according to the provisions of the statute, to J. B. Hammond, who took, not by way of descent at common law, but by force of the statute. The preamble of the statute shows that the legislature meant to abolish the law of descents altogether. The expression "on the part of the mother," means, from or through the mother. Now, this estate never came to J. B. Hammond from
*462] or through his mother. Under *the 3d branch of the statute, every estate which comes to an intestate, "and not derived from or through either of his ancestors," is supposed to have come by purchase, and is to descend accordingly. This estate was not derived to the intestate, J. B. Hammond, from or through either of his ancestors, and therefore, is to descend as if it came to him by purchase. This construction makes the statute provide for all cases, whereas, the construction insisted upon by the plaintiffs, leaves the cases where the estate has descended or passed by force of the statute from brother to brother of the whole blood, or from son to father, or from husband to wife, or from wife to husband, wholly unprovided for ; for these are not cases of purchase, nor of descent from ancestors. If, however, the case of Hammond be *casus omissus*, then the estate may descend at common law, through the line of his father.

One argument of the plaintiff's counsel was built upon the absurdity of supposing that the statute directed an estate to descend to the mother, which had already descended from her. But the statute only directs it to descend to the mother, by way of illustration, so as to lead to the heir.

But if the limitations over were good, then John McConnell died seised of an hereditament, a descendible interest, which went to his heir. Who was his heir? This same J. B. Hammond, so that, either way, the absolute estate in fee vested in him as a purchaser, and descended to his heirs. Again, the 3d section of the statute declares, "that no right in the inheritance shall accrue to or vest in any person, unless such person is in being, and capable in law to take as heir, at the time of the intestate's death." Now, these plaintiffs were not "capable in law to take as heirs" to John McConnell "at the time of his death." So that they are prohibited by the statute from taking the benefit of this executory devise, even if they could do so by the common law. Under the statute, J. McConnell had, at his death, an inheritable interest in the land devised to J. B. Hammond, with limitation over. The statute makes no difference between vested and contingent interests ; they all descend alike.

*463] *But there is a fatal objection to the plaintiff's recovery in this case. The lessors of the plaintiff are tenants in common with the defendants ; and one tenant in common cannot maintain ejectment against another, without proof of actual ouster. Such ouster is not proved.

Harper, in reply.—The defendants have confessed lease, entry and ouster, and therefore, an actual ouster need not be proved.

The whole question is as to the meaning of the words "descend on the part of the mother." There are only two modes of acquiring property, viz., by purchase and by descent ; by the act of the party, or by act of law.

Descents are either lineal or collateral. Lineal, is from the ancestor in the direct descending line. Collateral, is where you first ascend to the common ancestor, and then descend until you find the heir.

The construction of the statute adopted by the defendants, allows only one kind of descent—lineal. The statute uses the word "descent" generally, comprehending both kinds. It says, from or through either of his ancestors: "from" applies to lineal descent; "through" to collateral. If the statute includes collateral descents, there is an end of the question. If a man takes an estate by reason of his mother, he takes through his mother. If a man takes as great grandson from I. S., the estate has not passed through the father or grandfather, yet he takes through them. So, in tracing a collateral descent, the estate does not go through the intermediate links, yet the heir claims through them.

As to the executory devises. The contingency was not too remote nor indefinite. It must be determined within twenty-one years. If the contingency had been simply, dying without issue, there would be weight in the objection; but it is dying under age, and without issue; so that if he came of age, or had issue, the estate became absolute. Here are not two conditions, but two facts making one condition.

*The plaintiffs do not take as heirs, but as purchasers, under the will, by the description of their persons; if they answer the description of heirs, at the time the contigency happens on which the executory devise takes effect, they must take. A possibility is not descendible. They take as purchasers. This is an answer also to the objection raised upon the 3d section of the statute. They do not claim as heirs, and therefore, are not within the statute. The statute refers to their natural capacity to take. It alludes to the disability of alienage, attaint, &c., and was intended to exclude posthumous children, in cases of collateral descent. [*464

March 14th, 1813. Present, Marshall, Ch. J., Washington, Duvall and Story, Justices.

The court having taken time since last term to advise, Story, J. (after stating the facts of the case), delivered the opinion of the court as follows:—

It is true, that the general rule is, that an heir shall not take by devise, when he may take the same estate in the land by descent. 1 Roll. Abr. 626, L. 30; Hob. 30; 1 Salk. 242; 1 W. Bl. 22. But it is not denied, that all the estates which each of the grandsons derived under the will were estates by purchase. Admitting the executory devises over to be good, there could be no doubt as to any part of the estates; for the estates, are of a quality different from what the parties would have taken in the course of descent.

It has been argued by the plaintiff's counsel, upon the foregoing facts, that as to the whole estate immediately devised to John McConnell, the lessors of the plaintiff are entitled to recover, in the events which have happened, as his heirs *ex parte maternâ*; and that as to the estate devised to him upon the contingency of the death of John B. Hammond under age and without issue, the lessors of the plaintiff are entitled to recover, as the heirs-at-law of John McConnell, at the time when the contingency happened, although not heirs at the time of his death.

*The decision of these points depends upon the true construction [*465

of the statute of descents of Maryland, and the application thereto of the principles of the common law.

This statute of descents (1786, ch. 45), after reciting that the law of descents which originated with the feudal system and military tenures, is contrary to justice, and ought to be abolished, enacts, "That if any person seised of an estate," &c., "shall die intestate thereof, such lands," &c., "shall descend to the kindred, male and female, of such person, in the following order, to wit: First, to the child or children, and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father; and if no father living, then to the brothers and sisters of the intestate of the blood of the father, and their descendants, equally; and if no brother or sister as aforesaid, or descendant from such brother or sister, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree, equally; and if no descendant of such grandfather, then to the father of such grandfather; and if none such living, then to the descendants of the father of such grandfather in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree, without end: And if no paternal ancestor, or descendant from such ancestor, then to the mother of the intestate; and if no mother living, to her descendants in equal degree, equally; and if no mother living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as is above directed as to the paternal ancestors and their descendants. And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother; and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother, and their descendants in equal degree, equally; and if no such brother or sister, or descendant of such brother or sister, then to the grandfather on the part of the mother; and if no such grandfather living, then to his descendants in
*466] equal degree, equally; and if no such descendant *of such grandfather, then to the father of such grandfather; and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor; and if none such living, to his descendants in equal degree; and if no such maternal ancestor, or descendant from any maternal ancestor, then to the father of the intestate; and if no father living, to his descendants in equal degree, equally; and if no father living, or descendant from the father, then to the paternal ancestors and their descendants, in the same manner as is above directed as to the maternal ancestors."

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree, equally; and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants, in equal degree, equally; and if no brother or sister of the whole or half blood, or any descendant from such brother or sister, then to the father; and if no father living,

then to the mother; and if no mother living, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather, in equal degree, equally; and if no such grandfather, or any descendant from him, then to the grandfather on the part of the mother; and if no such grandfather, then to his descendants in equal degree, equally; and so on, without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants; and giving preference to the paternal ancestor and his descendants. And if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be; and if the husband or wife be dead, then to his or her kindred, in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives, in equal degree, equally."

*Three classes of cases are here in terms provided for: 1. "Estates descended to the intestate on the part of the father." 2. "Estates descended to the intestate on the part of the mother." 3. "Estates vested in the intestate by purchase, and not derived from or through either of his ancestors." [*467

The case of a *propositus* dying seised of an estate, which descended to him from his brother, who had taken the same by purchase or by descent, not *ex parte paternâ* or *maternâ;* and the case of a *propositus* dying seised of an estate which descended to him from his own child, who had taken the same by purchase or by a like descent; are not directly within the language of the statute. For, by the common law, a descent from brother to brother is held to be an immediate descent, and not from or through the parents; and the express provision of the statute of Maryland as to estates of purchase, necessarily involves the same conclusion; and the same may be declared of a descent from a child to a parent, under the same statute.

It has been argued, that the legislature intended to form a complete scheme of descents; and that the court ought not to construe any case to be a *casus omissus*, if, by any reasonable construction, the words can be extended to embrace it. Both parties accede to this argument, but they apply it in a very different manner. The plaintiffs contend, that the descent from brother to brother was meant to be included in the first and second classes of descents, as the parents were the common link of connection from and through whom the consanguinity was to be sought; that, therefore, the descent, in such case, is *ex parte paternâ*, or *maternâ*, as the father or mother happens to be the *commune vinculum*. And the plaintiff's rely on the words "and not derived from or through either of his ancestors," in the clause embracing the third class, as distinctly showing that the legislature deemed every case of descents to be completely within the preceding classes.

On the other hand, the defendants contend, that whatever might be the legislative supposition, it is impossible to support the position, that a descent from brother to brother, or from child to parent, is a descent *ex parte paternâ* or *maternâ*. *It is therefore, either a *casus omissus*, or the words "and not derived from or through either of his ancestors" are to be considered, not as qualifying and limiting the preceding words, but as either [*468

constituting a fourth class of cases, embracing all such as are not included in the three preceding classes; or as explaining estates by purchase to include all cases which are not paternal or maternal descents.

There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words, in order to supply deficiencies occasioned by that mistake. It would be still more dangerous, to admit, that because the legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed, by adopting the construction contended for by either party.

It is not a descent from or through the paternal or maternal line, in the sense of the common law. Nor is it a purchase. The words "and not derived from or through either of his ancestors," are manifestly used as explanatory of the legal import of purchase. They are the exact words which the common law selects to distinguish the estate of a purchaser from the estate of an heir. It is obvious, that the legislature use the words descent and purchase, in their technical and legal sense. They have also expressly provided for the case of a descent from brother to brother, passing by the parents; and from a child to a parent, when there are no brothers or sisters. These descents must, therefore, be direct and immediate; and the former case is so deemed also at the common law. It is, therefore, in our judgment, perfectly clear, that a descent from brother to brother is not within the statute, and of course, is a *casus omissus*, to be regulated by the common law.

To apply this to the present case. By the arrival of John McConnell at
*469] the age of twenty-one years, all the estates *devised to him immediately, became absolute estates in fee-simple. On his death, they passed to his half brother, John B. Hammond; and upon his death, they passed to the heirs-at-law of the latter. The lessors of the plaintiff have, therefore, made no sufficient title thereto.

Let us now consider the second question: whether the lessors of the plaintiff have any title to the estates which were devised over to John McConnell upon the contingency of John B. Hammond's dying under age and without issue? It has been argued by the defendant's counsel, that this executory devise is void, because the contingency is too remote. It is the acknowledged rule, that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after. In the present case, the contingency must have happened within twenty-one years, at all events. For if John B. Hammond attained his full age, the estate vested absolutely. To have defeated the estate over, it was sufficient, either that he attained his full age, or died under age, leaving issue. The authorities are conclusive on this point. 1 Wils. 140, 270; 2 Burr. 873; 1 Taunt. 174; 5 Bos. & Pul. 38; 12 East 288; 2 Str. 1175. There is no validity, therefore, in this objection.

In the next place, it will be necessary to consider, what is the nature of an executory devise as to its transmissibility to heirs, where the devisee dies before the happening of the contingency? And it seems very clear, that at common law, contingent remainders and executory devises are transmissible

to the heirs of the party to whom they are limited, if he chance to die before the contingency happens. Pollexfen 54; 1 Co. 99; Cas. temp. Talb. 117. In such case, however, it does not vest absolutely in the first heir, so as, upon his death, to carry it to his heir-at-law, who is not heir-at-law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee, at *the time when the [*470 contingency happens, and the executory devise falls into possession.

This rule is adopted, in analogy to that rule of descent which requires that a person who claims a fee-simple, by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir of such purchaser, at the time when that reversion or remainder falls into possession. Co. Lit. 11 *b*; 14 *a*; 3 Co. 42. Nor does it vary the legal result, that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though, on the death of the latter, the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the executory devisee. The case of *Goodright* v. *Searle*, 2 Wils. 29, is decisive on this point, and indeed runs on all fours with the present.

But it is contended, that the statute of descents of Maryland has changed the rule of the common law in this respect; and has made the death of the intestate the point of time from which the descent and heirship are in every case to be traced. The third section, which is relied on for this purpose, enacts as follows: "That no right in the inheritance shall accrue to or vest in any person, other than to children of the intestate and their descendants, unless such person is in being, and capable in law to take as heir, at the time of the intestate's death; but any child or descendant of the intestate, born after the death of the intestate, shall have the same right of inheritance, as if born before the death of the intestate."

In our judgment, the conclusion drawn from this clause is not correct. The object of the section is to limit the natural capacity to take, as heirs, to persons in being at the time of the death of the intestate, where the estate is then capable of vesting in possession; and not to make persons heirs, who, if in being at the time, would not, by the common law, answer the description of absolute heirs, or to give a vested absolute interest, where the common law had given only a possible contingent interest. The legislature had in view cases of *posthumous children, and cases where a descent to an [*471 heir had been defeated by the subsequent birth of a nearer heir. The argument of the defendants, on this point, ought not, therefore, to prevail.

No question has been made as to the land specifically devised to John B. Hammond in fee, with a limitation over to his father in fee. As that limitation over was a good executory devise, and, in the events which happened, took effect, it is very clear, that the lessors of the plaintiff cannot claim title thereto. This is, indeed, conceded on all sides.

The result of this opinion accordingly is, that the lessors of the plaintiff are entitled, as heirs of John McConnell, at the happening of the contingency, on the death of John B. Hammond, under age and without issue, to one moiety of the Church-hill lands, and the residuary estates, as tenants in common with the heirs of John B. Hammond; but they are not entitled to

any portion of the lands of which John McConnell had an absolute vested fee, at the time of his decease.

As, however, a tenant in common cannot in general maintain an action of ejectment against his co-tenant, and there are no facts found in this case to prove an actual ouster, and to take it out of the general rule, the consequence is, that the judgment, in the opinion of a majority of the court, must be affirmed, with costs.

Judgment affirmed.

Blackwell *v.* Patton and Erwin's Lessee. (*a*)

Probate of deed.—Amendment in ejectment.—Land law of Tennessee.

By the laws of North Carolina and Tennessee, a deed of land in Tennessee, executed in North Carolina, by grantors residing there in the year 1794, proved in 1797, by one of the subscribing witnesses, before a judge in North Carolina, and recorded in 1808, in the proper county of Tennessee, is valid, and may be given in evidence in ejectment.[1]

In ejectment, the date of the demise in the declaration may be amended, during the trial, so as to conform to the title.[2]

The first grant from the state of North Carolina, upon an entry, is valid, although issued upon a duplicate warrant, the original being in the hands of the surveyor-general; although a subsequent grant issued upon the original warrant for other lands.

Error to the Circuit Court for the district of Tennessee, in an action of ejectment, brought by the lessee of Patton and Erwin, against Blackwell, for 5000 acres of land, in Bedford county, in the state of Tennessee. At the trial, the defendant took three bills of exception. The first stated, that the plaintiff produced in evidence, at the trial, a deed of bargain and sale from John G. and Thomas Blount, to whom, it was alleged, *the land *472] had been granted by the state of North Carolina, while it was a part of that state. The deed from John G. and Thomas Blount, was executed on the 9th of October 1794, to David Allison. On the 29th of September 1797, it was proved by one of the subscribing witnesses, before John Heywood, a judge of the supreme court of law and equity, for the state of North Carolina, and registered in Stoke's county. On the 9th of December 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the supreme court of law and equity of the state of Tennessee, who ordered it to be registered. At November term 1808, in the supreme court of Tennessee, for Mero district (in which the land lies), the handwriting of the grantors, and of the subscribing witnesses, was again proved, and on the 28th of December 1808, the deed was recorded in the proper county. On the trial (which was in June term 1810) the plaintiff offered parol evidence to prove the handwriting of the subscribing witnesses and their death, before the month of December 1807, and also to prove the handwriting of the grantors. To the admission of this evidence the defendant below objected, but the court overruled the objection, and admitted the deed in evidence.

(*a*) March 6th, 1813. Absent, Washington and Todd, Justices.

[1] See Patton *v.* Reilly, Cooke 119; Patton *v.* Brown, Id. 126; Patton *v.* Cooper, Id. 133.

[2] S. P. Walden *v.* Craig, 9 Wheat. 576; McDaniel *v.* Wailes, 4 Cr. C. C. 201; Wilkes *v.* Elliot, 5 Id. 611.

The second bill of exception stated that the plaintiff also offered in evidence a deed to his lessors, bearing date after the demise laid in the declaration, to the admission of which deed the defendant objected, but the court admitted it to be read in evidence, saying the date of the demise was immaterial, or the plaintiff might amend his declaration, which he did, before the jury retired from the bar, by altering the date of the demise.

The third bill of exception stated, that the defendant offered evidence to prove, that the original grant or patent from the state of North Carolina to John G. and Thomas Blount, was issued upon a duplicate warrant, while the original warrant was in the hands of the surveyor-general; and that John G. and Thomas Blount afterwards obtained another grant or patent from the state *of North Carolina, for other lands, upon the original war- [*473
rant. To the admission of this evidence, the plaintiff objected, and the court rejected it.

Martin, for the plaintiff in error.—1. The deed from John G. and Thomas Blount to Allison, was not proved and registered according to the laws of North Carolina, or of Tennessee, so as to be valid. The law of North Carolina (1715, ch. 30, § 5, p. 18), requires every deed to be acknowledged, or proved, in open court, or before the chief justice, and registered, within twelve months after its date, in the county where the land lies. This deed bears date the 9th of October 1794, was never acknowledged, nor properly proved, and was not registered until the 28th of December 1808. By the law of England, a deed of bargain and sale is inoperative, until enrolled; in the same manner as a deed of feoffment does not operate, until livery of seisin. A deed by a joint-tenant—a deed for the reversion, and payment of rent to the bargainor—are good before enrollment. The bargainee is not seised before enrolment, and if he die before enrolment, his wife is not entitled to dower, although, when enrolled, it relates back to its date. 1 Bac. Abr. 473; 2 Bl. Com. 311; 3 Wood's Conveyancer 32–34.

2. The court ought not to have permitted the deed to the lessors of the plaintiff, dated after the demise, to be given in evidence on that declaration, nor to have suffered the plaintiff to amend his declaration, after the jury was sworn. *Beddington* v. *Parkhurst*, 2 Str. 1086; Runnington 87; *Basset* v. *Basset*, Bull. N. P. 105. Courts have gone no further in permitting amendments in ejectment, at the trial, than to enlarge the term which had expired, or to correct grammatical errors. Although the declaration is a fiction, in form, yet what is of substance must be truly set forth.

3. The act of North Carolina (1783, ch. 2, p. 322, § 9, 10 and 11), which prohibits the issuing of a grant *upon a duplicate warrant, was in [*474
force when this warrant was issued. It was a fraud upon the state, for only one warrant was paid for, and yet it was made to operate as two.

Campbell, contrà.—1. There were other laws of North Carolina, and of Tennessee, extending, from time to time, the term for registering deeds, so that any deed, even of fifty years standing, may now be registered.

The probate of the deed, before Judge Haywood, on the 29th of September 1797, brings the deed within the act of Tennessee (1809, November 23d, ch. 100, § 4, p. 129), by which it is enacted, "That all deeds, or mesne conveyances, for land within this state, which shall have been made and executed out of the limits of this state, and shall have been proven by one or more of

the subscribing witnesses thereto, or acknowledged by the grantor or grantors, before any judge of any court in another state, or before the mayor of any city or corporation in another state, and shall have been registered in this state, in the county where the land or any part thereof lies, within the time required by law for registering the same, such probate and registration shall be good and sufficient to entitle the same to be read in evidence in any court within this state." But the probate and the admission to registration is conclusive on this point.

To show that the term for registering deeds had been kept open until the present time, he cited the following laws: Iredell's Revisal of the Laws of North Carolina, p. 83, 1741, c. 1, § 2, 3; p. 173, 1756, c. 6, § 2, 3; p. 196, 1760, c. 6, § 2; p. 213, 1764; p. 224, 1766; p. 246, 1770; p. 269, 1773; p. 289, 1777; p. 424, 1782; p. 487, 1784; p. 590, 1786; p. 640; 1 Sess. A. A. P. 665, 668; Laws of Tennessee, 1794, c. 22, § 3; Ibid. 1796, 1797, 1801, c. 20, § 1; 1803, c. 57; 1805, c. 16, § 1; 1807, c. 85, § 1, 2; 1809, c. 100, § 4.

Marshall, Ch. J.—Pass over the 2d point.

*457] **Campbell.*—3. This was the first grant which issued upon this entry. It was good when it issued, and cannot be invalidated by a subsequent grant on the same warrant. Both cannot be void. If either, it must be the last.

March, 11th, 1813. Marshall, Ch. J., delivered the opinion of the court, as follows:—The writ of error in this case is brought to reverse a judgment obtained by the defendants in error, against the plaintiffs, in an ejectment brought in the circuit court of West Tennessee. At the trial, the plaintiffs in that court offered in evidence, in order to make out their title, a deed bearing date the 9th of October 1794, from John G. Blount and Thomas Blount, of North Carolina, to David Allison, of Philadelphia, which deed was recorded in the county in which the lands lie, on the 28th day of December 1808. The defendants objected to the admission of this deed, and excepted to the opinion of the court overruling the objection.

The original law requiring the enregistering of deeds, passed in North Carolina (then comprehending what is now the state of Tennessee), in the year 1715. This act requires that the deed shall be acknowledged by the vendor, or proved by one or more evidences, upon oath, either before the chief justice for the time being, or in the court of the precinct where the land lies, and registered by the public register of the precinct where the land lies, within twelve months after the date thereof. It was afterwards enacted, that the deed might be registered by the clerk of the county in which the land lies, and the time for the registration of deeds was prolonged, until Tennessee was erected into an independent state, after which, the time for enregistering of deeds continued to be prolonged by the legislature of that state.

In the year 1797, the legislature of Tennessee enacted a law, declaring that deeds made without the limits of the state should be admitted to registration, on proof that the same was acknowledged by the grantor, or proved by one or more of the subscribing witnesses, in open court, in some one of the courts of the United States, and on no other proof whatever, except

where the party holding such deed shall have the same proved *or acknowledged within the limits of the state of Tennessee, agreeable to the mode heretofore in force and use in that state.

It is contended by the counsel for the defendants in error, that the deed being recorded in the proper county, the judgment of a competent court has been given on the sufficiency of the testimony on which it was registered, and that judgment is not examinable in any other tribunal. But this court is not of that opinion. The proof on which a deed shall be registered is prescribed by law, and it is enacted, that the deed shall not be good and available in law, unless it be so proved and recorded. The evidence, therefore, is spread upon the record, and is always attainable. The order that a deed should be admitted to record, is an *ex parte* order, and might often be obtained improperly, if the order was conclusive. It is believed to be the practice of all courts, where the law directs conveyances to be recorded, and prescribes the testimony on which they shall be recorded, in terms similar to those employed in the act of North Carolina, to hold themselves at liberty to examine the proof on which the registration has been made.

This deed, in the present case, was proved before Judge Haywood, in North Carolina, by one of the subscribing witnesses thereto, on the 29th of September 1797, and registered in Stoke's county, in North Carolina. On the 9th day of December 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the supreme court of law and equity, in the state of Tennessee, who thereupon ordered the deed to be registered; and afterwards, in November term 1808, the same proof was received, in open court, in the county where the lands lie, and was ordered to be registered by that court, which order was executed.

This court is of opinion, that the deed was not sufficiently proved, according to the then existing law. The probate before Judge Haywood was not sufficient to prove it as a deed made out of the state, because the act of 1797 required that such probate should be made in open *court. The proof made before Judge Powell, and in open court, is insufficient, because [*477 it was not made by a subscribing witness.

On the 23d of November 1809, the legislature of Tennessee passed an act, declaring that all deeds for land within the state, made out of the state, by grantors residing without the state, and "which shall have been proven by one or more of the subscribing witnesses thereto, or acknowledged by the grantor or grantors before any judge of any court in another state, or before the mayor, &c., and shall have been registered in this state in the county where the land, or any part thereof lies, within the time required by law for registering the same, such probate and registration shall be good and sufficient to entitle the same to be read in evidence in any court within this state."

This act appears to the court to cover the precise case. This was a deed for land lying within the state of Tennessee, made out of the state, by grantors residing without the state, which had been proven by one of the subscribing witnesses thereto, before a judge of a court of another state, and had been registered in the county where the land lay, within the time required by law for registering the same. This act gave complete validity to the registration made in December 1808, and entitled the deed to be read

in evidence. It looked back, in order to affirm and legalize certain registrations made on probates which did not satisfy the laws existing at the time, but which the legislature deemed sufficient for the future.

In tracing his title, the plaintiff in the circuit court gave in evidence a deed to himself, which bore date posterior in point of time to the demise laid in the declaration of ejectment. The defendant, on this account, objected to the deeds going in evidence to the jury, but the court overruled the objection, and declared the date of the lease to be immaterial, and that it should be overlooked, or the plaintiff have leave to amend. The declaration was amended, by striking out the date of the lease mentioned in the declaration, and inserting a date posterior to the conveyance made to the plaintiff.

*478] *In an ejectment, the lease is entirely a fiction invented for the purpose of going fairly to trial on the title. Courts have exercised a full discretion in allowing it to be amended. A plaintiff has frequently been allowed to enlarge the term, when it has expired before a final decision of the cause. Between making the term extend to a more distant day, and commence at a later day, the court can perceive no difference in substance. They are modifications of the same power, intended to effect the same object: and although not precisely the same in form, the one is not greater in degree than the other. The amendment, therefore, was properly allowed.

Although this court is of opinion, that the circuit court erred in saying, that it was unnecessary to prove a title in the lessor of the plaintiff, at the date of the demise laid in the declaration, yet it is an error which could not injure the defendants, or in any manner affect the cause. The amendment being allowed, the question whether the deed could have been read in evidence, had the amendment not been made, becomes wholly immaterial, and this court will not notice it.

For the purpose of showing that the original grant was void, the defendant then offered evidence to prove, that it was founded on a duplicate warrant, issued by John Armstrong, entry-taker of western lands for the state of North Carolina, in the year 1793, the original warrant being still in the hands of the surveyor-general of the middle district, within which the original entry was situated; and that the grantees, after the said grant was issued, obtained the original warrant from the surveyor-general, and procured another grant founded thereon, for other lands. To the admission of this testimony, the plaintiff objected, and the court sustained the objection. To this opinion also an exception was taken.

By the laws of North Carolina, under which this entry was made, any citizen was permitted to enter with the entry-taker, any quantity of land not exceeding 5000 acres, which it was his duty to describe specifically. After the expiration of three months, the entry-taker was to give him a copy of the entry, with a warrant to the surveyor to survey the land. As no other

*479] *land than that described could be surveyed under this entry and warrant, while the land really entered remained vacant, it was entirely unimportant, whether the survey was made under the first or a second copy of the entry. If, indeed, two persons claimed the same land, under different surveys and grants, the elder patentee would, of course, hold the land at law. But no person other than such subsequent patentee, or one claiming under him, could contest the elder grant. To the state, and to all the world, it was perfectly immaterial, when this grant issued, whether it emanated on

the first copy of the entry, or on any other copy, as no other use had then been made of the first copy, and this grant was unimpeachable.

In 1784, a power was given to remove entries, when they were made on lands previously granted or entered. But certainly this would not extend to the removal of an entry, and the survey of other lands, on a copy thereof, which entry had already been executed and carried into grant, either on the first or on any other copy. The face of the grant gave no notice that it had issued on a second copy of the entry, and as the case was not provided for by law, it is not improbable, that every copy given by the entry-taker would bear the same appearance. There was nothing which would indicate to a purchaser that some future fraud might possibly be practised, whereby another grant might be obtained, and which might caution him, that a title, good to every appearance, was infected by a circumstance into which the law did not expect him to inquire. Had no subsequent patent issued in this case, for other lands, it would not be contended, that this patent was either void or voidable, and it is perfectly clear, that a patent which was valid, when issued, never can be avoided in the hands of a fair purchaser, by a subsequent fraud committed by the original patentee. It is the subsequent patent which injures the state, and which is obtained by fraud. It is the subsequent patent, if either, the validity of which is questionable.

In the year 1795, an act passed directing the books of entry-takers to be delivered to the clerks of the several county courts in which such entry-takers respectively resided: and in 1796, an act passed, prescribing the *manner in which duplicates might be obtained, where the warrants were lost, and others had not been issued, while the books remained with the entry-takers. [*480 It is strongly to be inferred, not only from the language of this act, but from the circumstance that no provision is made for duplicates to be issued by the entry-taker, in future cases of lost warrants, that every copy of an entry which was granted by the entry-taker, was considered as an original, and as an equal authority to the surveyor to survey the land entered. The entry being once executed, it was his duty not to execute it again.

This act provides, that where duplicates shall issue from the clerk, by order of the court, the surveyor shall note the fact in his plat, and it shall appear on the face of the grant, that the same is issued on a duplicate, and shall be liable to become null and void, if it shall appear that a grant had been obtained on the original warrant. This act applies only to grants issued on duplicates obtained in conformity with its provisions, and would seem to respect only the junior patent. It cannot affect the grant in this case, which was issued before its passage. But it affords strong reason for the opinion, that the state of North Carolina did not purpose to impeach its own grants, unless they conveyed notice to the world that they were impeachable, and even then they were voidable, not void. An individual not claiming under the same entry, could not avail himself of their liability to be avoided. It is the opinion of the court, that there is no error, and that the judgment be affirmed.

Judgment affirmed.

*Mills v. Duryee. (a)

Constitutional law.—Action on judgment of another state.

Nil debet is not a good plea to an action founded on the judgment of another state.[1]

Error to the Circuit Court for the district of Columbia, in an action of debt upon a judgment of the supreme court of the state of New York, to which the defendant below pleaded *nil debet*, which plea, upon general demurrer, was adjudged bad.

By the constitution of the United States, Art. IV., § 1, it is declared, that "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The act of May 26th, 1790 (1 U. S. Stat. 122), after providing the mode by which they shall be authenticated, declares, that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law, or usage, in the courts of the state from whence the said records are, or shall be taken." And by the supplementary act of March 27th, 1804, § 2 (2 U. S. Stat. 298), it is declared, that the provisions of the original act of 26th May 1790, shall apply as well to the records and courts of the respective territories of the United States and countries subject to the jurisdiction of the United States as to the records and courts of the several states.

F. S. Key, for plaintiff in error.—The true construction of that part of the constitution and laws of the United States will confine their operation to evidence only, and will not justify such an alteration in the rules of pleading. The "effect" to be given to such copies is their "effect" as evidence, for it *is not pretended, that an execution could issue here upon such a record.

*482]

If *nul tiel record* is the proper plea, or could be pleaded in such a case, there are no means of procuring and inspecting the original record (which is essential under such an issue); and the constitution and law, not having provided for this, it must be presumed, did not intend it. The record in this case is not the original; it is certified and authenticated as a copy; and therefore, unless entitled to more faith and credit here than in New York, it could not be offered to the court upon the plea of *nul tiel record*, for under that issue, this record, even in New York, would not be admitted. The original must be produced and inspected. But if this record would be entitled to such consideration in another state, by force of the constitution and law, it is not entitled to it in this district, which is not a state. *Phelps* v. *Holker*, 1 Dall. 261; *James* v. *Allen*, Ibid. 188; *Hitchcock* v. *Aicken*, 1 Caines 460; *Bartlett* v. *Knight*, 1 Mass. 401.

Jones, contrà.—It is admitted, that a record authenticated pursuant to the act of congress, is to have the effect of evidence only; but it is evidence of the highest nature, viz., record evidence. In every case of debt or con-

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(a) March 10th, 1813. Absent, Todd, Justice.

[1] Armstrong *v.* Carson, 2 Dall. 302, and note.

tract, the form and effect of the plea are determined by the dignity of that debt or contract; in other words, by the dignity of the evidence, whether it be of record, by speciality or simple contract. The act of congress makes the authenticated exemplification of the record equivalent to the original record, in its proper state; and communicates to it the same effect, as evidence, thereby making it capable of sustaining the same averments in pleading, and of abiding the same tests, as the original record. It, therefore, cannot be denied or controverted by any plea, such as *nil debet*, which goes to put in issue before the jury the matters averred by the record, and the existence of the record *itself; but the defendant must either distinctly deny the record, or avoid it by pleading *per fraudem*, satisfaction, &c. *Armstrong* v. *Carson*, 2 Dall. 302. [*483

In allowing this conclusive effect to the evidence of the authenticated record, it is immaterial, that it has not the further effect of enabling the ministerial officers of the law to issue an exeeution thereon, for that objection would be equally valid against the record, when used in its proper state, but out of the jurisdiction of its proper court; and also against the sentences of foreign courts of admiralty, under the law of nations. The act of congress communicates to the authenticated record the effect of record evidence in all courts within the United States, and does not limit it to the courts in any state, as supposed by the plaintiff in error.

March 11th, 1813. Story, J., delivered the opinion of the court, as follows:—The question in this case is, whether *nil debet* is a good plea to an action of debt brought in the courts of this district on a judgment rendered in a court of record of the state of New York, one of the United States? The decision of this question depends altogether upon the construction of the constitution and laws of the United States.

By the constitution, it is declared, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." By the act of 26th May 1790, ch. 11, congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared, that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have, by law or usage, in the courts of *the state from whence the said records are or shall be taken." [*484

It is argued, that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence, when admitted. This argument cannot be supported. The act declares, that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record, by declaring what faith and credit shall be given to it.

It remains only then to inquire, in every case, what is the effect of a judgment in the state where it is rendered? In the present case, the

defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt, that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.

But it is said, that admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel record* could not be pleaded, because the record was of another state, and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet*, after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, how-
*485] ever, is undoubted, *that an exemplification would, in such case, be decisive. The original need not be produced.

Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.

The last objection is, that the act does not apply to courts of this district. The words of the act afford a decisive answer, for they extend "to every court within the United States." Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *primâ facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision. On the whole, the opinion of a majority of the court is, that the judgment be affirmed, with costs.

Johnston, J. (*dissenting.*)—In this case, I am unfortunate enough to dissent from my brethern. I cannot bring my mind to depart from the canons of the common law, especially, the law of pleading, without the most urgent necessity. In this case, I see none.

*486] A judgment of an independent unconnected jurisdiction *is what the law calls a foreign judgment, and it is everywhere acknowledged, that *nil debet* is the proper plea to such a judgment. *Nul tiel record* is the

proper plea only when the judgment derives its origin from the same source of power with the court before which the action on the former judgment is instituted. The former concludes to the country, the latter to the court, and is triable only by inspection.

If a different decision were necessary, to give effect to the first section of the fourth article of the constitution, and the act of 26th May 1790, I should not hesitate to yield to that necessity. But no such necessity exists; for by receiving the record of the state court, properly authenticated, as conclusive evidence of the debt, full effect is given to the constitution and the law. And such appears, from the terms made use of by the legislature, to have been their idea of the course to be pursued, in the prosecution of the suit upon such a judgment. For faith and credit are terms strictly applicable to evidence.

I am induced to vary, in deciding on this question, from an apprehension that receiving the plea of *nul tiel record* may, at some future time, involve this court in inextricable difficulty. In the case of *Holker* v. *Parker*, which we had before us this term, we see an instance in which a judgment for $150,000 was given in Pennsylvania, upon an attachment levied on a cask of wine; and debt brought on that judgment, in the state of Massachusetts. Now, if, in this action, *nul tiel record* must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the constitution, by removing all cause for state jealousies, nothing could tend more to enforce them, than enforcing such a judgment. There are certain eternal principles of justice, which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits. But if the states are at liberty to pass the most absurd laws on this subject, and we *admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly, an effect will be given to that article of the constitution, in direct hostility with the object of it. [*487

I will not now undertake to decide, nor does this case require it, how far the courts of the United States would be bound to carry into effect such judgments; but I am unwilling to be precluded, by a technical nicety, from exercising our judgment at all upon such cases.

Judgment affirmed.

Oliver *v.* Maryland Insurance Company. (*a*)

Marine Insurance.—Deviation.

The length of time a vessel may wait to take in her cargo, without discharging the underwriters, does not depend on the usage of the trade.[1]

The danger which will justify a vessel in remaining in port a long time, without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent and indefinite.

If, according to the usage of the trade, a vessel be permitted to go from one port to another, to collect her cargo, and she unnecessarily exhausts, at one port, the whole time allowed, according to the usage of the trade, to complete her cargo, she cannot go to the other port, without being guilty of such a deviation as will avoid the policy.

What is a reasonable apprehension of danger, is a question of law, to be decided by the court. *Quære?*

Error to the Circuit Court for the district of Maryland. This case arose upon a policy of insurance on the snow Comet, "at and from Baltimore to Barcelona, and at and from Barcelona back to Baltimore."

She arrived at Barcelona on the 25th of July 1807, and after remaining forty days under quarantine, went up to the city, where she remained until the 8th January 1808. She then proceeded to Salou, for the principal part of her cargo, which she took in there, and sailed from thence on her return-voyage to Baltimore, on the 28th January 1808, and was captured by the British, and condemned under the orders in council of the 7th November 1807.

At the trial, the defendants insisted on the delay at Barcelona, and the stopping at Salou, as deviations, which destroyed the plaintiff's right to recover upon the policy. The plaintiff justified the stopping at Salou, 488*] *by the usage of the trade. To justify the delay at Barcelona, he relied on two grounds, 1st, a reasonable apprehension of capture; and 2d, the usage of the trade. But the court below decided, that these excuses, under the circumstances stated in the bill of exception, were insufficient. Verdict and judgment were rendered for the defendants, and the plaintiff brought his writ of error.

The circumstances relied upon to show a reasonable apprehension of danger were stated in the master's protest to be as follows: that hearing, in the month of August, news respecting the dispute between Great Britain and the United States, respecting the Chesapeake frigate, the agents recommended their remaining in Barcelona, until they should hear how the differences should terminate, as part of their return-cargo was to be purchased by bills on London. That when they were in the act of sailing for Salou, on the 1st of December, they were informed that the Algerine cruizers were out, capturing American vessels, and they were advised to remain, until they received further information.

Harper, for the plaintiff in error, contended, 1st. That the vessel had a right, under the usage proved, to remain at Barcelona, until her cargo was provided at Salou, and then to go to Salou to take it in. 2d. That she had a right to remain at Barcelona, until the danger of the Algerine cruizers had passed away. 1 Marsh. 204; 1 Johns. 181, 301; 2 Ibid. 138; 3 Ibid. 352.

(*a*) March 3d, 1813. Absent, Washington and Todd, Justices.

[1] See Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, 390.

Martin and *Pinkney*, contrà, did not deny that a reasonable apprehension of great danger would justify a reasonable delay ; but contended, there was no sufficient evidence of such reasonable apprehension. And with regard to the usage of trade, they insisted, that if the vessel exhausted her time for loading at Barcelona, she was not justified by the usage of the trade in going to Salou. That the court, and not the jury, was to judge, from the facts, whether the apprehension of danger was reasonable.

**Harper*, in reply, contended, that the question, whether there was reasonable apprehension of danger, was a question of fact for the jury to decide ; or it was a question in which the law and fact were so blended as to be a matter properly cognisable by the jury. [*489

March 13th, 1813. Marshall, Ch. J., delivered the opinion of the court, as follows :—This was an action brought on a policy insuring the snow Comet, at and from Baltimore to Barcelona, and at and from thence back to Baltimore. The Comet arrived at Barcelona, on the 25th day of July, in the year 1807, where she was compelled to perform quarantine. On the 28th of November, the Comet cleared out from Barcelona for Salou, a port of Catalonia, about sixty miles south of Barcelona, where her return-cargo was ready to be taken on board. On the first of December, when in the act of sailing, the officers of the vessel were informed that the Algerine cruizers were out, capturing American vessels. They were advised to remain, until they received further information. On the 8th day of January 1808, they sailed for Salou, and arrived on the 10th. They were detained by high winds, until the 28th of January, when they sailed for Baltimore. On the 5th of February, the vessel was captured by a British cruizer, while on her return-voyage, and carried into Gibraltar, where she was condemned, under the orders of council of the 8th of November 1807. Evidence was given that it was usual for vessels trading to Barcelona, to touch at Salou, or some other port on the same coast, to take in the whole or part of their return-cargo, and that, in some instances, vessels had remained in the port of Barcelona four, six and even eight months, waiting for a return-cargo.

On this evidence, the counsel for the defendants moved the court to instruct the jury, that the plaintiff could not recover in this cause, by reason of the length of time the vessel remained at Barcelona. The court refused to give the direction as prayed, but did instruct the jury, that, if they believed the facts stated, the plaintiff was not entitled to recover, unless from the whole *testimony in the cause, they should be of opinion, that the vessel did not remain longer at Barcelona than the usage and custom of trade at that place rendered necessary to complete her cargo. To this direction of the court, the plaintiff, by his counsel, excepted. [*490

This exception was not much pressed at the bar, nor does it appear to this court to contain any principle to which he could rightly object. Unquestionably, an idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation which discharges the underwriters. If the Comet remained, without excuse, at Barcelona, an unnecessary length of time, while her cargo was ready for her, and she might have sailed, she would remain at the risk of the owners, not of the underwriters.

There is, however, some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed, that this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to the port or trade. But the necessity of waiting where a cargo is to be taken on board, until it can be obtained, is common to all ports and to all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving that a particular vessel has or has not practised unnecessary delay in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion, that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity, the time usually employed for that purpose might be considered as evidence.

The defendants then moved the court to instruct the jury, that if the said vessel continued at Barcelona as long as was justifiable by the usage of trade at that place, for completing and taking in her cargo, and did not
*491] complete and take in her cargo there, but afterwards *went to Salou, and remained there the length of time as stated in the said protest, in such case, the plaintiff is not entitled to recover. The court instructed the jury, that if the vessel remained at Barcelona as long as the usage of trade justified, for the purpose of taking in a cargo there, that she could not afterwards go to another port, and take it in, without vacating the policy. To this opinion also, the counsel for the plaintiff excepted.

Upon this exception, there was some difference of opinion in this court. For myself, I considered the direction as attaching the departure, which would avoid the contract, to the act of sailing to and continuing in Salou, for the purpose of completing her return-voyage, and am of opinion, that although the Comet might have remained at Barcelona, long enough to have taken in a return-cargo there, for which she might or might not be blameable, yet that no additional fault was committed, by touching at Salou for the purpose of completing her cargo, if, to touch at Salou for that purpose, was the usage of the trade.

A majority of the court, however, is of a different opinion. The usage to stay at Barcelona for a return-cargo, and to touch at Salou for a return-cargo, as disclosed in the plaintiff's evidence, are considered by them, not as independent, but as auxiliary usages, which are to be taken in connection, in ascertaining whether there was or was not unreasonable delay in the conduct of the voyage. The assured had a right, under these usages, as they are called, to take in part of the cargo at Barcelona and part at Salou, or the whole at either port. The delay necessary for these purposes would be justifiable at either port; but if the assured exhausted the whole time, at one port, which, according to the usage, was allowable only for the purpose of taking in the whole cargo, the subsequent delay at another port, for the purpose of taking in the cargo, must be considered as unreasonable. The delay at Barcelona, under such circumstances, could not be necessary for the purposes of the voyage, and therefore, would determine the policy. But the deviation would rest merely in intention, until the time of

sailing for Salou, for until that *time, the assured would have a right to lade his cargo at Barcelona, and thus retroactively justify his stay there, under the usage. The delay could not be a consummated deviation, until the whole time allowed by the usage was exhausted, and the party had definitively abandoned the lading of a cargo, which would justify that delay. The opinion of the court below appears to the majority of this court to have proceeded on this ground, and to be correct.

The plaintiff, then, in addition to the former testimony, gave evidence that it was usual for vessels to remain at Barcelona, until their return-cargoes, or so much thereof as might be necessary for their completion, was provided and collected at Salou, or some other southern port in Catalonia, and then to sail to such port, for the purpose of taking in the cargoes so collected.

The defendants then moved the court to instruct the jury, that since it appeared from the protest of the master and others on board the Comet, and from the sentence of condemnation produced by the plaintiff, that all the return-cargo, which the said vessel took in at Barcelona, was taken in, on or before the 28th of November, that the said vessel was then ready for sea, and was actually cleared out on the 1st of December; and that being there, and about to sail immediately for Salou, the said snow Comet, in consequence of a report that the Algerine cruizers were out, cruizing in the Mediterranean against American vessels, remained at Barcelona, until the 8th of January 1808, before she sailed from Barcelona, if the jury believed these facts, the plaintiff could not recover. This opinion was given by the court, and the plaintiff excepted to it.

Had not the testimony on which this application was founded been spread upon the record, the court would have found some difficulty in deciding on the propriety of the opinion which was given, from the terms employed in stating the application to the circuit court. It appears, however, from a comparison of the application to the court with the testimony on which it was founded, to have been intended to obtain from the court the opinion, that the testimony respecting the report that the Algerines were out, capturing American vessels, was *not a sufficient justification for remaining at Barcelona, from the 1st of December 1807, till the 8th of January 1808. [*493

No doubt is entertained, that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in the port of Barcelona; and the apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But in each case, the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemy's cruizers. Nor is it sufficient, that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate, in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent and indefinite. In the present case, it is not shown, that there was any danger in proceeding from Barcelona to Salou. No Algerine force is shown to be interposed between those ports. Whatever might be the danger elsewhere, if there

was none in proceeding to and remaining in Salou, it was the duty of the master to have proceeded to that place, taken in his cargo, and remained there for further information. The master was bound to have gone so far on his voyage as he could, consistent with the general safety. The judgment is affirmed, with costs.

LIVINGSTON, J.—I concur in the opinion, that the judgment of the circuit court be affirmed; but in coming to this result, I have thought it necessary to examine only the fourth exception which was taken below. It is, according to my view of this cause, very immaterial, to inquire whether the plaintiffs succeeded in establishing the usage, as it has been incorrectly termed, for a vessel to remain several months at Barcelona for the purpose of ob-
*494] taining *a return-cargo: or whether, at one period, the master of the Comet entertained a well-grounded apprehension of danger of capture by British vessels; or whether it was the course and usage of the trade for vessels bound from Barcelona to any foreign ports to touch at Salou, or at some other port south of Barcelona, on the coast of Catalonia, in order to take in their return-cargoes; I say, whether these facts were established, or what opinion the court gave on them, in the course of the trial, are, in my judgment, as this case comes up, totally irrelevant in the decision of it, because there are other facts proved, and that by the plaintiffs themselves, which are in the opinion of the whole court fatal to their claims.

The facts are these: "That after all fear from British cruizers had ceased, to wit, on the 28th of November 1807, being ready for sea, the vessel cleared for Salou, on the 1st day of December following, and when in the act of sailing, information was received that the Algerine cruizers were out, capturing American vessels; the master was, therefore, advised to remain in port, until they received other intelligence, and did not sail for Salou, until the 8th of January 1808." On this evidence, the circuit court instructed the jury, that if they believed these facts to be true, the plaintiffs were not entitled to recover. In giving this opinion, the court in effect said, that the information which was received at Barcelona, respecting the Algerine cruizers, did not justify a stay there from the 28th of November to the 8th of January.

To this opinion, two objections are made. The one is, that the court took upon itself to decide whether the delay last mentioned proceeded from a justifiable cause, instead of leaving it to the jury to determine both the law and the fact. In doing so, I think, the court committed no error. What will excuse a delay, apparently unreasonable, so as to repel the charge of a deviation on that account, must ever be, and ought to be, a question of law, to be decided by a court, under all the circumstances of the particular case. In this way only can anything like certainty be attained; but if it
*495] be left to a jury, not only to find the facts, which is *exclusively within their province, but also to pronounce what is the law resulting from them, it will be next to impossible, to form a system of rules by which a merchant may safely regulate his conduct. Nor will it help the matter, to consider it as a mixed question of law and fact, because that gives to the jury a right to disregard the opinion of the court, which they will have no right to do, in case it be considered exclusively as a question of law on which the court alone has a right to decide. In civil cases, every man has

an interest in confining a jury as much as possible to their proper sphere which is to decide on facts; while a court does not encroach on their province, care should be taken not to encourage any improper encroachment on their part, by unnecessarily throwing on them any exercise of what are the legitimate functions of a court. Among these, none appear to me to be better settled, than that it is the exclusive privilege and bounden duty of a court, to decide whether an act, which is to be done within a reasonable time, to entitle a party to maintain his action, has been performed within such time, or not. So also, where a party sets up an excuse for an act which will otherwise defeat his right to recover, it appertains exclusively to the court, to decide on the sufficiency of the matter alleged; and if a jury, after deciding on the facts, take upon themselves the further office of determining the legal effect thereof, as to the case under consideration, in opposition to the declared opinion of the court, they forget their duty and act contrary to law.

But if this be a question of law, the plaintiff still supposes, that the circuit court erred, in not thinking that the facts proved, constituted a valid excuse for the last forty days' stay at Barcelona, and in not instructing the jury accordingly. This excuse was, in my opinion, properly disposed of by the judge below, but instead of stating at length why I consider the alleged apprehension of capture by the Algerines as furnishing no justification for this delay, it is sufficient to say, that I entirely concur, not only in the opinion which has already been delivered on this point, but in the whole of the reasoning on which it is founded.

Story, J., concurred with Judge Livingston.

*Marshall, Ch. J.—My own opinion was, that the jury was to find the fact, whether there was danger in passing between Barcelona and Salou; and that they ought to have been instructed, that if there was danger, it justified the delay, otherwise not. [*496

Judgment affirmed.

The Caroline. (a)

The Brig Caroline, William Broadfoot, claimant, *v.* United States.

Slave trade.—Information.

A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offence.[1]

An informal libel, or information *in rem*, may be amended, by leave of the court.[2]

Error to the Circuit Court for the district of South Carolina, in a case of seizure for violation of the acts of congress respecting the slave trade. The libel was in the words following:

"At a special district court for South Carolina district: Be it remem-

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(a) February 24th, 1813.

[1] The Anne, *post*, p. 570; The Little Charles, 1 Brock. 347. See the Emily and Caroline, 9 Wheat. 381; United States *v.* Ward, 5 Wall. 68–9; United States *v.* Huckabee, 16 Id. 431; United States *v.* Mann, 95 U. S. 586; United States *v.* Simmons, 96 Id. 365.

[2] See The Edward, 1 Wheat. 261; The Maybey, 10 Wall. 420.

bered, that on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, the United States of America, by Thomas Parker, their attorney for the district aforesaid, came here into court, and gave Thomas Bee, Esq., judge of the said court, to understand and be informed, that on the ——— day of ——— they, the said United States, by their proper officers of the customs, did cause to be seized, arrested and secured, a certain brig or vessel called the Caroline, her tackle, furniture, apparel and other appurtenances, as forfeited to them, the said United States; for that the said brig or vessel, since the 22d day of March 1794, was built, fitted, equipped, loaded, or otherwise prepared, within a port *or* place of the said United States, *or* caused to sail from a port or place of the said United States, by a citizen *or* citizens of the said United States, *or* a foreigner, *or* other persons coming into, *or* residing in the same, *either* as master, factor *or* owner of the said brig *or* vessel, for the purpose of carrying on trade *or* traffic in slaves to a foreign country; and also, for that
*497] the said brig or vessel, since the day and year last aforesaid, *was built, equipped, loaded *or* otherwise prepared, within a port *or* place of the said United States, *or* caused to sail from a port *or* place within the said United States by a citizen *or* citizens of the said United States, *or* a foreigner *or* other persons coming into or residing within the same, *either* as factor, master or owner of the said brig *or* vessel, for the purpose of procuring from a foreign kingdom, place *or* country, the inhabitants of such kingdom, place *or* country, to be transported into a foreign place *or* country, port *or* place, to be disposed of and sold as slaves, in violation of a certain act of congress of the said United States, passed the 22d March 1794, entitled 'an act to prohibit the carrying on the slave-trade from the United States to any foreign place or country.' Also, for that since the 1st day of January 1808, the said brig *or* vessel was built, fitted, equipped, loaded *or* otherwise prepared, in some port *or* place within the jurisdiction of the said United States, *or* caused to sail from some port *or* place within the said United States by some citizen *or* citizens of the said United States, *or* some other person, for the purpose of procuring negroes, mulattoes, *or* persons of color from *some* foreign kingdom, place *or* country, to be transported to some port *or* place within the jurisdiction of the said United States, to be held, sold *or* disposed of as slaves, *or* to be held to service *or* labor, in violation of a certain act of congress of the United States, passed the 2d day of March, in the year of our Lord 1807, entitled 'an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first day of January, in the year of our Lord 1808.' Wherefore, the said United States, by Thomas Parker, their attorney aforesaid, pray the advice and opinion of this honorable court in the premises, and that on due proof of the allegations aforesaid, the said brig or vessel, her tackle, apparel, furniture and other appurtenances, may be decreed and adjudged as forfeited to them, the said United States, and that such proceedings may be had thereon as are agreeable to law and justice, and the style, usage and practice of this honorable court." THOMAS PARKER,
Attorney U. States, S. C. District."

*498] *To the transcript of the record which came up, was annexed the following statement of facts:

"The information which was filed in this case against the Caroline was founded upon an alleged violation either of the 1st section of an act of congress, passed the 22d March 1794, entitled 'an act to prohibit the carrying on the slave-trade from the United States to any foreign place or country,' or of the 2d section of an act, passed on the 2d of March 1807, entitled 'an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808.' By the act of 1794, the fitting or sailing of a ship, for the purpose of a traffic in slaves to any foreign country, subjects the ship, concerned in such traffic, to forfeiture."

"The act of 1807 enacts, that if any ship within the jurisdiction of the United States shall be fitted out, or caused to sail, by any person, either as master, factor or owner, 'for the purpose of procuring any negro, mulatto or person of color from any foreign country, to be transported to any place whatsoever, within the jurisdiction of the United States, to be held, sold or disposed of as slaves, or to be held to service or labor,' she shall be forfeited to the United States. It was admitted by the claimant, that the Caroline came into this port, equipped like any common merchant vessel, that she did, after her arrival, receive fitments and take on board articles calculated for the slave-trade only It was satisfactorily proved, that the claimant, after receiving information that such equipments were illegal, restored the Caroline to the condition in which she was when she entered this port, but that this was not done till after her seizure; and that the wooden parts of the fitments for slaves were marked as they were taken out of the vessel. That in such condition, she left Charleston, bound to the Havana and to no other port. That she arrived at the Havana, on the 28th of June 1810, and that there she was sold, about the 6th of August 1810, to Spanish subjects, who fitted her out for the African slave-trade. His honor, the circuit judge, upon the ground of sufficient evidence having been adduced of intention to carry on the slave trade, either *abroad or at home, and a consequent violation either of the act of 1794, or of the act of 1807, decreed that the Caroline should be condemned as forfeited to the United States. We agree in the above statement of the case. [*499

William Drayton, Proctor for Appellant.
Thomas Parker, District-Attorney."

C. Lee, for the appellant, contended, 1st. That the libel was not sufficient to support the condemnation: and 2d. That the offence was not made out in point of fact.

1. The libel does not state any certain specific offence. It is altogether in the alternative. It does not state when, nor where, nor by whom, the vessel was seized; nor when, nor where, nor by whom, nor in what manner, the vessel was fitted out. It is altogether vague, uncertain and informal. An information *in rem* ought to be as precise and formal as an information *in personam*. The civil law requires that a libel should be certain and positive in all material circumstances.

2. The statement of facts is as imperfect as the libel. The vessel is only liable to forfeiture, when she shall have been actually fitted, equipped or prepared, not while she is fitting, equipping or preparing. The degree of equipment ought to have been stated, that the court might judge whether

it were such fitting, or equipment as is contemplated by the law. Upon every information for a penalty, the offence should be fully proved. Parker 22. This case is like that of *Moodie* v. *The Ship Alfred*, 3 Dall. 307; in *500] which this court decided, *that the ship was not illegally fitted out, although she had taken on board some articles calculated for war.

J. R. Ingersoll, contrà, contended, that the case and the libel were sufficiently explicit. The intent was clearly shown. It is not necessary, that everything necessary for the voyage should be on board, before the forfeiture accrues. The libel states the offence in the words of the act of congress.

The Court, after taking time to consider, directed the following sentence to be entered: "This cause came on to be heard on the transcript of the record, and was argued by counsel, on consideration whereof, it is the opinion of the court, that the libel is too imperfectly drawn, to found a sentence of condemnation thereon. The sentence of the said circuit court is, therefore, reversed, and the cause remanded to the said circuit court, with directions to admit the libel to be amended."(*a*)

The same point was also decided at this term, in the cases of *The Schooner Hoppet; The Schooner Enterprise; The Ship Emily*, and *The Schooner Ann.*

(*a*) The ground upon which the sentence of this court was founded, is understood to be as follows: The only offenses in the statute of 22d March 1794, ch. 11, for which a vessel could be forfeited, are that the same vessel is "fitted out" or "caused to sail" for the purpose of carrying on the slave-trade. The libel in this case alleges, in the alternative, that the brig Caroline "was built, equipped, loaded, *or* otherwise prepared," &c., *or* "caused to sail," &c., for the purpose of carrying on the slave-trade. It does not, therefore, positively allege that the vessel "was fitted out" or "caused to sail;" and the libel might be true, in the manner in which the charge was stated, and yet no offence committed, which would induce a forfeiture of the vessel. For if the vessel was "built, or loaded, or prepared," for the purpose of the slave-trade, the alternative averment in the libel would be completely satisfied; and yet, if she was not "fitted out," or "caused to sail," she could not be forfeited.[1] The facts, therefore, constituting the offence, not being directly averred, the libel could not be sustained. But the court did not mean to decide, that stating the charge in the alternative would not have been sufficient, if each alternative had constituted an offence for which the vessel would have been forfeited. The same observations are applicable to the count founded on the act of 2d of March 1807, ch. 67.[1]

[1] See The St. Jago de Cuba, 9 Wheat. 409; *v.* Gooding, 12 Id. 460; The Sarah, 2 Wall. The Plattsburgh, 10 Id. 133; United States 371.

Riggs *v.* Lindsay. (*a*)

Assumpsit.—Bills of exchange.—Letters.

The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills, and damages and costs of protest (if he has paid the same), upon a count for money paid, laid out and expended; and the bills of exchange may be given in evidence on that count.[1]

If one defendant produce in evidence a letter from his co-defendant to the plaintiff, the latter may give in evidence the written declarations of that co-defendant, to discredit the letter.

If, after protest of the bills, the plaintiff sell the salt without orders, it will not prejudice his right of action, although he render no account of sales to the defendants.

Error to the Circuit Court for the district of Columbia, in an action of *assumpsit*, in which the verdict and judgment were in favor of the plaintiff, Lindsay.

The case was now argued by *Jones* and *Harper*, for the plaintiff in error; and by *F. S. Key* and *Morsell*, for the defendant.

The former contended, that Riggs was not to be considered as a joint contractor, but a sub-purchaser; and *that if the defendants were [*501
jointly interested in the purchase, they were *severally* interested in the sales. In support of this position, they cited Watson on Partnership 24; 1 Ves. 242; Cowp. 449; 2 H. Bl. 298; 1 Doug. 371, and 1 H. Bl. 37.

The facts of the case are stated in the opinion of the court, which was delivered, as follows, by—

Livingston, J.—This was an action brought by the defendant in error, in the circuit court of the United States for the district of Columbia, against William Stewart, Charles J. Nourse, Aquila Beall and the plaintiff in error, Elisha Riggs, as copartners, to recover from them the amount of certain bills of exchange, and damages, which had been drawn on them by the defendant in error, to reimburse him for certain salt which he had purchased on their account, and which bills, being protested for non-payment, were afterwards paid, with damages, by the plaintiffs below. The defendant, Beall, was not found; the defendants, Nourse and Stewart, confessed judgment, and the other defendant, Riggs, pleaded the general issue.

The declaration contained several counts on the bills of exchange, and two general counts, the one for money paid, laid out and expended, the other for money had and received; under which last counts, a verdict was found for the plaintiff.

It appeared in evidence, that some time in November 1809, Stewart and Beall, two of the defendants below, wrote a letter to the plaintiff, ordering a purchase of salt, and stating that two other persons were concerned in the said order. This letter directed him to purchase from 10,000 to 30,000 bushels, and authorized him to draw for the amount of such purchases on the defendants, Stewart and Beall, or on George Price & Co., of Baltimore. Purchases of salt were accordingly made by Lindsay, who, from time to

(*a*) March 9th, 1813. Absent, Todd, Justice.

[1] See Chesapeake and Ohio Canal Co. *v.* Knapp, 9 Pet. 565.

time, apprised Stewart and Beall of the same. On the 4th January 1810, one of the defendants wrote to Lindsay as follows:

*502] *"SIR: You will hold up what salt you may have purchased, and send us a statement of your purchases. You have, no doubt, received Stewart and Beall's orders, requesting no further purchase. We shall, some time hence, direct you as to the disposal of the quantity purchased. In the meantime, you may draw upon us, or upon Stewart and Beall, for the amount," &c.

It appears, that Lindsay afterwards drew several bills of exchange on the parties who had subscribed the last-mentioned letter, and who were the defendants, in favor of certain persons therein named, including his commission for purchasing. These bills were presented to the drawees, who refused to accept or pay the same, on which they were protested and returned to Lindsay, who took them up. By the laws of South Carolina, ten per cent. damages are allowed on the return of such bills, under protest, and there was proof that these damages had also been paid by Lindsay. After the return of these bills, and payment of them by Lindsay, he sold the salt, and the proceeds on such resale were stated by Lindsay's counsel, at the trial, to the jury, who were desired to deduct the same from his demand against Riggs, which was done, and a verdict given for the balance. There was no other evidence of the proceeds, than such admission, and the defendant, Riggs denied that the sum stated by Lindsay's counsel was the amount thereof.

In the course of the trial, the counsel of Riggs produced a letter from Nourse to the plaintiffs, which, as he supposed, contained a statement favorable to his client. To discredit this statement, the plaintiff produced certain interrogatories, which had been exhibited to Nourse, with his answers, which were at variance with the letter produced by Riggs.

The first exception taken, at the trial, to the conduct of the court, was to its admission of proof of the several bills which had been drawn by Lindsay, and protested and paid by him, and the instruction which it gave to the jury, that under the count for money paid, laid out and expended,

*503] Lindsay might recover, not his *commissions which were included in the bills, but the ten per cent. damages, if the jury were satisfied, that they had been actually paid by him. Neither in the admission of this testimony, nor in the instructions given on it, was any error committed by the circuit court. As Lindsay was expressly authorized to draw, by the letter of the 4th of January 1810, he certainly had a right to do so, and whether the defendants accepted his bills or not, so as to render themselves liable to the holders of them, there can be no doubt, that as between Lindsay and them, it was their duty, and that they were bound in law, to pay them. Not having done so, and Lindsay, in consequence of their neglect, having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered, from the moment he drew the bills), it may well be said, that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid, by the drawees, he paid so much money for their use. Nor can any good reason be assigned, for distinguishing the damages from the principal sum, for, if it were the duty of the defendants to pay such principal sum, it is as much so, to reimburse Lindsay for the

damages which, by the law of South Carolina, he was compelled to pay, and which may, therefore, also be considered as part of the debt due by the defendant, in consequence of the violation of their promise, contained in the letter which has just been mentioned.

The second exception which appears on the record is to the admission of certain interrogatories, which had been propounded to the defendant, Nourse, with his answers to the same, having an indorsement upon the same, purporting to be an acknowledgment of Nourse that the same were correct. In the opinion of this court, this paper was rendered proper evidence, by the conduct of the defendant, Riggs, who had read as evidence for himself, a letter from Nourse to Lindsay, dated the 14th April 1810, containing, as he supposed, some matters favorable to his defence. This letter having been thus produced by Riggs himself, *it was certainly right, to allow Lindsay to discredit the representations made in that letter, by showing that Nourse had himself, at another time, given a very different account of the same transaction. [*504

The other opinions of the court below, to which exceptions were taken, may be comprised in these two; that the court erred, in thinking the defendants jointly liable as copartners, and that the resale of the salt did not destroy the plaintiff's right of action. In both these opinions, this court concur with the circuit court. It is, perhaps, as clear a case of joint liability as can well be conceived. Whatever doubt there might be, independent of the letter of the 4th of January 1810, most certainly, that letter puts this question at rest. Every one of the defendants sign it, and there is now no escape from the responsibility which they all thereby incurred to the plaintiff.

Nor did Lindsay's selling the salt, after he had taken up these bills, destroy his right of action against the defendants. If he has acted irregularly in so doing, he will be liable, in a proper action, for the damages which the defendants have sustained by such conduct, but such sale could not be pleaded or set up in bar to the present suit.

Nor will the defendant, under the circumstances of this case, be injured by the sum which the jury have discounted from Lindsay's demand, if it shall hereafter appear that as much was not allowed the defendants on that account as ought to have been. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

McIntire *v.* Wood. (*a*)

Mandamus.

The power of the circuit courts of the United States to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.[1]

This case came up from the Circuit Court for the district of Ohio, upon a certificate stating that the judges of that court were divided in opinion

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(*a*) March 9th, 1813. Absent, Washington and Todd, Justices.

[1] Kendall *v.* United States, 12 Pet. 526; Smith *v* Allyn, 1 Paine 453; Graham *v.* Norton, 15 Wall. 427; United States *v.* Smallwood, 2 Am. L. T. Rep. 109.

upon the question, whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, *commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that state?

*505]

Harper, for the plaintiff, referred the court to the case of *Marbury* v. *Madison* (1 Cr. 137). The constitution of the United States extends the judicial power to all cases in law and equity arising under the constitution and laws of the United States. By the 11th section of the judiciary act of 1789 (1 U. S. Stat. 78), the circuit courts have original cognisance of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the value of $500, &c. And by the 14th section of the same act, they have power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law. This is a suit of a civil nature at common law, and the matter in dispute exceeds the value of $500. The writ of *mandamus* is necessary to the exercise of their jurisdiction, and is agreeable to the principles and usages of law. 3 Burr. 1266. The power given by the constitution is divided between the supreme and the circuit courts. It has been decided, that the power to issue a *mandamus*, in such a case, does not belong to the supreme court; it must, therefore, be in the circuit courts.

March 15th, 1813. JOHNSON, J., delivered the opinion of the court, as follows:—I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the circuit court of Ohio, upon a motion for a *mandamus* to the register of the land-office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff, for lands to which he supposed himself entitled under the laws of the United States.

This court is of opinion, that the circuit court did not possess the power to issue the *mandamus* moved for. Independent of the particular objections which this case presents, from its involving a question of freehold, *we are of opinion, that the power of the circuit courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause of the constitution, which relates to this subject.

*506]

A case occurred some years since, in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it

here.[1] It was a *mandamus* to a collector to grant a clearance, and unquestionably, could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector and the district-attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*

LIVINGSTON & GILCHRIST *v.* MARYLAND INSURANCE COMPANY. (*a*)

Marine Insurance.—Misrepresentation and concealment.—Warranty.—National character.—Notice.—Usage of trade.—Abandonment.—Increase of risk.

To constitute a representation (in making insurance), there should be an affirmation or denial of some fact; or an allegation which would plainly lead the mind to the same conclusion.[2]

If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover upon the policy.

In general, concealment of papers amounts to a breach of warranty.

A Spanish subject who came to the United States, in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license, and who continued to reside here, and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as an American merchant, although the trade could be lawfully carried on by a Spanish subject only.

If a letter submitted to underwriters, ordering insurance, refer to another letter, previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal.

An usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country.[3]

The question whether an abandonment were made in due time, is not a question of fact, to be exclusively left to the jury, but to be decided by them, under the direction of the court.

No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.

If the plaintiffs do any act which increases the risk of capture and detention, according to the common practice of the belligerent, it may avoid the policy. It is not necessary, that the risk thus increased, should be the risk of rightful capture, according to the law of nations.

ERROR to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of insurance *(against capture only) upon the cargo of the ship Herkimer, "from Guayaquil, or her last port of [*507 departure in South America, to New York," "warranted American property, proof of which to be required in the United States only,"—"and warranted free from seizure for illicit trade." The declaration was on a loss by capture.

The case was stated as follows, by MARSHALL, Chief Justice, in delivering the opinion of the court: Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain, a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in

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(*a*) February 9th, 1813. Absent, LIVINGSTON and TODD, Justices.

[1] Gilchrist *v.* Collector of Charleston, 1 Hall's L. J. 429.

[2] A mere expression of opinion by the assured, cannot amount to a material representation. Clason *v.* Smith, 3 W. C. C. 156. And the omission of certain facts from an application for insurance, is no evidence of a concealment of them. Mercantile Ins. Co. *v.* Folsom, 18 Wall. 237; s. c. 9 Bl. C. C. 201.

[3] S. P. United States *v.* Wiggins, 14 Pet. 334.

foreign vessels, a certain quantity of goods, in the license mentioned, and to take back the proceeds in produce, on payment of half duties, came to New York, in September 1803 (Spain being then at peace with Great Britain), for the purpose of carrying on trade under his said license. On the 24th of August 1804, he entered into a contract with a certain Anthony Carroll, for the transportation of a certain quantity of goods to Lima, in Peru, under the said license. Carroll died, without carrying the contract into full effect. On the 25th of January 1805, war having then broken out between Great Britain and Spain, B. Livingston, who had been bound as Carroll's surety for the performance of the contract, entered into a new contract with Baruso for the transportation of the same goods. The preamble recites the license, and says: The said Baruso has agreed with the said B. Livingston to make an adventure to Lima, on the conditions and stipulations following, to wit:

1. In consideration, &c., he agrees to the following partnership with the said B. Livingston, in virtue of which he transfers to the said firm, all his powers, &c. (under the license), of sending an American vessel, belonging to the said Livingston, or chartered, in which vessel shall be embarked goods to the amount of $50,000, the funds and vessel to be furnished and advanced by said Livingston.

*508] *2. Baruso to obtain the necessary papers from the Spanish consul, and B. Livingston to pay the duties. Baruso answerable for detention or confiscation by the Spanish government or vessels, on account of any defect of right to send under said license, &c.

3. Livingston agrees, in four months, to embark the goods on board a vessel, to Lima, to proceed thither, and to return to the United States with a cargo.

4. Livingston to choose the supercargo and instruct him; and as the adventure will appear on the face of the papers to belong to Baruso, he shall give the supercargo a power, and recognise him the master of the cargo, so that the consignees at Lima shall follow literally his orders. The consignees, who were partners of Baruso, to receive a commission.

6. The said Livingston and Baruso agree to divide equally, and part and part alike, the profits of the adventure. Livingston to have commissions on sale.

7. Optional in Livingston to sell in United States, or convey the return-cargo to Europe. If he sells in the United States, Baruso may take out, at the price of sales, as much as will be equal to his rights.

8. If Livingston sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss, Baruso to claim nothing, as his share in the profits only accrues on the safe return of the vessel to the United States. Optional with Livingston to insure or not. Livingston not to be allowed for risk, if no insurance, more than 15 per cent. No insurance to be on the risks of the Spanish government.

12. If any loss accrues from causes not stipulated, Baruso to lose only his privilege. If loss on sale of return-cargo, Baruso to sustain half.

Livingston soon afterwards chartered the ship Herkimer for the voyage, and entered into a contract with the other plaintiff, Gilchrist, one James

*509] Baxter and Edward Griswold, for jointly carrying on, with them, *the said voyage. The cargo was purchased with their joint funds, and

was shipped to Lima, where, and at Guayaquil, a return-cargo was received, purchased with the proceeds of the original cargo.

On the 25th of March 1806, Mr. Gilchrist addressed to Alexander Webster & Co., at Baltimore, a letter containing an order for insurance on the cargo of the ship Herkimer, from Guayaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure for illicit or prohibited trade. It says, "the owners are already insured against the dangers of the seas, and all other risks, except that of capture." "You have already had a description of the ship from Messrs. Church & Demmill, the agent of Mr. Jackson, and which I presume is correct." "I think proper to mention, that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that in his letter from Lima, he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The letter of Church & Demmill was dated 13th February 1806, and after describing the ship, adds, "she sailed from Boston, the 12th of May last, for Lima, with liberty to go to one other port in South America, not west of Guayaquil, and from thence to New York. She has permission to trade there." This letter was laid before the board of directors, and the application, at that time, rejected. The letter from Gilchrist to Webster & Co. was afterwards laid before the board, and the company made the insurance for the plaintiffs at ten per cent.

The Herkimer, on her return-voyage, was captured, near the port of New York, by the Leander, a British ship of war, and sent to Halifax, where she was condemned. *The plaintiffs gave the underwriters notice of *510] the capture, and obtained their permission to prosecute a claim for restoration, without prejudice to their right to abandon. On receiving notice of the condemnation, they wrote a letter of abandonment, which was delivered to the underwriters, who refused to pay for the loss, whereupon, this suit was brought.

On the return-voyage, just after doubling Cape Horn, Baxter, who was supercargo and part-owner, gave to Edward Giles, the third mate, a bundle of papers, partly in Spanish, telling him, at the same time, that in all probability, they might fall in with privateers, who might overhaul the trunk in the cabin, and if they found the papers, it was probable, the vessel might be detained, as the papers were in Spanish, and they might not be able to translate them. Giles put the papers in his trunk.

After the capture, Giles was taken out of the Herkimer into the Leander, and on being asked, if he had any objection to have his trunk searched, replied that he had not. The trunk was then searched, and this bundle discovered. It contained papers, covering the cargo as the property of Baruso, mixed with others which showed that in fact it was the property of the plaintiffs and of Baxter and Griswold. Evidence was given to prove, that the usage of the trade made these papers necessary. There was also an estimate of the probable value of the cargo, if shipped to Europe.

The Herkimer arrived before the Leander; and Baxter, upon his exami-

nation on the standing interrogatories, described truly the character of the voyage, and stated correctly the property in the cargo, but denied his knowledge of any papers, other than those which were exhibited, as belonging to the ship.

Issue was joined on the plea, that the defendants had not broken their covenant, and the jury found a verdict in their favor.

On the trial, twenty-eight bills of exception were taken, partly by the plaintiffs, and partly by the defendants. Only those taken by the plaintiffs are now before the court.

*511] *The plaintiffs prayed the court below to instruct the jury, that the letter, ordering the insurance, does not contain a representation that no person, other than the said Livingston, Gilchrist, Griswold & Baxter, was interested in the return-cargo of the Herkimer; nor that all the persons interested therein were native Americans. The judges were divided on this point, and the instruction was not given.

The fifth bill of exception stated, that the plaintiffs prayed the court to instruct the jury, that if they believed the testimony offered by them, then there was no such concealment of the said papers as can affect the right of the plaintiffs to recover in this action; which instruction the court refused to give, but directed the jury, that if they should be of opinion, that from the usage and course of trade, it was necessary to have the Spanish and other papers, delivered by Baxter to Giles, the third mate, as aforesaid, then the delivery by Baxter to Giles, and the finding and taking of the said papers by the officers of the Leander, was not such a concealment as affects the right of the plaintiffs to recover.

The sixth bill of exception states, that the plaintiffs then prayed the court to instruct the jury, that Baruso having removed to New York, in the United States, while Spain was neutral, for the purpose of carrying on trade, and having continued to reside in New York, until after the capture of the Herkimer, the said Baruso could not, at the time of the voyage, be considered as a belligerent. This instruction the court also refused to give, but did instruct the jury, that if they should be of opinion, that the said Baruso settled in New York, before the war between Spain and Great Britain, and remained there domiciliated, and carrying on trade generally, until the capture of the Herkimer, he is to be considered as a neutral; but if they should be satisfied from the testimony, that he went to New York for no other purpose but to carry on trade as a Spanish subject, which he could not engage in as a neutral, and that he was not engaged in any other trade than as a Spanish subject, he cannot be considered as a neutral.

The seventh bill of exception states, that the court then, on the prayer
*512] of the defendants, gave to the jury the following opinion: *"The court having already given an opinion, that Baruso was not a joint-owner with the plaintiffs and Griswold & Baxter, in the return-cargo of the Herkimer, do, in compliance with the opinion of the supreme court, leave it to the jury to determine, whether Baruso had an interest in the return-cargo, which increased the risk of the said voyage, and if the risk was increased, that the policy was thereby vitiated." This opinion was given on the prayer of the defendants, to instruct the jury, that the non-communication to the underwriters of papers showing Baruso to have an interest, and to be a Spanish subject, vitiated the policy.

The eighth bill of exception stated, that the defendants then prayed the court to instruct the jury, that if they should be of opinion, that the papers which were delivered to Giles by Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the defendants, that such papers would accompany the cargo, then the plaintiffs were not entitled to recover. The court gave the opinion.

The ninth bill of exception stated, that the plaintiffs prayed an instruction to the jury, that in estimating the increase of risk on the return-voyage of the Herkimer, they were to consider it as a voyage which the defendants were informed, in and by the letter of Church & Demmill, was carried on under a license from the Spanish government; and the question for them to decide was, whether the risk of such a voyage, carried on under such a license, was increased by any of the circumstances relied on by the defendants to show an increase of risk in this case. This opinion the court refused to give.

The eleventh bill of exception stated, that the plaintiffs produced a witness to prove the usage of the trade, who said, that by the laws, regulations and usages of the trade, it was necessary that the property imported into, or exported from the colony, by a foreigner, should be under a Spanish license, and appear to be Spanish *property. Whereupon, the defendants moved the court to instruct the jury, that this evidence is [*513 not competent to prove the municipal laws of Spain, or the usage and custom of trade established by their municipal laws. The opinion of the court was, that "no parol evidence is admissible to the jury, or, if given, can be regarded by them, to prove the legislative edicts or acts of the Spanish government, or to prove any usage, custom or course of trade conformable to such edicts or acts; but that such evidence is admissible, to prove the general usage and course of trade that may depend on instructions to the government of Peru."

The thirteenth bill of exception stated, that the plaintiffs produced witnesses, ignorant of the laws of Spain, to prove their understanding of the usage of the trade; and the defendants produced counter-testimony on the usage; whereupon, the defendants moved the court to instruct the jury, that the testimony of the plaintiffs, if believed, was not competent to show the usage or course of trade, that the Herkimer, on her return-voyage, should be accompanied with papers giving the cargo the appearance of Spanish property. The court refused to give this opinion, but instructed the jury, that if they were of opinion, that the usage or course of trade from or to the province of Peru, by foreigners, was, to have a license from the King of Spain to trade, and to have Spanish papers on board, to show or give color that the cargo was Spanish property, the defendants were bound to take notice of such course of trade; but if the jury should be of opinion, that the trade was prohibited by the laws of Spain, the plaintiffs must prove that the defendants had notice or information of such prohibition.

The twentieth bill of exception is to an opinion of the court, that whether the abandonment was in reasonable time or not, is not a fact to be exclusively left to the jury, but to be decided by them, under the direction of the court.

The twenty-fourth bill of exception stated, that the defendants moved the court to instruct the jury, that the insurers are not liable for any increase of risk, in consequence of any acts done by the assured, to avoid seizure
*514] *and confiscation under the laws and regulations of the Spanish government, which instruction the court gave.

The twenty-fifth bill of exception stated, that the counsel for the plaintiffs then moved the court to instruct the jury, that the right of the plaintiffs would not be affected by any increase of risk, produced by such acts as were stated in the preceding exception, if such acts were acccording to the course and usage of trade on the voyage insured. This opinion the court refused to give.

The twenty-eighth bill of exception stated, that the plaintiffs moved the court to instruct the jury, that the increase of risk, by which alone the right of the plaintiffs to recover in this action can be effected, is an increase (by reason of some act or omission of the plaintiffs, or their agents) of the danger of rightful capture or condemnation, under the law of nations. The court refused to give this opinion.

The verdict and judgment being against the plaintiffs, they sued out their writ of error.

Harper, for the plaintiffs in error.—1. The first question is, that upon which the court below was divided in opinion, viz., whether the letter of Gilchrist to Webster & Co., ordering the insurance, contains a representation that no other person than Livingston, Gilchrist, Griswold & Baxter was interested in the return-cargo of the Herkimer, or that all the persons interested therein were native Americans. It certainly does not contain a direct affirmation of either of those facts. It contains, at most, a negative pregnant; an ambiguity, of which the underwriters, if they deemed it important, should have required an explanation. Nothing can amount to a representation which is not certain to a common intent; so certain as not to admit of a doubt, provided the veracity of the party be not questioned, and he be not under a mistake. There is no difference between a representation and a warranty, except that the one is contained in the policy and the other is out of it. They must both be equally certain.

Story, J.—Do you admit this question to be relevant to the cause?

*515] *Harper.*—No: that is another branch of the argument, I shall contend, that it was immaterial, whether Baruso were a neutral or not; but that he was, *quoad hoc*, neutral.

2. The second question arises upon the fifth bill of exceptions, which was the first taken by the plaintiffs. It is to the refusal of the court to instruct the jury, that there was no such concealment of papers as could affect the plaintiffs' right to recover; and to the opinion which the court gave, whereby they made the effect of the concealment depend upon the question whether the papers were necessary according to the usage and course of the trade. The plaintiffs object to the opinion given. 1. Because it makes the effect of Baxter's conduct relative to the papers depend on the usage and course of the trade; whereas, independently of any such usage, that conduct could not affect the right of recovery; inasmuch as it did not amount to a concealment of papers; and as the concealment of papers can-

not affect such a right. 2. Because it requires that the usage and course of the trade, in order to make this conduct of Baxter innocent, should render it necessary to have those papers on board, whereas, if the usage and course of trade *permitted* the having them, it was sufficient. 3. Because it extends to all the papers delivered by Baxter to Giles ; many of which were perfectly immaterial and innocent in themselves, independently of any usage or course of trade.

The act did not amount to a concealment. It was only putting the papers from one trunk to another, less liable to be searched. It must be such an act as would be likely to prevent discovery ; and it must be done with intent to deceive the belligerent, and to defraud him of some belligerent right. When the prayer for an instruation is hypothetical, the facts constituting the hypothesis are to be considered as found by special verdict. If these facts had been found by a special verdict, they would not have been a finding of a concealment. But concealment of papers is not a violation of neutrality. It is no ground for condemnation, nor even *for [*516
detention. The answer to the Russian memorial expressly disclaims concealment, and even destruction, of papers as a legal ground of condemnation. It is only a ground to refuse costs or damages on restitution ; or to refuse further proof, where there is *primâ facie* ground of condemnation independent of the concealment. 1 Rob. app'x, 5, Answer to the Russian Memorial ; *The Rising Sun*, 2 Rob. 88. Even spoliation of papers would affect Baxter's property only ; and the plaintiffs would be permitted to give further proof.

Some of the papers delivered to Giles were wholly unimportant, and unnecessary to the prosecution of the voyage in safety, and yet the opinion of the court (to be in favor of the plaintiffs) required that they should be necessary, according to the usage and course of the trade. Among those papers was an estimate of the value of the cargo, if reshipped from New York to Cadiz. This certainly was not necessary by the usage of the trade. There were several other papers equally unimportant. Yet, in the opinion of the court, the concealment of these papers violated the warranty of neutrality.

3. The third question arose on the sixth bill of exception which was to the opinion of the court, which made Baruso's character, as a neutral or belligerent, depend upon the kind of trade he carried on, as well as upon his domicil. The plaintiffs object to this opinion : 1st. Because the place of domicil, acquired in time of peace, is the criterion of a man's character, as neutral or belligerent, and not the nature of the trade. In the case of *The Harmony*, 2 Rob. 266, G. W. Murray, residing in France, was considered as a belligerent, while his partners in the same adventure, residing in the United States, were considered as neutrals. *The Indian Chief*, 3 Rob. 21 ; *The Citto*, Ibid. 37 ; 1 Rob. 323, Standing Interrogatories, 12th interrogatory, as to residence of the parties ; 5 Rob. App'x, Order in Council of the 24th of June 1803, relating to inhabitants of certain colonies ; *Wilson* v. *Marryat*, 8 T. R. 31 ; *Duguet* v. *Rhinelander*, 1 Caines Cas. 25. The nature of the trade has nothing to do with the question. If neutral by domicil, he may trade with belligerents, provided *it be not in articles [*517
contraband of war. His neutrality was not inconsistent with his privilege as a Spanish subject. He does not lose his privilege, by becoming

a neutral American. As between him and the government of Spain, he was still a Spanish subject. But as between him and the government of Great Britain, he was, according to the principles of the British prize courts, an American merchant. The plaintiffs also object to the opinion of the court, because there was no evidence upon which the court could ground the hypothesis, that Baruso came to this country to carry on that trade only. Although the fact might be, that he carried on no other trade, yet it does not follow, that he came here for no other purpose.

4. The fourth question arises under the seventh bill of exception, which states that the court (in compliance with the opinion of the supreme court 6 Cr. 274), left it to the jury to determine, whether Baruso had an interest in the return-cargo which increased the risk of the voyage; and directed the jury, that if the risk was increased, the policy was thereby vacated.

The plaintiffs object to this opinion of the court: 1. Because it leaves it to the jury to decide a mere question of law, viz., whether the contingent interest of Baruso in the voyage, could have the effect of defeating the plaintiffs' right to recover, by increasing the risk; instead of directing them, as ought to have been done, that such an interest was not subject to capture; that the plaintiffs were not bound to disclose it; and that, therefore, it could not in law affect their right to recover. 2. Because it does not, as it ought to have done, make the effect of Baruso's interest on the right of recovery, depend on his national character; it being clear, as the plaintiffs contend, that if he was a neutral, and not a belligerent, his property was not liable to capture, and no interest which he had in the voyage could affect their
*518] right. *3. Because it does not, as it ought to have done, make the effect of this interest on the right of recovery, depend on the usage and course of the trade; it being clear, as they contend, that if the usage and course of the trade authorized the use of a Spaniard's name to cover the voyage, a mere contingent interest of that Spaniard in the voyage, could not, nor could any interest which he could have in it, consistently with the warranty, affect the right of the plaintiffs. 4. Because the defendants, having protected themselves, by a warranty of neutrality, against the effect of any belligerent interest in the voyage, were not entitled to a disclosure of that of Baruso, even could it be considered as a belligerent interest.

The court below misunderstood the opinion of this court upon every point on which an opinion was given when this cause was before this court on the former writ of error (6 Cr. 274). Whether Baruso had an interest in the return-cargo was a question of law, dependent upon the construction of this contract. The opinion of this court was, that if Baruso had an interest in the return-cargo, the materiality of that interest to the risk of the voyage, was a fact to be decided by a jury, under the direction of a court. This court did not decide, that the question whether Baruso had such an interest, was to be left to the jury. The court below ought to have directed the jury, that Baruso had no interest. He was not to share the loss, unless that loss happened by a defect in his license. He was only to share in the profits, after the vessel should arrive. It was only a contingent interest in the success of the voyage, like the interest of a consignee, who is to have a commission on the sales. Suppose, a consignee in a neutral country should be a subject of a belligerent nation, would his contingent interest vitiate the policy? It would afford no just ground of interference by a belligerent.

The question is not, what would furnish a just pretext for rapacity, but what would be a just ground of detention under the law of nations? *Duguet* v. *Rhinelander*, 1 Caines Cas. 25; *Baker* v. *Blakes*, 9 East 282. [*519

The court below ought to have told the jury, that Baruso, being domiciliated in the United States, was to be considered as a neutral, and as such, his property was safe under the law of nations, whatever pretext his name might have afforded to a rapacious cruizer. The connection of a belligerent interest with a neutral interest, does not render void a policy on the neutral interest. Besides, the course of the trade made it necessary, that the property should be in the name of Baruso, and this was known to the underwriters.

But with submission to any opinion which this court may have given, the interest of Baruso was wholly immaterial to this case. The defendants have guarded themselves by the warranty of neutrality. If the property be neutral, their mouths are stopped. When they take a warranty, they waive all questions of this kind; the premium was calculated upon the warranty. When a contract is reduced to writing, all antecedent negotiations are merged in the conclusive act. The plaintiffs were not bound to give notice of any belligerent interest; as to everything against which the warranty is a protection, no disclosure was necessary. Marsh. 475. If Baruso's interest did not violate the warranty, it was immaterial.

5. The fifth question arose upon the eighth bill of exception which was taken to the opinion of the court, "that if the jury should be of opinion, that the papers which were delivered by Giles to Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk, were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the defendants, that such papers would accompany the cargo, then the plaintiffs were not entitled to recover."

To this opinion, the plaintiffs object: *1. Because it requires that those papers, in order to be considered as innocent, should be necessary by the usage and course of the trade; whereas, it was sufficient if the usage authorized them, although it might not have rendered them necessary. 2. Because the defendants, having protected themselves by a warranty of neutrality, against unneutral conduct, were not entitled to a disclosure of the fact, that those papers would be on board. [*520

The effect of the Spanish papers was neutralized by the real American documents on board, showing clearly the real state of the interest of the plaintiffs. If the Spanish papers had stood alone, they might have been a ground of detention, or perhaps, of further proof; but they, of themselves, showed a neutral character, though not the same ownership. They showed the property to belong to Baruso, and that he was a resident of Boston. But the papers which accompanied them in the same bundle, showed the real ownership and clear neutrality of the cargo. The Spanish papers, therefore, did not prove the property to be belligerent; and if they did not falsify the warranty, they were perfectly immaterial.

6. The sixth question was upon the ninth bill of exception, which was taken to the refusal of the court to instruct the jury, that in estimating the risk, they were to take into consideration, the circumstance that it was a

voyage which the defendants were informed was carried on under a license from the Spanish government. It is clear, that the connection of Baruso with such a voyage could not increase the risk.

7. The seventh question was upon the eleventh bill of exception, which was taken to the opinion of the court, that parol evidence was not admissible, to prove any usage, custom or course of trade, conformable to the legislative edicts or acts of the Spanish government. But that such evidence was admissible, to prove the general usage or course of trade that might depend upon instructions to the government of Peru. The plaintiffs object to this opinion, because it precluded them from parol proof of the usage and course *521] *of trade, in case that usage and course should have arisen out of, or even should happen to be in conformity with the legislative acts or edicts of Spain. Whereas, the usage and course of trade are, in all cases, facts capable of parol proof, and seldom susceptible of any other.

8. The eighth question arose upon the thirteenth bill of exception, which was taken to the opinion of the court, that the defendants were bound to take notice of the usage and course of trade, but not of the laws of Spain prohibiting the trade.

To the latter part of this opinion the plaintiffs object: 1. Because, whether the trade was generally prohibited by the laws of Spain, or not, was a matter wholly immaterial; and their right of recovery ought not to depend on the knowledge which the defendants might or might not possess of an immaterial fact. 2. Because if the prohibition of this trade by the laws of Spain was legally proved, and was a material fact, the defendants were bound to take notice of it. 3. Because there was no legal evidence given in the cause, or stated in any of the bills of exception, that this trade was generally prohibited by the laws of Spain; the only evidence being that it could not, according to the usage and course of the trade, be carried on to a foreign port, except under a special permission, a Spanish name, and Spanish papers. Therefore, it ought not to have been left to the jury, to find that this trade was prohibited by the laws of Spain, as a foundation for requiring the plaintiffs to prove that the defendants had notice of the prohibition.

9. The ninth question was on the twentieth bill of exception, which was taken to the opinion of the court, that the question whether the abandonment was or was not in reasonable time, was not a question of fact to be exclusively decided by the jury, but was to be decided by them, under the direction of the court. The plaintiffs contend, that under the opinion of *522] this court in this case, upon the former writ of error (6 Cr. 274), *it is a mere question of fact, to be found by the jury. But as some doubt arose in consequence of what was said by this court in the case of the *Chesapeake Ins. Co.* v. *Stark* (6 Cr. 268), this bill of exception was taken that the opinion of this court may be fully understood.

Marshall, Ch. J., said, he understood that the court might instruct the jury, that certain facts constitute reasonable notice; but that, in a special verdict, it must be stated, whether the time was reasonable.

Harper.—10. The tenth question arises upon the 24th and 25th bills of exception, in which the court instructed the jury, in substance, that the insurers were not liable for any increase of risk, in consequence of any acts

done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government; although such acts were according to the usage and course of the trade on the voyage insured. 1. Because it is in vague and indefinite terms; whereas, it ought to have specified the acts which were to have the effect in question; to the end that they might appear to be acts of which there was evidence before the jury, and which, if proved, were capable in law of producing that effect. 2. Because the effect of those acts on the right of recovery, is not made to depend on the course and usage of the trade. The plaintiffs object to this opinion.

11. The eleventh question was upon the 28th bill of exception, which was taken to the refusal of the court to instruct the jury, in substance, that the only risk, the increase of which could affect the plaintiff's right to recover, was the risk of rightful capture, under the law of nations. The plaintiffs contend, that what would give a mere pretext for unjust capture, was not sufficient to charge *the plaintiffs with an increase of the risk insured against, so as to avoid the policy. Everything was [*523 immaterial, which did not increase the risk of rightful capture and condemnation; and which did not furnish, at least, a ground of condemnation, which the belligerent has holden to be a rightful ground. Baruso had no interest in the ship, and yet the ship as well as the cargo was condemned—no doubt, on the principle, that it was a trade in time of war, not permitted in time of peace. But the license diminished the risk, because it showed that it was a trade permitted in time of peace.

Pinkney, Attorney-General, contrà.—1. As to the division of opinion in the court below. It is true, the letter ordering the insurance does not, in direct terms, deny, that no other person had an interest in the cargo, but it contains a strong implication to that effect. If any transaction requires *bona fides*, it is a representation for insurance. It is the act of the insured, and they ought not to shelter themselves under an ambiguity. If it be calculated to mislead, it is sufficient. It is true, that nothing is stated negatively. But why name others as concerned, who were not to be insured, unless to inform the underwriters respecting the whole transaction, with reference to the national character of all parties concerned? It is calculated to excite in the minds of the underwriters a belief, that it contains information on that subject. They who undertake to convey information must take care that it do not excite an idea which they did not mean to convey. This point, however, is not considered as of very great importance.

2. The next question is much more important. This question arises on the fifth bill of exception. The court gave, in substance, the instruction which the plaintiffs prayed, and yet the plaintiffs excepted, because [*524 *it was not exactly in their own words. The plaintiffs had, among other things, given evidence that the papers found in Giles's trunk were necessary, according to the usage and course of the trade, and then prayed the court to instruct the jury that if they believed the evidence so offered, then there was no such concealment of the said papers as could affect the right of the plaintiffs to recover; and this was, in truth, the direction which the court gave.

But the court ought not to have given the direction as prayed. The concealment of the papers was unneutral; although the parties were justi-

fiable in using them to protect their illegal trade. The whole transaction was unneutral: first, in concealing the papers, and secondly, in denying a knowledge of them. The belligerent had a right to see the papers. It was a clear belligerent right, flowing from the right of search.

No court of admiralty, however rapacious, has ever considered concealment of innocent papers as *per se*, a ground of confiscation. But this was not a concealment of innocent papers; it was a concealment of papers tending to prove the property to be belligerent. It increased the suspicions already excited by other circumstances. Baxter was supercargo, and his acts bind the others, although he was a partner. All the partners are affected by the fraud of any one of them. *The Welvaart*, 1 Rob. 105. If this unneutral conduct brought the property into suspicion, it is sufficient. If it subjects the property to such detention as would authorize abandonment, the plaintiffs were not entitled to the opinion prayed in the 5th exception. In a case where there was concealment of such papers as were calculated to induce such suspicion as would require further proof, and this concealment followed by prevarication, we could not expect a prize court to acquit. It would, at least, produce detention, continued by an adjournment of the case.

This concealment, connected with the other circumstances, justified the condemnation. There were documents showing the property to be in four Americans. Among the concealed papers was a copy of the royal Spanish
*525] license, authorizing a Spanish subject, resident *in Boston, to import goods into the United States from the Spanish colonies. The adventure appeared to be Spanish; it could only be carried on by a Spaniard. There was also concealed another paper of great effect—a power of attorney from Baruso to Baxter, the supercargo, in which Baruso says, the cargo "is laden for me and on my account and risk." It proved the property to be in Baruso, and that he was a Spanish subject. It calls him a Spanish merchant. It showed his national character to be belligerent, although he was resident in a neutral country. It is not residence only which gives the national commercial character. The intention, the nature of the errand, the permanency of the residence, are all necessary ingredients.

The circumstances of suspicion were very strong. Baxter's receipt, &c., states him to be the agent of Baruso. The letters from Baruso's friends, the clearances, &c., were all "on account of the royal license," and stated that the cargo was to be delivered to Baruso. He was the cloak of the transaction, and he could only be a cloak, by his Spanish character. When there are two sets of documents, it is immaterial to the captors, which they wished to conceal. All these circumstances created too strong a suspicion to justify an acquittal. The case might have been explained, but for the unfortunate conduct of the supercargo, which induced a denial of further proof. He, who could and ought to have explained the concealment, did not, but increased the suspicions by his prevarications. There were only three alternatives before the court—to acquit, to condemn, or to allow further proof. The suspicion was too strong to acquit; the prevarication precluded further proof; there was nothing left but to condemn.

The first and most essential of all belligerent rights is that of visitation and search. The right to see all the documents, is a necessary consequence of that right, or it would be nugatory. It was the duty of the supercargo,

as a neutral, to show *all* the papers. Why did he show the neutral papers only? The object of the supercargo was, to defeat an acknowledged belligerent right, and he endeavored to deceive the adjudicating court.

*Story, J.—I wish you to consider, whether, if the trade be necessarily belligerent, the concealment of these papers can be considered as material? [*526

Pinkney.—That is, whether they can make the case worse? Perhaps not.

3. The third point is as to the neutral character of Baruso, by reason of his residence in the United States. Locality is something; but not everything. So is the time of emigration. The general principle of the law of nations is, that the belligerent character belongs to the subject of the hostile nation, wherever found. Mere change of place, does not alter the character. It is easier for a neutral to slide into the character of an enemy, than for an enemy to fall into that of a neutral. But even in such cases, that great expounder of the law of nations, Sir W. Scott, examines all the circumstances of the case, time of removal, permanency of residence, motive and nature of his business. The case of Collett (*Wilson* v. *Marryat*, 8 T. R. 31) has no bearing upon this case. The special verdict found Collett to be a citizen of the United States, and the case depended upon the treaty of 1794. The case of Mr. Johnson is not more to the point. His office of American consul prevented his residence in London from affecting his national character. If he had not had the *animus revertendi*, before the voyage of the Indian Chief was commenced, and had not departed, before the arrival of the ship, the trade would have been adjudged unlawful. The next case is that of G. W. Murray. Sir W. Scott not only forgot to administer justice in mercy, but pushed his principles of commercial law infinitely too far. The commissioners under the 7th article of the British treaty,(*a*) gave Murray compensation, on the ground, that the decision of Sir W. Scott was wrong. *But, even upon the principles on which that case was decided, residence alone does not constitute national character. The time of his removal and the nature of his employment were also considered. So also, in the case of *The Citto*, 3 Rob. 38, the nature of Mr. Bowden's residence in Holland was examined. [*527

The question always is, whether he has become, not a citizen or subject, but a merchant of that country; *i. e.*, a general merchant. But did Baruso become a general American merchant? Was his trade American? Was it neutral? No: he carefully wrapped himself up in the folds of his license, and fenced himself round to exclude the American character.

The case of *Duguet* v. *Rhinelander* is not more applicable than the others. The plaintiff was a naturalized citizen, had been long resident, and was embarked in the general trade of the country.

As to the plaintiff's second objection to the opinion, because there was no evidence upon which the court could raise the hypothesis that Baruso came to this country for no other purpose than to carry on that particular trade—the fact is otherwise. There was evidence from which the jury might infer the facts supposed by the court; and they have found it.

(*a*) Of whom Mr. Pinkney was one.

4. The fourth question arises upon the seventh bill of exception, and is, whether the court ought to have left it to the jury, to decide whether Baruso had an interest in the cargo? Perhaps, it was a question of law, dependent on the construction of the contract, and ought to have been decided by the court. But the plaintiffs cannot complain that the court left it to the jury to decide a question of law, which the court ought to have decided against him. Baruso had an interest: he was a partner. The written contract says "he agrees to the following *partnership*." It is not contended, that they are bound by the word "partnership" if the contract does not in law amount to a partnership; but the term may explain other doubtful ex-
*528] pressions. Livingston was to contribute *vessel and funds; Baruso, the license, and services, so far as his services were necessary to give effect to the license: here was a joint contribution for common benefit. It was not necessary that the losses should be equally borne, nor the profits equally divided. Here was also a participation of profits, even in an equal degree, in a certain event. So there was a contribution in loss. If the expedition failed, Livingston would lose his goods, and Baruso the use of his license for a certain time. The suffering, in their own estimation, would be equal. In case of loss upon the sales, Baruso was to contribute, and if the cargo should be lost by reason of a defect in the license, the whole loss would fall upon him. He is guaranty also for the consignees in South America. He had also an interest in the specific goods: in a certain case, he was to have a right to take a portion of the goods themselves. The policy was underwritten while the vessel was on her return-voyage, and while he had this interest. It was not a mere contingency, but a vested interest.

It is contended, that if the usage and course of the trade authorized the use of a Spanish cover, a real Spanish interest would not increase the risk. But the warranty of American property forbids a mixture of a belligerent interest; at least, it would in a court of admiralty.

5. The fifth question was upon the eighth bill of exception. This opinion will not bear the construction which the plaintiffs have put upon it. It does not mean to say, that the papers, to be innocent, must be necessary, according to the usage of the trade; but if it was the usage of the trade to have such papers, then they were innocent.

6. The plaintiffs were not entitled to the instruction prayed for in the ninth bill of exception, because it was an instruction as to a fact; viz., that the defendants had notice that the voyage was to be carried on under a royal Spanish license. Whether they had such notice depended upon the question, whether they recollected the letter of Church & Demmill, and whether they knew it was the same ship and the same voyage.

*529] *7. The seventh question was upon the 11th bill of exception, and was, whether parol evidence could be given of an usage which grew out of a law, inasmuch as the law itself was not proved by competent evidence? It was supposed, that the law should be first proved, before evidence could be given of the usage dependent on that law.

8. The eighth question arose on the 13th bill of exception, and was, whether the defendants were bound to take notice of the Spanish laws of trade? There is no adjudged case which requires underwriters to take notice of such laws, although they are bound to know the usage of the trade.

If there was no evidence of the law, the opinion was immaterial, and could not injure the plaintiffs.

9. The ninth question arose upon the 20th bill of exception, and was, whether reasonable notice was a question exclusively for the jury? The plaintiffs had no right to except to this opinion. Reasonableness of time is a matter of fact, to be found by a jury, under the direction of a court. And the court may direct them, from certain facts, whether it be reasonable. In the same manner as, in trover, the court may instruct the jury that a demand and refusal are evidence of a conversion.

10. The tenth question arises upon the 24th and 25th exception, and was, whether the defendants were liable for an increase of risk, in consequence of any acts done by the plaintiffs to avoid seizure and confiscation by the Spanish government for illicit trade? the plaintiffs having taken that risk upon themselves. The principal objection to this opinion seems to be, that it is too abstract, and does not state the facts which were supposed to increase the risk. But there were facts enough stated in the bill of exception, to ground the instruction upon. All the paraphernalia of the Spanish garb, were acts done to protect the cargo from *confiscation by the Spanish government for illicit trade, and certainly increased the risk of capture by the British, which was the only risk which the defendants took upon themselves. 1 Marsh. 416 (Condy's edition); 1 Caines 549. [*530

11. The eleventh question arose upon the 28th bill of exception, and was, whether the risk, the increase of which could affect the plaintiff's right to recover, could be any other than the risk of rightful capture, under the law of nations? It was not necessary that the risk should be of just condemnation under the law of nations. It was sufficient, if it increased the risk of condemnation, upon any principle recognised by the courts of the captor. The court was not bound to give an opinion, unless prayed; and if the opinion prayed be not correct, the court is not bound to give any other. *Sperry* v. *Delaware Insurance Co.*, 2 W. C. C. 243.

Harper, in reply.—1. Even if the letter ordering the insurance did contain the intimations supposed, yet it did not amount to a representation; which must always be a positive affirmance or denial of some fact. See the opinion of this court in this cause, 6 Cr. 274; and Marsh. 33.

2. As to the fifth exception, it is said, that the court gave, in substance, the opinion prayed; yet if the prayer and opinion were both wrong, the plaintiffs had a right to except. But it is not, in substance, the same. Perhaps, if taken alone, it might be so considered, but when taken in connection with the refusal to give the instruction as prayed, it is, or must be understood as being different.

It was not merely the delivery of the papers to Giles, but it was also the conduct of Baxter, in denying the existence of the papers, &c., which was insisted upon by the defendants as constituting the concealment. The defendants were still at liberty to argue to the jury, *that the concealment by Giles, in connection with the conduct of Baxter, was such a concealment. By refusing the plaintiffs' prayer, and giving the instruction as they did, the inference was plain, that it did amount to such a concealment. [*531

But there is another more important objection to the opinion. The con-

cealment, even of criminal papers, is not a ground even of detention; nor even to deny further proof. Spoliation alone has that effect. (See the answer to the Prussian Memorial in the Case of the Silesian Loan.) If the papers are found and produced, it excites only a slight suspicion that other important papers may be concealed. But even if it did authorize a denial of further proof, yet it is only in a case where so strong a suspicion exists from other circumstances, that the court cannot acquit. But here no such suspicion was raised by the other circumstances. The concealed papers themselves proved the neutrality of the property; the case did not need further proof. The power of attorney of Baruso was irrevocable; if not expressly, yet by implication.

There is no case which decides that concealment of papers is a ground to refuse further proof. There is a great difference between concealment and spoliation of papers, as to the degree of suspicion excited. When the papers are destroyed, the mind is left to conjecture, and the strongest suspicion may be justified. But when the papers are found and produced, the whole extent of their criminality appears at once.

It is true, that the act of an agent binds his principal; but *civiliter*, not *criminaliter*. 1. This was not a case which required further proof: 2. Concealment, even of criminal papers, is not a ground to refuse further proof, if the case required it: and 3. The papers were innocent. Spoliation is a criminal act in the eye of a court of admiralty.

Upon the whole, then, this trade was within the exception of the order in council of the 24th June 1802, and therefore, the property *was
*532] not liable to condemnation on account of Baruso's being a Spanish subject, he being an inhabitant of a neutral country, and so stated to be, upon the face of the papers. It was a trade from an enemy's colony to a neutral country. The papers, therefore, in the eye of a court of admiralty, were perfectly innocent. The king in council has a right to relinquish part of the belligerent rights which the nation might claim according to the law of nations. He has done so. He has said, that the property of a Spanish subject, being an inhabitant of a neutral country, shall not be liable to confiscation.

If the papers had been destroyed, suspicion might have been thrown upon the transaction, because their innocence could not appear. But when found, they showed Baruso's interest to be as free from capture as Livingston's.

3. As to the sixth exception. We admit, that something more than mere residence is necessary to constitute national character. We admit, there must be an intent to trade. Time also is a necessary ingredient; but no particular length of time is required. The residence must be so long only as to show his real intention. It is not necessary that he should embark in all the trade of the country; it is sufficient, if he carry on a part of it; it is sufficient to make it the trade of this country, if the benefits of it belong to this country, and not to Spain. He employed our ships, our seamen and our merchants, all of whom were to make a profit. It was a trade between a Spanish colony and the United States. Great Britain never complained of such a commerce as this; she complained only of a commerce between the colony and the mother country. If he had come to this country, with a view to the war, and to carry on a trade, belligerent in its

nature, or not usual in time of peace, there might be some ground for the objection. But this commerce was neutral in its nature. The court meant to say, that if the trade was such that a neutral could not carry it on, then, &c. There was no evidence that he came to carry on a trade which, as a neutral, he could not carry on. It is true, it was a trade which, as an *American, he could not carry on; but that did not make the trade belligerent. The Spanish government might have permitted an American to carry it on, and it would still have been a neutral trade. [*533

4. As to the seventh bill of exceptions. If the question of Baruso's interest be a question of law, then we contend, that he had no such interest as could falsify the warranty. He was not a partner. To constitute a partnership, there must be an universal participation in gain and loss in all events. But in some events, he was not to participate in either. In one event only, was he to share the gain, and in one only, was he to participate in the loss. He was not a joint-owner of the cargo. In trover or replevin, he could not have proved an interest. If he had sold the cargo, the vendee would have had no title; if he had given a note in the name of all, he only would have been bound. This interest was merely contingent, like that of a consignee in his commissions.

5. As to the eighth bill of exceptions. The warranty of neutrality was a protection to the defendants against all belligerent interests and belligerent appearances, and therefore, it was not necessary to disclose the belligerent cover of the real neutral interest. It is sufficient, that the property insured was strictly and really neutral.

6. As to the ninth exception. The letter of Church & Demmill, stating that the vessel was to trade under a license, was referred to in the letter which ordered the insurance, and which was laid before the defendants. It is a principle of law, that they are supposed to know what they had the means of knowing, and what it was their interest to know. It was proved, that the letter of Church & Demmill had been laid before them, on a former day, and when they were again referred to it, they ought to have recollected its contents, or have asked for it again.

7. As to the eleventh bill of exception. *An usage cannot be against law, and yet we were prevented from proving it, because it was conformable to law. According to the opinion of the court, we were bound to prove that the usage was contrary to law, before we could prove it by parol. [*534

8. As to the thirteenth bill of exception. The defendants were as much bound to know the laws of the trade, as the usages of the trade.

10. As to the 24th and 25th bills of exception. The knowledge which the defendants had of the trade and its usage, at the time of underwriting the policy, authorized the plaintiffs to use all the means necessary to make the voyage legal.

11. As to the 28th bill of exception. The case cited is, that if there be an edict under which the belligerent does condemn, although unlawfully, it ought to be disclosed. But here was no such edict, the condemnation was not only unlawful, but unauthorized.

The court ought not wholly to reject the opinion prayed, if it be not exactly correct; because it leaves the jury to infer that no part of it is correct. They ought to go on and state what the law is.

March 15th, 1813. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—This perplexed and intricate case, which is rendered still more so by the manner in which it has been conducted at the circuits, has been considered by the court. Their opinion on the various points it presents will now be given.

If the question on which the court was divided be considered literally, the answer must undoubtedly be, that the letter of the 25th of March 1806, contains no averment that no person other than Livingston, Gilchrist *Griswold & Baxter, were interested in the return-cargo of the
*535] Herkimer, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the court concerning its contents. But the real import of the question is this. Is the language of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return-cargo? If it does amount to such an averment, then it is a representation, and if it be untrue, its materiality to the risk, must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy, on the ground of fraud, or because the insurer has been misled by it.

Upon reading the letter on which this insurance was made, the impression would probably be, that the four persons named in it were the sole owners of the return-cargo of the Herkimer. The inference may fairly be drawn from the expressions employed. Such was, probably, the idea of the writer at the time. The writer, however, might have, and probably had, other motives for his allusion to other owners, than to convey the idea that there were no others. The premium might, in his opinion, be affected in some measure by stating the little apprehension from capture, which was entertained by others, and especially, by that owner who was the supercargo. If, however, it was not supposed by Mr. Gilchrist, that the persons named in his letter were the sole owners of the cargo, of if, in fact, they were not the sole owners, he has expressed himself in so careless a manner as to leave his letter open to misconstruction, and in the opinion of some of the judges, to expose his contract to hazard in consequence of it.

But that part of the court which entertains this opinion, is also of opinion, that the letter ought not to be construed into a representation of any interest to grow out of the voyage, distinct from actual ownership of the cargo. "The owners, says Mr. Gilchrist, are already insured against the dangers of the seas," &c. His application was for the owners; and when he proceeds to state, that others were concerned, he must be understood to say, that they were concerned as owners. Consequently, if the letter implies
*536] an averment, that he has named all the owners, *it implies nothing further, and ought not to be construed into a representation, that there were no other persons interested in the safe return of the cargo.

Others are of opinion, that to constitute a representation, there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion, the majority of the court is understood to concur. The instruction, then, applied for by the

counsel for the plaintiffs, on which the circuit judges were divided, ought to have been given.

5. A majority of the court is also of opinion, that the instruction prayed for, as stated in the 5th exception, ought to have been given. If the jury believed the facts offered in evidence by the plaintiffs, which were, that by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board, on her return-voyage, the Spanish and other material papers delivered by Baxter to Giles, then there was no such concealment of said papers as can affect the right of the plaintiff to recover in this action. In general, concealment of papers amounts to a breach of warranty. But when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board, for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property, in the Spanish ports; and of the American papers, to prove the American character of the property to other belligerents. But to have exhibited the Spanish papers to a British cruizer, and thus to induce a suspicion that the property was belligerent, would have been not less improper, than to have exhibited the proofs of American property in a port of Peru, and thus to defeat the sole object for which Spanish papers were necessarily taken on board.

6. A majority of the court is also of opinion, that under all the evidence in the cause, Baruso was to be *considered as an American merchant, whether he carried on trade generally, or confined himself to a trade [*537 from the United States to the Spanish provinces. The circuit court, therefore, erred, in making the neutral character of Baruso to depend on the kind of trade in which he was engaged, instead of its depending on residence and trade, whether general or limited.

7. The instruction of the circuit court to which the 7th exception was taken, is obviously formed on a plain and total misconstruction of the former opinion of this court. In no part of that opinion, has the idea been indicated, that the interest of Baruso was a question solely for the consideration of the jury, unaided by the judge. It is certainly a question on which it was proper for the judge to instruct the jury. The opinion, given by this court, was, that "if the jury should be of opinion, that the Spanish papers, mentioned in the case, were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact, that they would be on board, would vitiate the policy; but if the jury should be of opinion, that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy." The instruction of the circuit court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury, the regular usage of trade. They refuse to allow any influence to a fact, to which this court attached much importance. It is the unanimous opinion of this court, that in giving this instruction, the circuit court erred.

8. The circuit court seem also to have varied from the directions formerly given by this court, in the opinion to which the 8th exception is taken. This court placed the innocence or guilt of having on board the Spanish papers,

mentioned in the case, on the regular usage of trade; the circuit court has made their innocence to depend on their being necessary. The counsel for the defendants contends, that this is a distinction without a difference; but it is impossible to say, what difference this distinction might make
*538] *with the jury. It is also the opinion of this court, that, in estimating the materiality of the papers to the risk, their effect, taken together, should be considered; not the effect of any one of them, taken by itself.

9. The opinion which the court refused to give, to which refusal the 9th exception is taken, depends on several distinct propositions which must be separately considered.

The letter, on which this insurance was made, contains a direct reference to a previous letter written by Church & Demmill, which was laid before the company, for a description of the ship. The first question to be considered is, did this reference make it the duty of the directors to see that letter, and are they, without further proof, to be considered as having read it? The letter was addressed to, and, it is to be presumed, remained in the possession of the agent who made this insurance. It is a general rule, that a paper, which expressly refers to another paper, within the power of the party, gives notice of the contents of that other paper. No reason is perceived for excepting this case from the rule. It is fairly to be presumed, that, on reading the letter of Gilchrist, the board of directors required the agent of the plaintiffs to produce the letter of Church & Demmill, unless they retained a recollection of it. In that letter, they were informed, that the vessel had sailed for Lima, with liberty to go to one other port in South America, and that "she had permission to trade there."

What was the amount of the information communicated by this letter? The permission to trade was, unquestionably, a permission granted by the authority of the country. It was a permission from the Spanish government. But whether this permission was evidenced by a license, or by other means, was to be decided by other testimony; whether it conveyed notice to the underwriters, that such a license was on board the ship, depends, in the opinion of part of the court, on the usage of the trade. Those who
*539] entertain this opinion, think, that as this was submitted *to the jury, the court committed no error in refusing to say, that the defendants were to be considered as knowing that the Herkimer sailed with a Spanish license on board. In estimating the increase of risk, it was certainly the duty of the jury, to consider it as a voyage known to the underwriters to be carried on for the purpose of trading to Lima, and that the Herkimer had such papers on board as were usual in such a trade, but whether the license be such a paper or not, the jury were to judge as of other facts. A majority of the court, however, is of a different opinion. The underwriters, having full notice that the voyage was permitted, might fairly infer, that it was licensed by the Spanish government; because in no other way would it be permitted. The whole question turned upon the construction of a written document which it belonged to the court to make.

11 & 13. The eleventh and thirteenth exceptions may properly be considered together, since they are taken to opinions given on the same subject, and do not essentially vary from each other. The circuit court appears to have supposed, that the general usage and course of trade could not be

given in evidence, or, if given in evidence, ought to be disregarded, if the jury should be of opinion, that such usage was founded on the laws or edicts of the government of the country where the usage prevailed. That is not the opinion of this court. The usage may be proved by parol, and the effect of the usage remains the same, whether it originated in an edict, or in instructions given by the government to its officers. Any conjectures, which the jury or the witnesses may make on this subject, can be of no importance, and ought to have no influence on the case. Neither can it be more necessary to give notice of a usage founded upon statute, than of a usage founded on instructions. The circuit court, therefore, erred, in directing the jury, that the underwriters were not bound to take notice of the usage of trade, if they should be of opinion, that the trade was probibited by the law of Spain.

20. The opinion of the circuit court to which the 20th exception was taken, appears to be entirely correct.

*24 & 25. The twenty-fourth and twenty-fifth exceptions are to the same opinion, somewhat varied in form, and rendered more explicit, on the application of the plaintiffs, than it had been in the instruction given on the motion of the defendants. It is essentially the same with that to which the 7th exception was taken, and appears to have been founded on a total misapprehension of the former opinion given by this court. In that opinion, it was expressly stated, that such papers as, conformable to the regular usage of trade, were to be taken on board a vessel, would not vitiate the policy. "The acts, done by the assured to avoid seizure and confiscation, under the laws and regulations of the Spanish government," which are mentioned in the application made to the court by the counsel for the defendants, comprehend these papers. This question, therefore, was decided by this court on the former argument of this cause, and the court is now unanimously of opinion, that the circuit court erred, both in granting the prayer of the defendants, and refusing that of the plaintiffs. [*540

28. In the opinion to which the 28th exception was taken, this court concurs with the circuit court. The direction asked by the counsel for the plaintiffs, ought not to have been given. It is expressed in terms which, if assented to, might misguide the jury. Rightful capture, according to the law of nations, might be construed to mean capture for a cause which would justify condemnation, according to the law of nations, as construed in the United States. But capture will always be made on suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment. Such acts or omissions, therefore, of the plaintiffs, as would induce a capture and detention, according to the common practice of the belligerents, are proper for the consideration of the jury in estimating the risk.

This court is of opinion, that there is error in the proceedings of the circuit court in this cause, in refusing to give the opinion on which that court was divided; and also in the opinions to which the 5th, 6th, 7th, 8th, 9th, 11th, 13th, 24th, and 25th exceptions are taken. This court doth, therefore, reverse and annul the judgment rendered by the circuit court, and doth remand the cause to the said court, that a *venire facias* *de novo* may be awarded, and other proceedings had therein, according to law. [*541

STORY, J.—I concur in the judgment of reversal which has just been pronounced. But as, in some instances, I differ from the opinions expressed by the majority, and in others, I concur upon grounds somewhat variant, I have ventured to express my own views at large, upon the important points which have been so fully and ably argued.

The first question which presents itself is on the certificate of division. To constitute a representation, there should be an explicit affirmation or denial of a fact, or such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use, without intending to authorize a particular conclusion, the assured ought not to be bound by the conjectures, or calculations of probability, of the underwriter. The latter, if, in such case, he deems the facts material, ought to make further inquiries. In the letter of the 26th of March 1806, there are no words negativing the existence of other interests than those of the plaintiffs and Messrs. Griswold & Baxter. The negative, if any, is to be made out by mere inference or probable conjecture, and as there is no reason to suppose, that the statement was made with that intent, I am satisfied, that it did not amount to a representation negativing the existence of such interests. The court below ought, therefore, to have given the direction prayed for by the plaintiffs' counsel.

But, even admitting that the letter did contain the representation contended for, I am well satisfied, that it was substantially true. It is not pretended, that any other person, except Baruso, had any interest in the cargo; and it is very clear, that, whatever might be his contingent interest in the possible profits of the voyage, he had no vested interest in the cargo itself. He was not a partner, for he wanted one of the essential characteristics of partnership, a direct vested interest in the joint funds. He possessed a mere
*542] possibility, which, in *the successful termination of the voyage, might entitle him to a right of action for a proportion of the profits; or, in a specified case of election, to take a proportion of the property itself. But it was not such an interest as was liable to capture, or such as could be claimed or condemned in a prize court. It was less certain than even a *respondentia* or bottomry interest, which have not been allowed to be asserted before the prize jurisdiction. The commissions of a supercargo upon the sales might, with as much propriety, be deemed a vested interest in the cargo consigned to his care. I pass over, for the present, the fifth exception.

The sixth exception points to the national character of Baruso. As Baruso emigrated from Spain to the United States, during a time of peace, no question arises as to the ability of a belligerent subject to change his national character *flagrante bello*. It is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicil. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject, and yet engaged in neutral trade; or he may be a neutral subject, and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction.

But whenever a person is *bonâ fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor and against neutrals and belliger-

ents. It is perfectly immaterial, what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bonâ fide* in a country, with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicil, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or *domicil. But when once that domicil is fixed and ascertained, all other [*543 circumstances become immaterial. The prayer of the plaintiffs (which was refused by the court), in effect, asked, that if Baruso was *bonâ fide* settled in New York, and had no domicil elsewhere, he was not to be considered as a belligerent. The court, in effect declared, that the character of his trade, and not his mere domicil, fixed his national character. There was, therefore, error, both in the refusal and in the direction of the court.

The seventh exception arose from a misconception of the opinion of the supreme court. The court did not mean to intimate, that whether an interest increased the risk or not, was a mere question of fact for the jury. On the contrary the court considered that it was a mixed question of law and fact, on which the court were bound to direct the jury as to the law. As the court below were of opinion, that Baruso was not a joint-owner of the cargo (in which opinion I concur), the question ought not to have been left to the jury, in the broad and unqualified terms which are used. Strictly and legally speaking, Baruso had no interest in the cargo; and therefore, "his interest could not be material to the risk;" and if the point meant to have been left to the jury, was, whether the concealment of the name or the possibility of interest of Baruso increased the risk, it should have been left, with proper directions as to the effect of the usage of trade and neutral character of Baruso, in settling that question. If the usage of trade allowed or required such cover, or if Baruso were a neutral, I am not prepared to say, that, in point of law, the risk could thereby have been increased. It would have been a mere inquiry into the possible hazards from the rapacity of belligerents, or the possible effects of one Spanish name instead of another. Men reason differently upon such speculations. Nor am I prepared to say, that it is ever necessary for the assured to declare the national character of other distinct interests engaged in the same adventure, unless called for by the underwriter. If such interests are not warranted or represented to be neutral, the underwriter must be considered as calculating upon the *possible existence of belligerent interests, or as waiv- [*544 ing any inquiry.

The fifth and eighth exceptions may be considered together, as they are founded upon the legal effect of the taking on board and the concealment of the papers, by Baxter, from the belligerent cruizer. The prayer of the plaintiffs, in the fifth exception, was for a direction that, under all the circumstances of the case, there was no such concealment as would avoid the plaintiffs' right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the court erred in their refusal, although the direction, afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a

right to a direct and positive instruction; and the jury are not to be left to believe in distinctions, where none exist, or to reconcile propositions, by mere argument and inference. It would be a dangerous practice, and tend to mislead, instead of enlightening a jury. The opinion of the court, in effect, was, that the concealment of any papers, which were necessary to be on board, by the usage and course of the trade, did not affect the plaintiff's right to recover. But (in conformity with the prayer of the defendants in the eighth exception), that if any of the papers increased the risk, and were not necessary by the usage and course of trade, and the fact, that such papers would accompany the cargo, was not disclosed to the underwriters, the plaintiffs were not entitled to recover.

It is undoubtedly true, that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. It must also be conceded, that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied, and the property is thrown into jeopardy thereby, there can be no reasonable doubt, that such conduct constitutes a breach of the warranty. Concealment, and even spoliation of papers, do not ordinarily induce a condemnation of the property; but *they always afford cause of suspicion, and justify capture and detention. In many cases, the penal effects extend in reality, though indirectly to confiscation. For if the cause labor under heavy doubts, if the conduct be not perfectly fair, or the character of the parties are not fully disclosed upon the papers before the court, the concealment or spoliation of papers is made the ground of refusing further proof to relieve the obscurity of the cause; and all the fatal consequences of a hostile taint follow on the denial.

*545]

But the question must always be, whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend, that every idle and accidental, or even meditated, concealment of papers, manifestly unimportant, in every view, before the prize tribunal, should dissolve the obligation of the policy. And if, by the usage and course of trade, it be necessary or allowable to have on board spurious papers, covered with a belligerent character, whatever effect it may have upon the rights of the searching cruiser, it would be difficult to sustain the position, that the concealment of such papers, which, if disclosed, would completely compromit or destroy the neutral character, would be a breach of the warranty. In such case, the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would induce the conclusion, that the interest was enemy's, covered with a fictitious neutral garb, the disclosure would not, in such a case, less authorize the same conclusion. In such case, it would depend upon the sound discretion of the court, under all the circumstances of the case, to allow the veil to be drawn aside, and admit or deny the claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers (as he does in all cases where the usage of the trade demands it), he necessarily waives his rights under the warranty, so far as the visiting cruiser may demand the disclosure of such papers. In other

words, he authorizes the concealment, in all cases where it is not necessary to assume the belligerent national character for the purpose of protection.

*If this view be correct, it is clear, that the court ought to have given the direction prayed for by the plaintiffs. Sitting here, under [*546 a clause in the policy, which enables us to look behind the sentence of condemnation, we see, that the property was really neutral; and if the jury believed the evidence, the concealment was of papers which were authorized by the course of trade for the voyage, and so far from giving a hostile character, was the only means of preventing a strong presumption of that character. If we but consider the known course of decisions in the British courts on questions of this nature, we shall find, that independent of the question of the neutral or hostile character of the ostensible owner, the trade between the belligerent mother country and its colony affects with condemnation the property engaged in it, although such property be neutral, and there be an interposition of a neutral port in the course of the voyage. On examining the papers in this case, it will be found, that they point, though obscurely, to such an ultimate destination. And at all events, the existence of contradictory papers, one set American, and the other Spanish, would, in a Spanish trade, afford an almost irresistible inference in a prize court, that the property was really Spanish.—*Noscitur ab origine.* It would take its character from its origin.

But it is immaterial, in my view, whether a prize court would, under such circumstances, acquit or condemn. When the cover of a Spanish character was allowed, it was allowed for the purposes of protection; and the disclosure of it was not required elsewhere than in the Spanish dominions. One of the risks against which the insured meant to guard himself was, in my judgment, a loss on account of the use of the Spanish character: a loss which might have been more plausibly resisted, if there had been a disclosure, instead of a concealment of it.

The court also erred in declaring (in the eighth exception), that the taking on board of any of the papers, which were not necessary by the usage of the trade, if the risk thereby were increased, avoided the plaintiffs' right to recover. The effect of the whole papers should have been taken together. The evidence did not authorize the court to consider and separate the effect of *each single paper. If one unnecessary paper might have increased [*547 the risk, if singly considered, and yet, if accompanied by the others, it would not have had that effect, certainly, the existence of that paper with the others would not have destroyed the right of the plaintiffs. Yet the opinion of the court would have authorized the jury to draw a different conclusion.

The court should have directed the jury, that if the papers were authorized by the usage and course of the trade, the concealment of them, under the circumstances, did not vitiate the policy; and that if some were authorized, and others not, yet the possession or concealment of the latter, with the former, did not vitiate the policy, unless the unauthorized, so connected with the authorized, papers increased the risk.

The question, presented by the 9th exception, is, whether the defendants are to be considered as having notice that the voyage insured was to be pursued under a Spanish license. The letter of the 26th March 1806, expressly refers to the letter of 17th of February 1806, which had been laid before the

underwriters; and they must, therefore, be deemed of conversant all the facts therein stated. A party shall be taken to have notice of all facts of which he has the means of knowledge in his own possession, or is put directly upon inquiry, by reference to documents submitted to his inspection. In the letter of the 17th February, the ship is declared to have a permission for the voyage, which, in this trade, can be understood in no other sense than a license. The court ought, therefore, to have given the direction prayed for by the plaintiffs.

The court erred in the opinion expressed in the 11th exception. The course and usage of trade may, in all eases, be proved by parol, whether such course and usage of trade arise out of the edicts or out of the instructions of the government, and whether the trade be allowed or prohibited by such edicts or instructions

The court erred also in the latter part of their direction to the jury under the 13th exception. It was immaterial, whether the trade was or was not prohibited by the laws of Spain. In either case, the underwriters *548] *were bound to take notice of the usage and course of the trade. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy, on a voyage to such country.

The 20th exception cannot be supported. The opinion of the court was entirely correct.

The 24th and 25th exceptions ought to be considered together, in order to present the opinion of the court below with its full effect. It is clear, that any acts done by the assured in the voyage, according to the course and usage of the trade, although such acts may increase the risk, do not vitiate the policy. This opinion was pronounced by this court, on the former argument of this case, in reference to the Spanish papers to which the present application of the defendants obviously pointed. The court, therefore, erred, in granting the prayer of the defendants, and in refusing that of the plaintiffs.

The last (the 28th) exception cannot be sustained. The proposition is conceived in too general terms, and might mislead the jury. Any acts or omissions of the insured or his agents which, according to the known edicts or decisions of the belligerents, though not according to the law of nations, would enhance the danger of capture or condemnation, might, if such acts or omissions were unreasonable, unnecessary or wanton, form a sound objection to the right of recovery. The assured can have no right to jeopardize the property, by any conduct, which the fair objects of the voyage, or the usage of the trade, do not justify.

Judgment reversed.

Young *v.* Grundy. (*a*)

Failure of consideration.

Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet, if a new agreement, as a substitute for the old one, be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note, against the indorsee, even in Virginia.

This was an appeal from a decree of the Circuit Court for the district of Columbia, sitting in Alexandria, as a court of equity.

*Young brought a bill in equity against Grundy, to be relieved [*549
from a judgment at law, obtained by Grundy against him on a promissory note given by him, in Virginia, to one William Chambers, from whom it passed, by several intermediate indorsements, to Grundy. It was given in 1795, for part of the purchase-money of a large tract of land in Virginia, which Chambers and others contracted to sell and convey to Young. It was afterwards discovered, that Chambers and others had been imposed upon, and that they had title only to a very small part of the land they had sold to Young; whereupon, a new agreement was entered into, on the 6th September 1798, between Chambers and others and Young, by which the original contract was rescinded and compensation made to Young for the injury he had sustained by their breach of contract, and provision was made to reimburse him the moneys he had paid, and to take up paper of his, equivalent to that which was then outstanding, and which he had issued for the original purchase-money. Young, in his bill, contended, that Chambers and others had not complied with this new agreement, but that they owed him more than enough to cover this note.

In the court below, the injunction was dissolved, and upon final hearing, the bill was dismissed. Young appealed to this court.

E. J. Lee, for the appellant, contended that there was an original defect of consideration for this note, which, according to the laws of Virginia, followed it into the hands of the present holder. Laws of Virginia, vol 1, p. 36; *Turton* v. *Benson*, 1 P. Wms. 497; *Wheeler* v. *Hughes' Ex'r*, 1 Dall. 23; *Norton* v. *Rose*, 2 Wash. 233; *Stewart* v. *Anderson*, 6 Cr. 204.

Swann, contrà.—There is no ground of equity as to Grundy. There was no original want of consideration. Young held the bond of the payee to convey the land, and had *his remedy upon that bond. The new [*550
contract was a substitute for the old one, and was made after Grundy became the holder of the note, without notice of any defect of consideration. By the new agreement, it was understood, that Young should take up this paper, unless it was taken up by Chambers and others, who had an option to take up this or any other equivalent paper of Young's.

March 16th, 1813. Livingston, J., delivered the opinion of the court, as follows:—Whatever equity the complainant may once have had against the payee or holder of the note for 433*l.* 15*s.* which was assigned to George Grundy, in consequence of the non-performance of the agreement of the 15th of May 1795, this court is of opinion, that all such equity was done away by

(*a*) March 13th, 1813.

the contract of the 6th September 1798. This last contract was made for the express purpose of making the complainants a compensation for the loss they had sustained, by the non-performance of the other, and was evidently received as an equivalent or substitute therefor. By this latter contract, then, they were placed, as it respected the holders of all their notes, precisely in the same situation as if there had been no want or failure of consideration of the agreement made in 1795. Whether the agreement of 1798 has been complied with, it is not material to inquire, because, previous thereto, this note was held by Grundy, who cannot be affected by any claim which the complainant may have against the other defendants, in consequence of any subsequent transactions between the parties. The court is of opinion, that the decree of the circuit court be affirmed, with costs.

Judgment affirmed.

Palmer *v.* Allen. (*a*)

Bail on attachment.

In the district of Connecticut, the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison, for want of bail.[1]

Error to the Supreme Court of Errors of the state of Connecticut, in an action of assault and battery and false *imprisonnent, brought *551] by Allen against Palmer, who was a deputy-marshal of the United States for the district of Connecticut, and had served a process of attachment upon Allen, and committed him to prison, for want of bail, without such a *mittimus* as is usual upon commitment on like process issuing from the state courts.

Palmer pleaded a special justification, under the writ of attachment issued out of the district court of the United States for the district of Connecticut. His plea was, upon demurrer, adjudged bad, for want of showing a *mittimus;* and that judgment was affirmed in the supreme court of errors. (*b*)

The question was now submitted to this court, who were furnished with copies of the following opinions, delivered in the court below.

Opinion of Judge Brainard, in which the majority of the court below concurred. "The original action was trespass, for an assault and battery and false imprisonment, in which the defendant in error was plaintiff; and to which the defendant below, now plaintiff in error, pleaded specially, that he was a deputy to the marshal of the United States for the district of Connecticut, and in that capacity, had in his hands to serve, a writ of attachment, issued under the authority of the United States, returnable to the district court of the United States for the said district; in virtue of which, he attached the body of the plaintiff below, read the writ in his hearing,

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(*a*) March 16th 1816. Absent, Todd, Justice.

(*b*) The following judges being present: Mitchell, Ch. J., Swift, Trumbull, Edmond, Smith, Brainard, Baldwin and Ingersoll, Judges; Swift and Baldwin dissented, and Ingersoll gave no opinion, having been counsel in the cause.

[1] See Wayman *v.* Southard, 10 Wheat. 37; Darst, 1 How. 306; Ex parte Freeman, 2 Curt. Boyle *v.* Zacharie, 6 Pet. 659; Duncan *v.* 491.

and for want of bail committed him to the keeper of the jail in New Haven, &c., with whom he left a true and attested copy of said writ and process, which he avers to be the same imprisonment and pretended trespass complained of, &c.; to which there was a demurrer and joinder in demurrer, and adjudged by the superior court to be insufficient. On which this writ of error is brought: plea, nothing erroneous.

*"The first action was debt, brought on a statute law of the United States, for an alleged breach thereof. Whether that law be [*552 constitutional or not, as it is unnecessary, it would, perhaps, be indecorous to discuss; and whether debt be the proper action to be brought on it or not, is unimportant for my purpose. The process was under a law, issued under the authority, in the hands of a marshal of, and returnable to a court, all of the United States. The service appears to be arrest of the defendant's body, reading in his hearing, and for want of bail, commitment, &c. The authority of the jailer to receive and keep the defendant, was a copy of the process, without a *mittimus*. Is this a justification? Is this a defence?

"The first question is, in the state of Connecticut, in an action of debt, for instance, in point of service of an attachment returnable to a state court, is a *mittimus* necessary to authorize a commitment? If not, it settles this case, and there is manifest error. But if it be, the next question is, whether a *mittimus* be necessary in a process issued under the laws and authority of the United States, returnable to and cognisable by a court of the United States, to be served in this state on a citizen of the same. This proposition I think correct, that such is the constitution of the state of Connecticut, and from the infancy of her laws and jurisprudence has been—that no man's person shall be imprisoned, unless by judgment of court, or direction and order of a magistrate. In every instance of final process, there is an order of commitment, a *mittimus*, contained in the body of the instrument, in the execution itself. In all cases where the subject-matter has been adjudged by a court of competent jurisdiction, the officer's duty is pointed out, and the extent of the debtor's or delinquent's liability is ascertained, the result is made, the end is known.

*"On attachments, it will be agreed on all hands, that a man shall [*553 not be committed to prison, if he procure reasonable bail, of the reasonableness or sufficiency of this bail, who is to judge? Is the officer, in all instances? I apprehend not. In case of an attachment, the direction to the officer, indeed, is, for want of estate, to attach the body of A. B. and him, safely keep, and have to appear before the court. But the mode of this safe-keeping and having to appear, is pointed out and provided for by law.

"The most ancient statute I find on the subject, entitled 'an act for regulating jails and jailers,' says, that no person or persons whatsoever shall be committed to prison, although arrested or seized by attachment, execution, or any other writ, or for non-payment of rates, debts or fines, or for any misdemeanor, or capital or criminal offence, or any other cause, without a *mittimus*, granted and signed by civil authority, declaring the cause and ground of his commitment, requiring the jailer to receive and keep such person or persons in the prison, until discharged according to law. In a subsequent statute, passed in May 1706, entitled 'an act concerning officers levying executions,' it is enacted, that when any officer shall have a writ of

execution to levy, &c., and doth seize the body, &c., and commit him to prison ; a copy of the writ or execution, signed by the officer and delivered to the jailer, shall be sufficient warrant or order for him to receive such person, and him hold in safe custody, till delivered by law.

"In the revision of the statutes, in the year 1750, the phraseology of the former statute was altered, and the latter was incorporated with it, under the title of 'an act concerning arrests and imprisonments for debt, damages, fines,' &c. This statute has remained the same ever since, and its reading in relation to this subject is—That no person or persons, for the non-payment of rates, fines, debts, or for any crime or offence, shall be committed to prison, without a *mittimus* granted and signed by civil authority, declaring the cause and ground of his commitment, requiring the jailer or keeper
*554] of the prison, to receive and keep such person or persons in the *prison, until discharged according to law, unless where any proper officer, for want of estate, seize the body or bodies of any persons or persons by an execution or distress, or warrant for fines and rates, and commit him or them to prison ; in which case, a copy of the execution or distress, attested and signed by such officer, and delivered to the jailer or keeper of the prison, shall be a sufficient warrant or order for him to receive such person or persons, and him or them to hold in safe custody till delivered by law.

"From the broadness of the ancient statute, it is apparent, that in relation to all process, civil or criminal, mesne or final, no person could be committed to prison without a *mittimus*, an instrument stating the cause, ordering the reception, and directing the detention, signed by a magistrate, or as the expression is, civil authority. In 1706, it occurred to the legislature, that part of this provision was unnecessary ; that in final process there was a *mittimus* in relation to that subject from the highest authority : hence the legislative dispensation with *mittimus* in cases of executions. When the legislature, in 1750, incorporated the latter statute, which had made a distinction between final and mesne process, into the former, can it be supposed, that they intended to narrow the grounds of the ancient provisions and regulations ?

"At the revision in 1750, it also occurred to the legislature, that there were other cases than executions, where a *mittimus*, in the sense generally understood, would not only be unnecessary, but improper ; hence, the exemption was extended to distress or warrants for fines or rates. The present statute says, that no person, for the non-payment of rates or fines, shall be committed to prison, without a *mittimus*, unless indeed a distress or warrant for such rates and fines has been granted by proper authority, having competent jurisdiction.

*555] "The word debts in the statute still remains to be *satisfied with a fair and reasonable construction. The original title of the act, was 'an act concerning arrests and imprisonments for debt, damage, fines,' &c. Suppose, the reading to be, that, in an action for debt, no person shall be imprisoned without a *mittimus*. This would comprehend all actions of debt, in a proper and technical sense—of course, the present. But this I suppose is too narrow a construction. The true meaning is commensurate with all actions by attachment, which sound in or claim debt or damage, and which by the process of a court, may be reduced into debt or damage. In all which cases, while in mesne process, before adjustment, there shall be a

mittimus to authorize a commitment, after which, when liquidated, the execution speaks the order of the court.

"But the statute, since its existence in its present form, seems pretty generally to have had an uniform practical construction; the best comment, perhaps, that can now be made upon it. So far as I can learn, it has received, in practice, in relation to mesne process, the same construction that was given to the former statute in relation to the same subject, and which the words of that statute absolutely and necessarily require. Both under the former and present statute, in all cases of attachment, a *mittimus* has been deemed necessary to authorize a commitment.

"But the second and, perhaps, more important question remains. In a mesne process by attachment for debt, issued under the law and authority of the United States, returnable to a court of the United States, to be served on a citizen of this state, within the same, to authorize a commitment, is a *mittimus* necessary?

"The United States have a right to prescribe what mode of service for their own processes they may deem proper; and if they have pointed out a mode, that mode must be pursued: if they have not, it should seem fair reasoning, to conclude, that they had left that subject to the existing regulations of the several states. The United States have a statute, entitled 'an act for regulating *processes in the courts of the United States,' [*556
in which (1 U. S. Stat. 93, § 2), it is enacted, 'that the form of writs, executions and other processes, except their style, and the forms and modes of proceeding in suits at common law, shall be the same as are now used in the said courts respectively, in pursuance of the act, entitled 'an act to regulate the processes in the courts of the United States.' What those forms and modes are, the statute nowhere specifies, other than by the above reference; and the same statute expressly repeals the whole of the act referred to. On recurrence, however, to that statute, we find it there enacted, 'that the forms of writs, &c., and modes of process in the circuit and district courts, in suits at common law, shall be the same in each state, respectively, as are now used or allowed in the supreme courts of the same.'

"But it has been said, that *mittimus* is no part of the process. If I am correct in my conclusion on the first point, it is, by the law of this state, a part, and essential to the completion, of service, in case of commitment. If part of the service, it is part of the process. Process, in one sense, is the method taken by law to compel a compliance with the original writ, by giving the party notice to obey it; a warning to appear in court at the return of the original writ. On failure of obedience, further process is said to be had by attachment, &c. I understand, that the word process, as used by the legislature of the United States, in the statute referred to, is to be received in its broadest and most extensive sense. It is to be taken for all proceedings, in any action, from the beginning to the end.

"Mode of process includes mode of service. Whatever is necessary to complete the service of a writ returnable to a state court, is, by that statute, made necessary to complete the service of a writ returnable to a district or circuit court. A *mittimus* is as necessary in the one case as in the other.

*"'But it may be said, that there is no provision in the laws of the [*557
United States for procuring a *mittimus:* that, of course, there may be a failure of justice. When the legislature of the United States referred

to the laws of the several states, they were bound to know them and to make provisions correspondent with them; and I am not prepared to say, that they have not. I am not prepared to say, that it would not be the duty of the judge and justices of this state, on application of the marshal, to grant a *mittimus*. Besides, they have in each district, at least, one judge peculiarly their own. Sufficient is it, that they have the power of making all necessary provision. They do, in many instances, call into their service the judges and justices of the state courts, and make them *pro hâc vice* their own: such as taking bonds of recognisance in cases of prosecutions for breaches of the laws of the United States, and various other instances. But in the words of a great man and eminent judge, 'If the law does not work right, let the legislature mend it; it's their business.' I am of opinion, that there is no error."

Opinion of Judge BALDWIN, in which Judge SWIFT concurred. "I differ in opinion, only on the necessity of a *mittimus*, for a legal commitment by the marshal of the United States for the Connecticut district, on an attachment for debt. I am of opinion, that a *mittimus* is not necessary by the statute of Connecticut, to authorize a commitment on attachment, in any civil cause, and if it were, it is doubted, whether it would be obligatory on the marshals of the United States.

"Before proceeding to give the reasons for my opinion on either of these points, I would remark, that it is presumed, it will not be contended, that the marshals are bound by a mode of proceeding which may have been used by the executive officers of the state, unless the same was required, or has been sanctioned, by the laws of the state. If the practical construction of the state officers, can give a binding effect to the statute of the state on *558] *them, which the letter does not require; I apprehend, that a contrary construction, by the marshals, sanctioned by the subsequent act of congress in 1792, requiring that the forms of proceedings in suits, should be the same in future, as had then been adopted, and used in pursuance of the former act, will be equally binding on them.

"I do not know, that there has ever been a judicial construction of the statute in question. I admit, that the practice among our state officers (through abundant caution), has been to commit, by *mittimus*, in all cases of arrests, except on executions: but it will also be admitted, that the practice was never followed by the marshals of the United States. Ever since the establishment of the judiciary of the United States, a period of more than twenty years, they have uniformly committed, in cases of attachment, by copy of their writ; we ought, then, as the question now comes up for judicial decision, to give the proper effect to the provisions of the two statutes, independent of such practical constructions.

"I will then examine, whether the statute of Connecticut requires a *mittimus* for commitment on attachments?

"1. This statute, owing to repeated alterations and compilations, from materials enacted at different times, is not explicit, or very intelligible, its history will probably give some aid in its construction. (*a*) As early as 1650,

(*a*) Stat. Conn., latest revision, printed in 1808. Index, heads, *Mittimus*, reference to arrests, No. 5, 6, page 58, and in notes there. Also, Execution, No. 17, stat. p. 283, § 5.

it was enacted, that no man's person should be arrested or imprisioned, for any debt or fine, if satisfaction could be found from his estate. At that time no arrest, or attachment of the person, was allowed for debt.(*a*) [*559 *The ordinary process was by summons, and on default of appearance, an attachment for the contempt issued, by order of the court. By subsequent provisions, and particularly, at the revision in 1672, an attachment, was allowed as an original process, in certain cases, and the form was then given. In 1702, the plaintiff was allowed a summons, or an attachment, at his opinion, in all civil actions. In 1693, a *mittimus* was first required, to authorize a commitment, and at the revision in 1702, it was extended and made necessary, in all cases civil or criminal. The words are, 'that no person shall be committed to prison, although arrested or seized by attachment, execution, or any other writ, or for non-payment of rates, debts or fines, or for any misdemeanor, or capital or criminal offence, or any other cause, without a *mittimus*,' &c. Inconvenience was soon experienced, and in 1706, a commitment by copy, was authorized, in case of arrest on execution.

"At the revision in 1750, the statute took its present shape, viz: 'That no person shall be arrested and imprisioned, for any debt, damage or fine, where sufficient means of satisfaction can otherwise be found from his estate. Provided, that no person, for the non-payment of rates, fines or debts, or for any crime or offence, shall be committed, without a *mittimus*, granted and signed by civil authority,' &c., 'unless the body has been taken by execution or distress, or warrant for fines or rates, in which case, a copy of the execution or distress, attested and signed by the officer, and delivered to the jailor, shall be a sufficient warrant or order.' &c.

"By omitting, in the last statute, in the clause requiring a *mittimus*, the expressions 'arrested by attachment, or any other writ, or any other cause,' and by adding to the exception, 'an arrest by distress or warrant,' for which a copy only is requested, is is evident, the legislature meant to limit the necessity of a *mittimus*. By the letter of the act, as it now appears, it is not required, on an attachment for trespass, tort, case, or any other civil cause, unless it is on an attachment *for debt; and it can [*560 hardly be presumed, that the legislature would thus dispense with it in all other cases, and retain it in that; or that under an expression of doubtful import, they meant to include all manner of attachments.

"All doubt, it appears to me, will be removed, by giving that meaning to the word debt, as here used, which it had when first introduced into the statute, before an attachment of the person was allowed on mesne process in any case. It there evidently means a judgment debt (for there could then be no arrest for non-payment of any other), in which sense, it will include as well damages recovered for *tort*, as for money due on contract. As no mention is made in the existing statute, of mesne process by attachment, in any case, and the word debt cannot apply to the variety of demands which may be the subject of attachment, and as no reason can be assigned, why that alone should be selected, I conclude, the legislature, when they altered the statute, did not mean to include any arrest, by attachment, on mesne process.

"The terms also of the ancient statute were, that no person shall be com-

(*a*) See title, Actions Civil, page 31, § 1, and in notes there.

mitted without a *mittimus*, although arrested by attachment, or for non-payment of rates, debts or fines. Those of the present statute are only, that no person for 'non-payment of rates, debt or fines,' shall be committed without a *mittimus*, unless by executions, &c. The first makes a distinction between a commitment on attachment, and a commitment for non-payment of a debt, &c.; a distinction which is obvious. At the time of the attachment, no debt is ascertained; the officer has no power to collect any. He is merely to secure the appearance of the person attached, before the proper court, to try the question of indebtedness. The officer has no power to commit, if the person attached will procure bail for his appearance, if not, he is to be imprisoned, not for the non-payment of the debt, but to secure his appearance at court. Whether he is in debt, is a question *sub lite*, to say, he with-
*561] holds the debt, is to *prejudge the cause. I am, therefore, of opinion, that the non-payment of the debt mentioned in the statute, has no reference to mesne process, and that there is no occasion by our statute for a *mittimus*, to commit in any case, except for crimes. Such I contend is the true construction of the statute in question, and such I think is the construction all would give it, if a different practice of our officers had not created a doubt.

"2. If it were evident, that our statute required a *mittimus* in such case, doubts are entertained, whether it is applicable to the process of the United States. It seems to be agreed, that the *mittimus*, required by our statute, must be 'granted and signed by civil authority' of this state. This they are neither authorized nor compelled by any law either of the United States, or of this state, to do in such case.

"In cases, where it is deemed necessary for the civil authority of this state, to aid in executing the laws of the Union, power is specially given them to do so; as in all cases of a criminal nature, and in taking depositions, &c.; but there is no authority given to them, or duty imposed on them as magistrates, to aid the execution of their civil process; and to expect it of them, or leave it optional with them to give or withhold the aid, would be derogatory to the general government. They are an independent sovereignty. Their officers must have all the power incident and necessary to the execution of the duties of their offices.

"By a statute of this state, passed in 1794, Stat. p. 368, 'permission is given to marshals and other officers of the United States, to use our jails, to confine persons under the authority of the United States, with the same authority in the keeping of prisoners, under the authority of the United States, as the keepers of said jails, under the authority of this state have.' The effect is, and was intended to be, to take away all control or responsibility from keepers of the jails, under the authority of this state, as to prisoners confined by the authority of the United States. The prison-keeper of the sheriff, as such, has no power to receive a prisoner under the
*562] *authority of the United States. He must have a special power from the marshal, to enable him to act as keeper under their authority. Such part of the prison, as may at any time be used for such purpose, by the officers of the United States, is as distinct from the other, and from the control of the state officers, as though it were a distinct building. Neither the sheriff nor the county are responsible for the safe-keeping of the prisoners. The keepers may be, and some times are, different; or if

the same person is the keeper of both, he acts in different capacities, and under different authority.

"Hence, I infer, that the keeper of the prison of the United States, has no power to commit on civil process by the authority of the state, nor, I contend, have the civil authority of the state any power to require it, and yet if a *mittimus* is necessary by our statute, it must be 'granted and signed by civil authority,' of the state, directed to the keeper of the jail of the United States, commanding him, by authority of the state of Connecticut to receive and hold the prisoner, under the authority of the United States. I may add also, that if the *mittimus* is to be considered as a writ or process, included in the act of congress, its form must be that of commitment, but the style, that of the United States, that is, it must issue by the authority of the United States, bear teste of the proper judge, and be sealed and signed by the clerk, but in such case, it would not have the requirements of our statute, by being granted and signed by civil authority of the state; and the United States have no analogous civil authority to execute the power.

"Does it, then, follow, as has been said, that the process by attachment must be abandoned? I think not. The party claiming a debt, has a right to the advantages of such a writ, and when the officer shall have done his duty, in making the arrest, if no provision is made by law, directing the mode of commitment, he must take a reasonable course, such as would be sanctioned by the principles of the common law, and such as was probably used, before we had any law requiring a *mittimus* in any case. Having arrested the prisoner by legal process, the *officer became responsible for his appearance at court, and on failure to procure bail, he was bound to hold him in custody. His place of custody is the prison. [*563

"The same warrant which commanded the arrest, required the officer to keep his prisoner safely, so that he might be had before the court. The officer was therefore authorized to commit. Still, it is reasonable and proper, that the keeper of the prison, should be able to show the cause and ground of the commitment, and of his holding the prisoner in custody. This he will be enabled to do, more fully, and more satisfactorily, by the copy of the process, and the doings of the officer thereon, than by the *mittimus* usually granted. This is the course required by our statute, on commitment by execution, distress or warrant, and is that which I apprehend the common law in similar cases would require.

"It therefore, appears to me, that on either ground, and most clearly, on the first, there was no occasion of a *mittimus*, to complete the justification of the officer, and that his plea was sufficient, and ought so to have been adjudged."

March 16th, 1813. JOHNSON, J., delivered the opinion of this court, as follows:—This suit comes up from the state court of Connecticut, to reverse a judgment of that court. The defendant here brought an action below, against Palmer, and recovered damages for a supposed assault and false imprisonment.

The facts of the case were these: Palmer is a deputy-marshal, and in that capacity, arrested the body of Allen, on a writ sued out by the United States, to recover a penalty which Allen was charged with having incurred

by a violation of a law of the United States. In this suit, bail was demanded, and upon Allen's failing to give it, he was committed to prison. The illegal act with which Palmer was charged, was committing the defendant to jail, without a *mittimus* from a magistrate. It appears, that it is the practice of that state, and in this case, the majority of the judges decided it to be the law, that such a *mittimus* must be obtained, before a defendant in a civil
*564] suit can be committed *to prison. The practice, however, in the courts of the United States in that district, has been the reverse.

To this action, the defendant pleaded a justification; and on demurrer, the state court adjudged the plea insufficient, for want of setting forth such a *mittimus;* no question was made of the correctness of taking the body of Allen, or detaining him, until he should give bail. It was supposed, that the law of the United States, which enacts, that the form of writs, executions and other processes "and the forms and modes of proceeding in suits of common law, shall be the same as are now used" in the state courts respectively, gives efficacy to the laws of Connecticut on this subject, and imposes upon the officers of the United States an obligation to conform their conduct to the provisions of those laws.

But this court are unanimously of a different opinion. The plea made out a sufficient justification, and ought to have been sustained as such. A writ, known to the jurisprudence of that state, issues to the marshal, in the alternative, commanding him to attach the goods of the defendant, to a certain amount, and for want of such goods, to take his body: under this writ, not only in conformity to the literal meaning, but according to the established usage and received opinions of that state, the officer was sanctioned in taking the person of the defendant into actual custody; and the 56th section of the collection law of March 2d, 1799, expressly authorizes a demand of bail. Detention, therefore, until bail was given, was strictly authorized by law, and the defence to the assault and imprisonment was complete. Committing the defendant to the state prison, was but one mode, and the least exceptionable mode of detaining his person, and if it was not so, it would only be the ground of a special action on the case against the officer for mal-treatment or oppression.

But it is equally clear to this court, that the law above alluded to, commonly called the process act, does not adopt the law of Connecticut, which requires the *mittimus* in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a
*565] restraint upon their *state officers, in the execution of the process of their courts, and is altogether inoperative upon the officers of the United States, in the execution of the mandates which issue to them. The judgment below must be reversed, and judgment entered for the defendant.

Judgment reversed.

Young *et al. v.* Black. (*a*)

Set-off.—Former recovery.—Demurrer to evidence.

If three joint-owners of a cargo employ the master of a ship to sell it for them, and he afterwards become interested in the share of one of the joint-owners, he cannot, in an action brought against him by the three joint-owners, to recover the amount of sales, set off his share of that amount.

Upon the issue of *non-assumpsit*, the defendant may give in evidence the record of a former judgment between the same parties, on the same cause of action.[1]

It is a matter of discretion with a court, whether it will compel a party to join in demurrer to evidence. A demurrer to evidence ought not to be allowed, where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.[2]

Quære? Whether the refusal of a court to compel a party to join in a demurrer to evidence, can in any case, be assigned for error?

Error to the Circuit Court for the district of Columbia. The suit was brought by Young, Deblois and Lawrason, against Black, to recover the proceeds of the sales of a cargo shipped by the plaintiffs to the West Indies, on board the brig Active, of which the defendant was master, and to whom the cargo was consigned. The plaintiffs, Young and Deblois, had each an interest of three-eighths in the cargo, and the plaintiff, Lawrason, the other two-eighths. Upon the general issue, a verdict and judgment were rendered for the defendant.

At the trial, the plaintiffs took four bills of exception. The 1st was to the admission in evidence of a record of a judgment between the same parties, together with parol evidence, that it was for the same cause of action. The 2d and 3d bills of exception were to the admission of parol proof, that the defendant had an interest in Lawrason's two-eighths of the cargo, after the plaintiffs had shown their written instructions to the defendant, with his promise to obey them, his bill of lading of the cargo, and his account of sales of it. The 4th bill of exception stated the whole evidence offered as well by the plaintiffs as by the defendant, and that the plaintiffs offered to demur to the whole *evidence, but the defendant refused to join in demurrer, and the court refused to compel him to join. [*566

E. J. Lee, for the plaintiffs in error.—1. The record mentioned in the first bill of exception was not admissible evidence, because it was for a different cause of action. The former action was for a breach of orders, and founded upon a disavowal of the conduct of the defendant; but the present action affirms his conduct, and seeks for payment of the balance due upon his account of sales.

2. The court ought not to have permitted the defendant to use parol evidence to contradict the written documents which proved the property of the cargo to be in the plaintiffs.

3. The court ought to have compelled the defendant to join in the demurrer. 3 Bl. Com. 372–73; 1 Wash. 150, 220; 2 Call 555, 571; 3 Tucker's Blackstone 372, note.

(*a*) March 12th, 1813.

[1] Carvill *v.* Garrigues, 5 Penn. St. 152; Finley *v.* Hanbest, 30 Id. 190; Young *v.* Rummell, 2 Hill 478.

[2] Suydam *v.* Williamson, 20 How. 436.

Swann, contrà.—The record and parol evidence were properly admitted, and the jury were to decide whether it was for the same cause of action as the present.

As to the demurrer: it does not appear, that the whole evidence was stated. The defendant was not bound, by any rule of law, to join in the demurrer, nor was the court bound to compel him. It was a matter entirely within the discretion of the court.

March 16th, 1813. STORY, J., delivered the opinion of the court, as follows:—The present action was brought by the plaintiffs in error, as joint-owners of the brig Active and cargo, to compel the defendant, who was master of the said brig, to account for the proceeds of said cargo, which was sold during a voyage to the West Indies. Young owned three-eighths, *567] Deblois three-eighths, and Lawrason two-eighths of the cargo. *At the trial, upon the general issue, several exceptions were taken by the plaintiffs, which have been argued, and we are now to pronounce our decision respecting their validity.

The defendant offered in evidence a record of a former suit between the same parties, in which judgment was rendered for the defendant, supported by parol proof that the former suit was for the same cause of action as the present suit. The plaintiffs denied its admissibility, under the general issue; and we are all of opinion, that the objection cannot be supported. It has been long since established, that under *non assumpsit*, the defendant may give in evidence anything which shows that no debt was due, at the time when the action was commenced, whether it arise from an inherent defect in the original promise, or a subsequent discharge and satisfaction. And the precise point now in controversy has been adjudged to be completely within the rule. If the former judgment had been for the plaintiff, there would be no doubt, that it would have extinguished the demand; and it is not less conclusive, because it was for the defendant. The controversy had passed *in rem judicatam*, and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question.

The second exception was taken to the decision of the court, admitting evidence to show that the defendant had a sub-interest in that portion of the joint cargo which belonged to Lawrason; an interest which was not proved to have been known to or acknowledged by the other owners. And we are all of opinion, that the circuit court erred in admitting that evidence. The other owners had nothing to do with any private contract between Lawrason and the defendant. Any right of retainer which the latter might have against Lawrason, could be enforced only in an action against Lawrason himself; but it offered no legal defense to the express contract proved to have been made with all the joint-owners. It might have been contended, with as much propriety, that the defendant was entitled in such an action to a set-off of a separate debt due from either of the owners. Nor is there any equity *568] in such a claim *against the plaintiffs. As joint-owners, they had a lien upon the proceeds for the general balance between them; and had a right to have them applied, in the first instance, in discharge of the joint debts. Whether, after a final settlement of the accounts of the voyage, anything would have been due to Lawrason, does not appear; and yet this evidence, admitted as it was, would have applied the general property to

discharge his private contracts, although the joint account might have finally turned out against him. We hold it a sound rule of law, that a joint contract can never be defeated by the mere private contract of an individual of the concern, to whom the other parties have confided no authority for this purpose. Our opinion on this exception disposes also of the third, which is taken to parol evidence offered to show the acknowledgment of Lawrason of the sub-interest of the defendant.

The last exception is of a novel character. The plaintiffs, upon the whole evidence, offered to demur, and prayed the court to compel the defendant to join in the demurrer. The court refused to do this, and in our opinion, their refusal was perfectly correct. A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court, in the exercise of a sound discretion, under all the circumstances of the case. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows, that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove ; and it would be as little justifiable, where he offers contradictory evidence, or attempts to establish inconsistent propositions. In the present case, the plaintiffs admit that they denied the whole defense of the defendant, and offered evidence to contradict the evidence by which that defense was attempted to be supported. There would, therefore, have been the most manifest impropriety in acceding to the prayer of the plaintiffs.

The court give no opinion, whether a refusal to compel a party to join in a demurrer to evidence can, in any case, be assigned for error.

*On the whole, for the error of the circuit court in admitting the evidence disclosed under the second and third exceptions, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo.* [*569

Livingston, J.—I concur with this court in reversing the judgment of the circuit court, and for the error assigned in the second exception. But I give no opinion on the refusal of that court to compel the defendant to join in the demurrer to evidence, which was offered by the plaintiffs, not because I have any doubt of the correctness of the decision which a majority of the judges have formed on that point, but because I entertain a very strong conviction, and think it my duty to express it, that such refusal can never be the subject of revision upon a writ of error ; the contrary of which seems to be implied by the opinion just read. Such applications must ever be made to the discretion of the court which tries the cause, and such court will generally be in a situation to decide more correctly, having all the circumstances of the case before it, than an appellate tribunal ; and if it should commit a mistake in the exercise of its mere discretion, in refusing to compel a party to join in a demurrer to evidence, or in refusing to grant a new trial, or in refusing to continue a cause, or in any other matter resting solely in discretion, I have no hesitation in saying, that less mischief and injury will arise from obliging parties, now and then, to submit to such inconveniencies, than to open a door to the endless litigation which will be produced by permitting appeals in all the variety of cases of this nature which must

necessarily arise in the progress of every contested action, and which in Great Britain have never yet been assigned for error.

JOHNSON, J., said, he did not wish it to be understood, that a writ of error would lie to a decision within the diseretion of the court below.

STORY, J., said, he did not mean to be understood, in delivering the opinion of the court, as stating that the refusal to compel a party to join in demurrer to evidence *was a ground for a writ of error. He con- *570] curred in opinion with Judge Livingston.

MARSHALL, Ch. J.—On that point, the court has not given any opinion. The former opinions of this court on the subject of discretion, &c., are to be considered as law; but they are not to be extended further.

Judgment reversed.

The Schooner ANNE. (*a*)

The Schooner ANNE *v.* UNITED STATES.

Pleading in admiralty.

A libel may be amended, after reversal, for want of substantial averments.[1]
A libel must aver specially all the facts which constitute the offence.
The non-intercourse act of March 1st, 1809, was in force between the 2d of February and 2d of March 1811, by virtue of the president's proclamation of November 2d, 1810.
The Aurora, *ante*, p. 382; and The Hoppet, *ante*, p. 389, re-affirmed.

THIS was an appeal from the sentence of the Circuit Court for the district of South Carolina, condemning the schooner Anne, for violation of the non-intercourse law of March 1st, 1809, § 6. (2 U. S. Stat. 529.)

C. Lee, for the appellant.—1. The libel in this case is too imperfect, to warrant a sentence of condemnation. It does not state what kind of goods were taken on board; it merely says, certain articles prohibited by law. If they were French goods, it was lawful to take them on board. This is a penal prosecution, and this court has decided at this term in the case of *The Hoppet* (*ante*, p. 389), that the offence must be specially set forth in the libel. The place of lading is not stated, nor the time, so that it may be known, whether the act was done, while the law was in force. It does not state whether the goods were put on board, with the knowledge of the owner, or with the knowledge of the master, but without naming either the master or the owner, it says, in the alternative, that the goods were put on board with the knowledge of the owner or master. The evidence cannot cure the defects of the libel.

2. When these goods were put on board (between the 2d of February and the 2d of March 1811), the act of *March 1st, 1809, was not in *571] force, unless by virtue of the president's proclamation of November 2d, 1810. That proclamation is not set forth in the libel, so that the act done does not appear by the libel to be contrary to law. The libel ought to

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(*a*) March 11th, 1813. Absent, TODD, Justice.

[1] The Mary Ann, 8 Wheat. 380.

have stated that France had, before the 2d of March 1811, so revoked her edicts, as that they ceased to violate the neutral commerce of the United States ; and that the president had declared it by his proclamation. This is not like the revival or continuance of a law, by a law ; but when the revival of a law is to depend upon a matter of fact, the libel ought to state the fact, that the court may judicially know whether the law be revived or not.

STORY, J.—This court has decided, at this term, that the act of March 1st, 1809, was in force in February 1811.

C. Lee.—If that point has been decided, it was when I was not present, and shall forbear to make any further observations ; but if it had not been decided, I should have adduced the new evidence communicated to congress by the late documents, to show, that in March 1811, the Berlin and Milan decrees were not repealed, and that the repeal did not take place until the 28th of April.

JOHNSON, J.—That point was considered in the case of *The Aurora* (*ante*, p. 382).

Jones, contrà.—The cases of *The Hoppet* and *The Aurora* have settled all the points in this case, except the omission to state in the libel the president's proclamation. The court can take notice of the law, and therefore, can notice the proclamation authorized by that law.

JOHNSON, J.—That point was decided in *The Aurora.*

Jones.—Then, as to the objections to the form of the libel. This is not a case in which the appellant could plead not guilty, and put the United States upon the proof of everything alleged. But he is to put in his claim upon oath, like an answer to a bill in chancery. *All that is necessary in [*572
the libel is to state, generally, the grounds on which the forfeiture is claimed. By referring to the law, it is made certain. It is clear, by the terms of the law alluded to in the libel, that the goods must have been of British growth or manufacture ; and such was the proof in the case. The doctrines relative to indictments at common law do not apply to the case.

March 16th, 1813. MARSHALL, Ch. J.—The sentence of the circuit court, in this case, must be reversed, for the defects in the libel, for the reasons stated in the case of *The Hoppet.*

Sentence reversed, and the cause remanded, with leave to amend the libel.

United States *v.* January and Patterson. (*a*)

Application of payments.—Official bonds.

When a collector of revenue has given two bonds for his official conduct, at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond.

Error to the Circuit Court for the district of Kentucky. This case was submitted to the court, without argument, and—

Duvall, J., delivered the opinion of the court, as follows:—In this cause, the opinion of the court is required on a single point. The facts are these: The supervisor of the revenue, for the district of Ohio, in due form of law, *573] appointed John Arthur collector *of the revenue for the first division of the first survey of the said district. Arthur, on the 25th day of August 1797, together with the defendants, his sureties, executed a bond to the United States, in the penalty of $4000, with condition that Arthur should truly and faithfully execute and discharge all the duties of said office, according to law. The supervisor, for greater security to the government, was in the habit of renewing the commission, and renewing the office-bond; and on the 23d day of March 1799, Arthur executed another bond to the United States, with Robert Patterson surety, in the penalty of $6000, with this condition, "that if the said John Arthur has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office, and shall also render and settle his accounts according to law, then the obligation to be void," &c.

Arthur proceeded to make the collections, and from the commencement of his duty to the 30th of June 1802, was charged with the collection of $30,584.99½. On the settlement of his account in the year 1803, he was in arrear $16,181.15½, and suits were instituted on each of the bonds. The pleadings were the same in both actions. There was a plea of performance, to which the plaintiffs reply, and allege as a breach of the condition, that the defendants have failed to collect and pay over the revenue arising within his district, &c., and are in arrear to the United States, &c., on which issue was joined. Pending the suits, Arthur died; and they were prosecuted to judgment against the sureties only.

The supervisor kept one general account only against the collector. On the trial, the plaintiffs exhibited, on their part, the general account between them and the defendant on which the balance, as before mentioned, is $16,181.15½. They also exhibited the balance appearing to be due, by terminating the account with the period when Arthur gave the second bond, at the time his first commission was revoked, which was $6483.59½.

The defendants, to support the issue on their part, offered the deposition of a witness, who proved that James Morrison, the late supervisor of the revenue, informed him, that Arthur had paid a sufficient sum to discharge *574] *the bond first given, and that what he had paid should be so applied. After reading the deposition, the plaintiffs introduced the supervisor himself to contradict the defendants' witness. In his testimony, he admits,

(*a*) March 16th, 1813. Absent, Todd, Justice.

that the payments made by Arthur, if applied to the first bond, would discharge it; and that he might have frequently told January and others, that the whole of the bond would be paid off, if the payments made by Arthur were appropriated exclusively to its discharge; and that he himself had entertained the opinion, that they ought to be so applied. To repel the testimony of the supervisor, and to support that of their witness, the defendants produced a clerk in the supervisor's office, who proved, "that the defendant, January, several times called at the office of the supervisor, on the subject of his bond, expressed his uneasiness about its remaining out, and his desire to get it up. That the supervisor assured him, that Arthur had paid enough to discharge that bond, and that he might make himself easy; but refused to give up the bond, because he thought that such bonds ought to remain as vouchers, in his office.

The plaintiffs, on this state of the case, moved the court to instruct the jury, that the promise of the supervisor as to the application of the payments in discharge of the bond, was not of itself an appropriation of the payments, unless it was followed by some act of appropriation. The court overruled the motion, and at the instance of the defendants, instructed the jury, that if they believed, that the supervisor had made the election and promise as proven, it was a declaration of his election how the payments made by Arthur should be applied; and that whether a formal entry, in the books of their appropriation, corresponding with that election, were made or not, was immaterial, and that the jury ought to consider the application as made. To the opinion of the court thus given, the plaintiffs excepted, and this court must now decide as to the correctness of the opinion of the court below.

The law, with respect to the application of particular payments, when the debtor owes distinct debts, has long *since been settled. The [*575
debtor has the option, if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application.

In this case, a majority of the court is of opinion, that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is; where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted, that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety in the second bond: and *vice versâ*, justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any, in the possession of the parties interested. The court is of opinion, that the circuit court erred in the opinion given, and that it be reversed.

Judgment reversed.[1]

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[1] In 5 Mason 87, there is a review of this case by Judge STORY, in which he says, that the only points upon the record were the admissibility of Hughes' deposition, and the instruction of the court with reference to that deposition. No point was made as to the effect

UNITED STATES *v.* PATTERSON. (*a*)

Public accounts.

A debtor of the United States, who puts evidences of debts due to himself, into the hands of a public officer of the United States, to collect and apply the money, when received, to the credit of such debtor, in account with the United States, is not entitled to such credit, until the money gets into the hands of a public officer of the United States, entitled to receive it.

Its being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct, before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States therefor.

THIS was also a writ of error to the Circuit Court for the district of Kentucky.

The case was submitted without argument, and DUVALL, J., delivered
*576] the opinion of the court as follows :—*This case has been considered in connection with that against January and Patterson. A suit was instituted on the bond, dated 23d March 1799, against Arthur and Patterson; and pending the suit, Arthur died. The defendant pleaded performance, to which the plaintiffs replied, alleging as a breach of the condition, that the stipulations therein contained had not been performed, and that the defendant was in arrear to the plaintiffs, the sum of $16,181.15½, &c., on which issue was joined.

The evidence, exhibited in the suit against January and Patterson, was produced in this case. On the trial, the defendant took several exceptions, but not having appealed, they are not open to examination.

The plaintiffs also took an exception to the allowance of a credit to the defendant. The supervisor had received the evidences of a number of outstanding debts due to Arthur, which he undertook to collect, and promised to apply the proceeds to Arthur's credit. Among them was the bond of Beelor & Moore, which was sued; at the trial of this suit, it appeared, that the amount of that bond had actually come into the hands of the agent of the person who had been supervisor; but that office being extinct, it was

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(*a*) March 16th, 1813. Absent, TODD, Justice.

of payments and credits made on a general account, in an account-current between the parties. But the whole cause seems to have proceeded upon the assumption, that but for the special election and promise of the supervisor, the payments made and credited, upon general account, would not have extinguished the antecedent items of debt, so as to have discharged the first bond in which January was surety. The point not having been made, could not intentionally have been decided by the supreme court. The United States are bound by the same rules as to the application of payments, as any other creditor. United States *v.* Wardwell, 5 Mason 82. In the case of official bonds, executed by the principal, at different times, with separate and distinct sets of sureties, the court has settled the law to be, that the responsibility of the separate sets of sureties must have reference to, and be limited by the periods for which they respectively undertake by their contract, and that neither the misfeasance nor nonfeasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable. United States *v.* Eckford, 1 How. 250; Jones *v.* United States, 7 Id. 688. And see Boody *v.* United States, 1 W. & M. 150; Myers *v.* United States, 1 McLean 493; Postmaster-General *v.* Norvell, Gilp. 106.

contended on the part of the United States, that the payment could not be considered as a payment to government. The court was of a different opinion, and instructed the jury accordingly; to which opinion of the court, an exception was taken, and a writ of error prosecuted.

This court is of opinion, that the circuit court erred in the decision thus made. The reception of the outstanding debts by the supervisor, for the purpose of having suits commenced for the recovery of them, was an accommodation to the defendant, who could not be justly entitled to credit, until the money was in the hands of some public officer authorized to receive it.

Judgment reversed.

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*577] *Livingston *v.* Dorgenois. (*a*)

Error.—Mandamus.

A writ of error does not lie to an order of the court below, granting an indefinite stay of proceedings, upon suggestion of the attorney for the United States, in a case to which the United States are not parties; but the court will award a *mandamus nisi*, in the nature of a *procedendo*.[1]

This was a writ of error to the District Court of the United States for the district of Orleans, in a suit brought in that court, by Edward Livingston against F. I. Le Breton Dorgenois, marshal of the territory of Orleans, according to the forms of the civil law, as established in that territory.

The petition of E. Livingston stated, that one John Gravier, on the 30th of April 1803, was an inhabitant of the province of Louisiana; that he was the owner and possessor of a plantation or parcel of land adjoining, and next above the city of New Orleans, and bounded in front on the river Mississippi, which had been uninterruptedly owned and possessed by himself, and those under whom he claimed, for upwards of eighty years. That the said plantation or parcel of land had then, to wit, on the said 30th day of April, and long before, been greatly increased by the alluvion of the said river, which had always, from the several periods of its increase, been considered, possessed and lawfully held, as parcel of the said tract of land, by the said Gravier and those under whom he held.

That the mayor, aldermen and inhabitants of the city of New Orleans having, under some pretence of title to the said alluvion, or to a servitude therein, committed divers trespasses on the said land, the said John Gravier filed his petition in the superior court of the territory of Orleans, being a court of competent jurisdiction, and from whose judgment there is no appeal, praying for an injunction against the said trespasses, and that he might be quieted in the possession of the said land. And that such proceedings were had in the said court, on the said petition, that it was finally adjudged and decreed, that the said John Gravier should be quieted in his lawful enjoyment of the said alluvion, and that an injunction, before granted, should be made perpetual, which judgment was carried into execution. After which, the petitioner (Livingston) took possession, *under Gravier, of the property in question, which he held as the legal owner [*578

(*a*) February 18th, 1813. Absent, Livingston and Todd, Justices.

[1] See Patterson *v.* Patterson, 27 Penn. St. 40.

in fee, by virtue of sundry conveyances from Gravier, and others who legally held under him; and that the possession of Gravier, in which he was quieted by the said decree, was legally and uninterruptedly transmitted to the petitioner, Livingston, and that he held the same until the 25th of January 1808, when he was forcibly dispossessed by the defendant, the marshal of the district of Orleans, who still retained the possession thereof, contrary to law.

The petitioner then prayed that, in the first instance, without prejudice to his further claims, he might be restored to the possession of which he had been illegally deprived, and might have such further and other relief as the nature of his case might require.

To this petition, the defendant answered, and pleaded in bar, that before and on the 25th of January 1808, he was marshal of the district of Orleans, and in his official capacity received from the president of the United States, an instruction or mandate, to remove from the lands in question, all such persons as should be found thereon, and who should have taken possesion thereof, or settled thereon, since the 3d of March 1807, which instruction or mandate was communicated to the defendant officially, by the direction of the president of the United States, in a letter written by James Madison, then secretary of state, which letter is in the words and figures following, viz.:

"Department of State, Nov. 30, 1807.

"Sir: In pursuance of the provisions of the act of congress, 'to prevent settlements on lands ceded to the United States, until authorized by law,' I am directed by the president, to instruct you to remove immediately from the land known and called by the name of the Batture, in front of the suburb St. Mary, of the city of New Orleans, which was ceded to the United States by the treaty with France, and the settlement of which has not been authorized by any law of the United States, all persons who shall be found on the same, and who shall have taken possession or settled thereon, *since *579] the 3d day of March, in the year 1807. Should any aid be necessary you will call for the assistance of the good citizens of the district, as the *posse comitatus*, or civil power of the territory. I have the honor to be, very respectfully, Sir, your obedient servant,

"Francis Joseph Le Breton Dorgenois, Esq., James Madison."
Marshal of the Orleans Territory."

And that the defendant did, accordingly, on the said 25th day of January, as marshal as aforesaid, and in obedience to the said instruction or mandate of the president, remove the plaintiff and his servants from the lands aforesaid, the same having been taken possession of by the plaintiff, since the 3d of March 1807, which said removal is the same which the plaintiff has set forth in his petition, and this he is ready to verify, &c.

To this plea, there was a general demurrer and joinder; but upon the day assigned for the argument, "Tully Robinson, Esq., attorney for the United States, moved the court that the proceedings be stayed, upon a suggestion that the suit is fictitious and collusive; that the defendant is entirely uninterested in the cause, not having (though impliedly admitting by the pleadings that he has) any right of property or possession in the tract or parcel of land called the Batture, but that the said suit is carried on for the

sole purpose of affecting the interest of a third party, to wit, of the United States, and of obtaining the possession from them." Whereupon, sundry documents were filed in support of the suggestion, and against it ; and the plaintiff offered to consent that the United States should intervene in the cause, but the counsel with the attorney for the United States replied, that the offer could not be accepted, because the United States could not be made defendants in any case. The motion of the attorney for the United States was thereupon *argued, and the court having taken time to consider, and having also granted a rehearing, ultimately decreed that the proceedings should be "finally stayed;" whereupon, the plaintiff sued out his writ of error to the supreme court of the United States. [*580

P. B. Key, for the plaintiff in error, contended, 1. That the suggestion of the district-attorney ought not to have been received to stay the proceedings. 2. That the rights of the United States (if they had any) could not have been injured by a decision in this case. 3. That to protect the interest of the United States, they had a clear adequate remedy by intervention, as known and used in the civil law.

1. A proceeding so novel and extraordinary, and so pregnant with mischievous consequences, ought to be supported by clear law, or decided usage and practice. If proceedings are to be stayed, at the mere suggestion of interest in the United States, it will be in the power of the district-attorney, at any time, to stay proceedings in any cause, by such a suggestion. There is neither statute law nor practice to justify such a proceeding, nor can it be sustained by analogy to those cases in which courts of law have sometimes stayed the proceedings, at the suggestion of a third party. There is no case in which they have been stayed, upon the mere allegation of the interest of such party, or upon the mere suggestion of collusion. It is only in cases where the testimony leads to indecency, and is *contra bonos mores ;* or where the peace of families, and the happiness and reputation of individuals are put to hazard, by actions founded upan wagers made by indifferent persons, and where the injured party would be without remedy, that the court will interfere to stay proceedings, as in the case of *Da Costa* v. *Jones*, Cowp. 729, and *Cox* v. *Phillips*, Cas. temp. Hardw. 237. *Here it is a mere suggestion of property in the United States, who, if they have any right, have a remedy. That right, if any, cannot be affected by this suit. [*581

2. The question before the court upon the demurrer is, was the defendant justified in removing the plaintiff from his possession? If he was not, the plaintiff is entitled to restoration to his possession, with damages, but the right of the United States is not affected. If the defendant was justified, then there is an end of the plaintiff's case. The judgment in this case cannot be given in evidence against the United States. It is *res inter alios acta*. If this "suggestion" prevails, the plaintiff is ruined, because the United States are not suable, and he has no redress, however illegal the conduct of the officer who removed him. Whenever the United States have a right, they must prosecute for the recovery of it. There is no obstacle in the way. It is every day's practice. In a case of trover for a ship, between individuals, the United States would not be permitted to stay proceedings, upon a suggestion that the suit was collusive—that neither of the parties

had possession or property in the ship, but that she was forfeited to the United States.

3. But the United States had a clear adequate remedy to protect their rights by intervention, as known and used in the civil law. In 2 Domat 676, the proceeding by intervention is defined. The petition of intervention ought to set out the interest of the party, with his proofs; the parties litigant are called upon to answer; and the party intervening is considered as plaintiff. This is what the plaintiff offered to permit the United States to do, but they refused, "because the United States could not be made defendant;" whereas, the process of intervention would have made them plaintiff. But the reason is obvious; intervention would have obliged them to show and establish their title; which they could not do, and therefore, they resorted to this extraordinary mode of suggestion, for the purpose of avoiding a judicial investigation of their right. *The consequences of such a proceeding, if supported, are too serious and glaring not to be perceived by the court. *582]

Pinkney, Attorney-General, stated, that he did not appear for the United States, nor for Dorgenois. The writ of error is not against Dorgenois, but against the United States; yet no citation had been served on the United States, or their attorney. He appeared as *amicus curiæ*, and objected to the court's hearing *ex parte* affidavits to prove the value of the matter in dispute to be more than $2000; but the court overruled his objection, and heard the affidavits.

On a subsequent day, he stated that he should confine his argument to two questions. 1. Has this court any jurisdiction of the cause? Is it before them? and 2. How shall it be disposed of?

1. The cause is not before this court. The writ of error has issued improvidently; there is no authority nor precedent for a writ of error in such a proceeding. It is not a judgment; and a writ of error at common law, as well as by statute, lies only to a final judgment. This was not a final judgment; for the complaint is, that the court below refused to pronounce a final judgment. This proceeding is not between the parties to the suit: it was equally adverse to Dorgenois as to Livingston. It is not defended by Dorgenois: he opposed the motion, and had as good a right to do so as Livingston. He had a right to go on and get judgment for his costs, if the law was on his side. If the motion of the district-attorney had failed, Dorgenois could not have had a writ of error: nor could the United States. No person who is not a party or privy can have a writ of error. If it be a right, it ought to be reciprocal. There are no authorities directly in point, because the case must be rare; but in analogous cases, no writ of error lies. The prayer for the benefit of clergy, which intervenes and prevents the attainder, produces a final *stay of the proceedings; yet no writ of error lies, because it was no judgment. The only remedy is a *certiorari* to bring the case into the crown-office. *Long's Case*, Cro. Eliz. 489; 9 Viner 476, pl. 2; Ibid. 480, pl. 13. So, in the case of recusancy, where the conviction is by proclamation, error will not lie, because there was no judgment. So, in the case of prohibition, error will not lie for refusing a prohibition, consequently, it will not lie on the granting it. There is a strong analogy between that case and the present, which is in the nature of *583]

a prohibition. 1 Salk. 236. So, the refusal to grant a new trial, or to continue a cause, &c., are not the ground of a writ of error. 1 Hen. & Munf. 222; 4 Cranch 324; 2 Binn. 80, 93; 6 East 633.

2. But if this court is in possession of the cause, and if the merits of the case are against the plaintiff, the court can have no motive to interfere, or to reverse the proceedings. The plaintiff never could be entitled to recover. He brought his action, eighteen months after the cause of action accrued; and the general rule of the civil law is, that it must be prosecuted within one year, if the sole ground of action be the unlawful force. There is only one exception, which is, where the defendant continues in the possession thus unlawfully and forcibly acquired. If the force be removed within the year, the action must be brought within the year. The action in the civil law is called *interdictum unde vi.* L. 1. ff. d. tit. *de vi et vi aramata;* 2 Pothier 103, Of possession and prescription, c. 6, § 2, 5; 7 Pothier's Posthumous Works, 258, 259, c. 13, art. 3. The plaintiff's own case shows, that the force was more than a year before his suit, and was discontinued within the year. The defendant was not in possession, when the suit was brought. But it is said, that the limitation ought to have been pleaded, by analogy to the common law. At common law, it was first decided, that if it appeared by the plaintiff's declaration, that his claim was within the statute of limitations, it need not be pleaded. Afterwards, it was held necessary to plead it, that the *plaintiff might have notice, and reply the exceptions; but in the civil law, there are no exceptions. It is not necessary to plead the [*584 limitation. If Dorgenois did not take advantage of the limitation in his favor, it is evidence of collusion.

But without insisting on this defence, the justification set up by the defendant is sufficient. This court will look into it to support the proceedings, but not to reverse them. The plea sets up the act of congress, and the order of the president. Every government causes its rights to be protected in the same way. In every republic, we find the same. It was so in Rome, Sparta, Athens, &c. The act of congress was indispensable. Its sole object was to guard against intrusions—to preserve the *status quo.* The president is to exercise a judicial power in deciding whether it be a case in which he was to execute the law. Wherever he was of opinion, that the lands had been ceded to the United States, and that the settlement thereof had not been authorized by any law of the United States, and that a person had settled thereon, since the 3d of March 1807, it was his duty to execute the law. The instructions to the marshal stated, that the lands had been ceded to the United States, and that the settlement thereof had not been authorized by any law of the United States, but did not state the fact that there had been an intrusion into those lands since the 3d of March 1807. The president might have had an inquest to ascertain that fact, but he was not bound to do so. He left that fact to be decided by the marshal, who found that there had been such an intrusion. If the president had jurisdiction to issue the warrant, the marshal was justified in obeying it, whether the president decided right or wrong. If, on the face of the warrant, the jurisdiction be asserted, although falsely asserted, he is bound to obey. He cannot say, that the president has over-stepped his authority. The contrary doctrine would make the inferior the appellate tribunal. He is only to look to his precept. He could not inquire whether the United States had title or not.

The president could not execute the law personally: he must act by inferior
*585] agents. An *officer who has an execution, on the face of which all appears right, is justified.

But another ground of objection to the justification is, that the warrant does not state that the intrusion was since the act. The president had a right to inquire, or to substitute an agent to make the inquiry. But the justification states the fact, that the lands were ceded to the United States, and that the plaintiff had intruded since the act. If the marshal were not competent to ascertain that fact, yet it appears from the other proceedings. If Gravier's possession be Livingston's possession, then the fact is stated, that Gravier's possession was since the act.

It is immaterial, whether the United States had title or not. If the president had authority to decide, his decision is conclusive as to the officer. It differs from a common case where a man cannot delegate an authority further than he has title. Independent of the question of title, the act of congress has given the president a judicial authority to ascertain facts, and to issue his warrant thereon.

Another objection to the plaintiff's claim is, that the United States are not suable. The judgment would have been nominally against the marshal, but would have affected the title of the United States. The execution, upon the judgment in an action of *interdictum unde vi*, is conclusive as to the possession. If the agents of government may be sued, all its rights may be subjected to judicial cognisance. The non-suability of government prevents the judicial decision directly on the property or rights of the government, so as to affect permanently the interests of the United States. A contrary doctrine would be inconsistent with sovereignty. There are cases of forfeiture, &c., where the United States are plaintiffs, and there may be cases in which they may authorize suits to be brought against themselves.

It is immaterial, whether the United States show their title or not. It is sufficient, if it be set up; or if that question be necessarily in contest. That the right of the United States was in contest, appears from the president's
*586] *message to congress, communicating his proceedings relative to the batture, which the plaintiff has produced in evidence.

The case has been thus far considered, on the supposition that the plea of justification by the marshal is a good defence in law. But if it be an imperfect defence, will this court send the cause back to be risked by such a defence, or to be abandoned or betrayed? It is clear, that the United States claim title, and this court will take care of the interest of the United States.

It is said, that the plaintiff was willing that the United States should intervene. But who has authority to intervene, and submit the rights of the United States to judicial investigation? The president had no such right. But if they were to intervene, it must be as auxiliary either to the plaintiff or the defendant. The judge was, therefore, driven to stay the proceedings: he could not compel the defendant to amend his defence. The government could not intervene as an individual may: it cannot submit its rights as defendant. Probably, the imperial code provided for the protection of the imperial rights. By analogy, the United States ought to have the same privilege. If the defence be not good, there is no remedy for the United States but to stay the proceedings. Every court has such a discretion to stay proceedings, when the feelings, &c., of third persons, are

injured; *à fortiori*, where the interests of the United States are concerned, even in cases where there is no collusion. But where there is collusion, the right is unquestionable.

If this court should reverse the decision of the judge, it can only send the case back, with directions to proceed in the cause.

Harper, in reply, observed, that he should be alarmed for himself and for his fellow-citizens of the United States, if it could be supposed necessary to reply to many of the positions advanced by the attorney-general. They find their refutation, *not only in the universal understanding of the country, but in the heart of every person who hears them. This case [*587 has no analogy to that of *Cox*, where the suit was only a pretext to intermeddle with the domestic concerns of third persons, and to harrow up their feelings.

The government of the United States has no greater right to stay the proceedings in a suit between third persons, than any other individual; and no individual can stay the proceedings in such cases, upon the mere suggestion of interest or collusion, without becoming a party to the suit. It is true, that the United States cannot be brought into court as defendant in all cases; but shall it, therefore, come when it pleases, and interfere in private concerns? It is sufficient, that it can seize what it pleases, and hold what it seizes, without being compellable to account. But it is the only civilized government that refuses to submit its rights to judicial decision.

The question of collusion, being a question of fact only, he rested upon the argument of the appellant as contained in his printed statement of the case.

The action *interdictum unde vi*, is a possessory action only; and the only question is the forcible entry, and its legality. The title does not come in question. The only question is concerning the force and the damages. It was the only action he could have brought. If there had been a question of title, he might have had the *actio utilis* with his possessory action. If the United States had an interest, it ought to have been shown. In the case of the direct taxes, President Washington did not think that the dignity of the United States forbade a judicial investigation. He directed a case to be made and argued at the expense of the United States.

But the defence of the appellee is wholly untenable. It is no justification. The warrant of the president is not authorized by the act of congress (March 3d, 1807, 2 U. S. Stat. 445). The party to be ousted under the authority of that law must be one who had taken possession since the 3d of March 1807. It does not apply to *one who had received peaceable [*588 possession from one, who was in peaceable possession before and on that day. Its object was to prevent intrusion by strangers into the vacant lands ceded by the treaty. It means an original taking, not receiving a derivative possession. It must appear also, that these lands were ceded. But they were not ceded; the cession was only of vacant lands. But the estate to which this alluvion had accrued, was in possession of Gravier, at the time of the treaty, and had been in his possession, and in that of those under whom he claimed, for more than 80 years. The alluvion had been judicially decided to be the private property of Gravier, by a competent tribunal, whose decision was conclusive.

But there is another fatal objection to the defence, which is, that the act of 1807 did not apply to any claims under French or Spanish grants, until the board of commissioners appointed by virtue of the act of congress of 1805, § 4 (2 U. S. Stat. 326), should have rejected them, or until they should be rejected by the secretary of the treasury, or by congress, to whom there was a right of appeal. The report of this board of commissioners was not made until January 1812, and was not transmitted to congress by the secretary of the treasury until November 1812, long subsequent to the forcible removal of the appellant. The defence ought to have averred, that this claim had been submitted to the board of commissioners and rejected, &c.

It is said, that the action *interdictum unde vi* is an annual action. But it is also stated in the books, that if the spoliator remain in possession, it may be brought at any time. The plaintiff states the defendant to be in possession, and the fact is admitted by the defendant. But it is said, the truth of the fact is not so. Yet it appears, that the defendant took possession by force, and kept the plaintiff out, and has not delivered the possession to anybody else. The United States disclaimed possession. The possession, therefore, is to be presumed to remain with the defendant.

*589] It is objected, that a writ of error does not lie in such *a case. It may be admitted, that at common law, this is not such a judgment as will support a writ of error. But in the civil law, in equity, in admiralty and ecclesiastical cases, every decree or sentence of dismissal may be appealed from. But it is said not to be a final sentence, because the court below may rescind it at any time. A decree that a judgment shall be finally stayed is a final decree, as much as a decree dismissing the bill.

It is also objected, that if the cause be sent back, the United States cannot have a hearing. But the United States may intervene, which is a process analogous to a bill of interpleader. It is not true, that they cannot intervene but as auxiliary to the plaintiff or defendant. This is shown by Pothier, cited by the attorney-general. He speaks throughout of the right of the third person who intervenes. But if the United States cannot intervene, without joining one or the other party, why not join the defendant who claims under the United States? If his defence is imperfect, why not help him? If collusive, why not make a better? Even under the Roman civil law, the Emperor himself cannot by rescript affect the property of a person who has not been heard. Code, tit. 4, Corp. Jur. Civ. vol. 2, p. 258.

March 16th, 1813. The counsel for the appellant dismissed his writ of error, and prayed a *mandamus nisi* to the judge of the District Court of Orleans, in the nature of a *procedendo*, which was granted.

Mandamus *nisi* awarded.

Otis *v.* Bacon. (*a*)

Embargo.

By the 11th section of the act of 25th April 1808, the collector had no right to detain a vessel and cargo, after her arrival at her port of destination, under a suspicion that she intended to violate the embargo; and such detention could not be justified by instructions from the secretary of the treasury, nor by the confirmation of the president.[1]

Error to the Supreme Judicial Court of the state of Massachusetts, in a case involving the construction *of an act of congress, and the justi- [*590
fication of an officer of the United States, claiming justification under such act—the decision of the court below being against the justification thus set up. The case was this:

Bacon, the defendant in error, having obtained permission to import a cargo of flour from Baltimore into the port of Barnstable, arrived with his cargo at a place called the Mud-hole, in the district and port of Barnstable, on the 2d of October 1808, and on the 3d, obtained from Joseph Otis, the collector of the port, a permit to land the cargo. On the next day, the vessel and cargo were seized by Simeon Crowell, the inspector of the port. Bacon called at the collector's office to inquire into the cause of the seizure, and was informed by Joseph Otis, the collector, that he had not authorized it. But William Otis, the deputy-collector, in answer to an offer by Bacon to give bond and security to any amount if he would release the vessel and cargo, said, "I have got your vessel, and I will keep her." Bacon then abandoned the property to William Otis, the plaintiff in error, and made a protest and abandonment before a notary-public. On the 3d day after the seizure, Crowell removed the vessel to Bass river, six miles south-east of the Mud-hole, and on the 13th of October, 233 barrels and 49 half-barrels of the flour were landed and stowed in Crowell's house. The vessel and the residue of the cargo was afterwards carried away by persons unknown, and the cargo sold in the West Indies.

Bacon brought his action of trover against Joseph Otis, the collector, William Otis, the deputy-collector, and Simeon Crowell, the inspector. Joseph Otis died before the trial, and Crowell was never taken.

At the trial, William Otis, the plaintiff in error, relied on the 11th section of the act of congress of the 25th of April 1808 (2 U. S. Stat. 501), by which it is enacted, "That the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, the intention is to violate or evade any of the provisions of the acts lay- [*591
ing an embargo, until the decision of *the president of the United States be had thereupon," and offered in evidence certain letters from the secretary of the treasury, containing instructions to the collector, and stating that the president had confirmed the detention of the vessel: also written orders from Joseph Otis, the collector, to Crowell, the inspector, to seize the vessel and land the cargo. And also offered evidence that an unusually large quantity of flour had been imported into Barnstable, about the same time, and also

(*a*) March 12th, 1813. Absent, Todd, Justice.

[1] See Otis *v.* Walter, 2 Wheat. 21; 6 Id. 583; 11 Id. 192.

evidence of the declarations of the mate of the vessel, the day before she was carried off; all of which evidence was rejected by the court.

The judge instructed the jury, that if they believed the testimony relative to the declarations of William Otis, and the other circumstances, it maintained the issue on the part of Bacon. And also, that the collector had no right, under the circumstances, to detain the vessel, she having arrived at her port of destination, and obtained a permit to unlade. And further, that if the collector had power to detain the vessel, his authority did not extend to the seizure of the cargo, which seizure was, of itself, unlawful, and a conversion of the cargo. And that if Bacon had been aiding in forcibly rescuing the vessel and cargo, and had obtained any benefit from it, the verdict must be for the defendant.

The defendant took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error under the 25th section of the judiciary act of 1789.

Jones, for the plaintiff in error.—The declarations of the defendant were not sufficient evidence of the trover and conversion, and there was no evidence that he did any act. The judge ought to have left the jury to draw their own inference from those declarations.

*592] *The vessel had not, in fact, arrived at her port of destination. Her clearance was for Yarmouth, which, although within the district of Barnstable, is six miles distant; she might even have gone to Provincetown, on the other side of Cape Cod.

Part of the defence was, that the vessel was carried off by collusion with the plaintiff, and yet the judge rejected the principal evidence which connected him with the transaction, the declarations of Martin, the mate, who ran away with the vessel, and sold the cargo at Nevis.

The judge also rejected the evidence tending to show the motives for a fraudulent voyage, and the grounds of suspicion which the collector had. He rejected also the letters of instruction from the secretary of the treasury, and the letter giving notice that the president had confirmed the detention of the vessel, which, even if they were not authorized by law, were yet good evidence in mitigation of damages.

Amory and *P. B Key*, contrà.—If the collector had no right to detain the vessel, under any instructions which could be given, the letters offered in evidence must have been immaterial, and therefore, inadmissible.

She was not ostensibly bound to any other port—she had arrived and obtained a permit to land her cargo. Yarmouth was not another port, it was part of the same port of Barnstable.

If a judge tells the jury that a fact is proved, when it is not, it is not an error in law. The jury are not bound to regard the opinion of the judge as to the existence of a fact. The sufficiency of any fact or facts to maintain the issue, is a matter of law, and the instruction of the judge upon that point is proper.

As to the instructions, if they were merely conformable to the law, they were immaterial; and if contrary to law, inadmissible.

*593] *In trover, what is not a justification cannot be given in evidence in mitigation of damages. The damages are the value of the article

converted. Vindictive damages are not to be given. It is a mere indemnification that is sought.

As to the declarations of Martin : he is not proved to be the agent of the plaintiff. Why was he not examined as a witness?

Jones, in reply.—The judge ought to have told the jury, that if they found Martin to be the plaintiff's agent, then his declarations were evidence, otherwise not.

The president's confirmation of the seizure was a justification, under the provisions of the law.

The jury may give vindictive damages in trover, if they will. Evidence may, therefore, be given in mitigation.

March 17th, 1813. WASHINGTON, J., delivered the opinion of the court, as follows :—This is an appeal from the Supreme Judicial Court of the commonwealth of Massachusetts, under the 25th section of the judiciary law. The judgment complained of was rendered in an action of trover and conversion, brought by the appellee against Joseph Otis, Crowell and the appellant, for taking and converting a quantity of flour, the property of the appellee. The trial took place between the appellee and appellant, Joseph Otis having died after the commencement of the suit ; and the process not having been served on Crowell. The verdict having been in favor of the plaintiff, the appellee, judgment was rendered thereupon in his favor.

By a bill of exceptions taken to the charge of the court the following facts appear to have been given in evidence. That Bacon having obtained from the governor of Massachusetts such a certificate as authorized him, under a provision in one of the embargo laws, to transport a cargo of flour from some of the southern *states to the district of Barnstable, did, accordingly, procure such a cargo at Baltimore and arrived with it in [*594 the schooner Ann, at a place called the Mud-hole, in the port and district of Barnstable, on the 2d of October 1808. On the 3d of the same month, a permit to land the cargo was granted by Joseph Otis, the collector of the port. The day following, the vessel and cargo were seized by Crowell, the inspector of the port. Bacon immediately called at the collector's office to inquire into the cause of the seizure, and was informed by Joseph Otis that he had not authorized it. But William Otis, the deputy-collector, in answer to an offer made by Bacon to give bond and security to any amount, if he would release the vessel, said, "I have got your vessel, and I will keep her." The offer to give bond not to go anywhere with the vessel and cargo was repeated, but William Otis refused to give her up. Bacon then proposed to unlade the vessel, and again offered bonds, which Otis, the appellant, refused, and said, " you may see the flour landed, but you shall not have it, after it is landed." The appellee then abandoned the property to the appellant, and the next day, made a protest, and abandoned before a notary-public. The seizure and detention of the vessel and cargo by Crowell is fully proved. On the third day, after the seizure, Crowell removed the vessel to Bass river, six miles south-east of Mud-hole ; and on the 13th of October, 233 barrels and 49 half-barrels of the flour were landed and delivered to the appellee. The vessel, with the residue of the cargo, for the conversion of which residue this suit was brought, was afterwards carried away by persons unknown, and the cargo sold in the West Indies.

Upon this evidence, the court charged the jury, that if they believed the evidence of the declaration of William Otis, and of the other circumstances in this case respecting the seizure and detention of the said vessel and her cargo, it was sufficient, in point of law, to maintain the issue on the part of Bacon, and to prove the conversion of the 298 barrels and 21 half-barrels of flour which were carried off in the vessel. That the collector had no right to detain this vessel and cargo, she having arrived at her port of discharge, and obtained a permit to unlade, and that even if he had a right
*595] *to detain the vessel, this authority did not extend to a seizure of the cargo, and that such seizure was of itself a conversion; and that as the defendant, Otis, had failed to make out a justification, he must be considered as a wrongdoer, and chargeable to Bacon for the value of said flour. But that if the jury should believe from the evidence, that Bacon aided or consented to the rescue and carrying off the vessel and cargo, or had by forceable or collusive means obtained any benefit from the sale of said cargo, in consequence of said rescue, then the defendant, Otis, was entitled to a verdict.

It is apparent on the face of this record, that this cause in the court below turned upon the construction of the 11th section of the act of congress of the 25th of April 1808, ch. 66, and the question for this court to decide is, whether that court erred in the opinion given to the jury upon that statute. The words of the 11th section are, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon."

If this section authorized the collector to seize and detain this vessel and cargo, under the circumstances in the case as detailed in this record, then the opinion of the court below was erroneous. If it gave no such authority, then it was clearly right.

The power of the collector to detain is confined to a vessel ostensibly bound with a cargo to some other port of the United States. Can a vessel which has actually arrived at her port of discharge, and has received from the collector of the port a permit to land her cargo, be considered as a vessel ostensibly bound to some other port of the United States? We think not. The reason for authorizing the detention of a vessel, before she has arrived at her port of discharge, does not apply to one which has actually performed her voyage, according to the stipulations of the bond given by the owner, at the port of her departure. All rational grounds of suspicion
*596] of an intended violation of the embargo laws is *then done away: for if such an intention, at any time, existed, it would be difficult to assign to the master or owner a motive for postponing the execution of it, until after the arrival of the vessel at her port of discharge. It is, therefore, scarcely to be conceived, that such a case was in the contemplation of the legislature

It is true, that this vessel had not arrived at Yarmouth, where her cargo was to be landed, at the time of the seizure. But it is sufficient, in the opinion of the court, that she had arrived at the port to which she was destined, and had received a permit to land. The voyage was as much at an

end, in relation to the question, as if she had arrived within 100 yards of the wharf at Yarmouth. It is, therefore, the unanimous opinion of this court, that there is no error in the opinion of the court below on the construction given by that court of the above statute.

Other exceptions were taken, in the course of the trial of this cause, to the opinion of the court below, on rejecting certain evidence offered by the appellant. But this court has no authority, under the law which authorizes this appeal, to notice any error except such as appears on the face of the record, and immediately respects the questions of validity of the constitution, treaties, statutes, commissions or authorities in dispute.[1]

The opinions of the court below, in relation to the evidence offered by the appellant, even if erroneous, which we neither affirm nor deny, have nothing to do with the construction of any statute of the United States; and therefore, they cannot be regarded by this court.

Judgment affirmed.[2]

Thornton *v.* Carson. (*a*)

Award.

An award is not void, because in the alternative, and contingent; nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control.

Error to the Circuit Court for the district of Columbia, sitting at Washington.

*Two actions of debt, commenced at law, by Carson against Thornton, upon two bonds for the payment of money, were referred, [*597 by consent, under a rule of court, to arbitrators, who awarded that the first action should "be marked and considered settled; and that the other also should be marked and considered settled, provided, that the defendant, Thornton, in conjunction with the trustees of the Gold-mine Company of North Carolina, should convey and secure, by a deed and assurance legally executed, with proper and usual covenants, unto John K. Carson, his heirs and assigns, for the benefit of the said John, and the heirs of Thomas Carson, deceased, on or before the first day of January 1811, one-eleventh part of all the minerals and mines that might thereafter be found upon a tract of land, in the county of Montgomery, and state of North Carolina, which, by deeds bearing date the 5th of December 1805, was conveyed by the said John K. Carson, to the said William Thornton, and by the said William Thornton, to the said trustees of the Gold-mine Company; and that if such conveyance and assurance should not be made, on or before the said 1st of January 1811," then, in the first suit, judgment should be entered up by the court for the plaintiff (Carson), for the penalty of the bond, to be released on the payment of a certain sum expressed on the award, and also in the second suit, judgment should be entered for the plaintiff, for the penalty of

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(*a*) February 23d, 1813. Absent, Todd, Justice.

[1] Matthews *v.* Zane, 7 Wheat. 164; Ross *v.* Barland, 1 Pet. 655; Pollard *v.* Kibbe, 14 Id. 354; Armstrong *v.* Adams Co., 16 Id. 281.

[2] For a further decision in this case, see 11 Mass. 409.

the bond, to be released on the payment of another sum also expressed in the award; and that upon receiving such conveyance and assurance, Carson should convey to Thornton five shares in the Gold-mine Company of North Carolina, which Carson had subscribed for on the 1st of April 1806.

Exceptions were taken to this award, 1st. Because it is not final. 2d. Because it is uncertain. 3d. Because it is unreasonable. 4th. Because it is contingent and conditional. 5th. Because it is against law; and 6th. Because it is no award. But the court below overruled the exceptions, and rendered judgment for the amount of the money mentioned in the award.

*598] *The defendant, Thornton, brought his writ of error, and his counsel insisted upon the following errors.

1. That the award was not final or certain, because its final determination depends on a contingency; and would be an award in favor of the plaintiff in one event, and in favor of the defendant in another. It was also uncertain, because there was no way of ascertaining whether the fact to be done by the plaintiff in error, and the other persons, was or was not done; nor whether the conveyances were made as directed; nor whether they were "proper and sufficient," nor how, nor by whom, the entry was to be made in the suit; and the arbitrators could neither reserve this to be determined by themselves, nor leave it to be done by others. It was also uncertain, because it is not stated, when the entry ("settled") was to be made in the suit in the one event, nor the judgment for the plaintiff in the other.

2. The award was bad, because it required the plaintiff in error to do what was manifestly out of his power, viz., to get other persons to join him in executing a deed, which, if not impossible, was at least unreasonable. It was also unreasonable, because it required a deed to be made by the plaintiff in error, who is stated to have no title or interest in the thing to be conveyed; and because it only required that the deed should be made; not that it should be delivered; so that the same would not have been binding upon the defendant in error; and therefore, the award being uncertain, unreasonable and inconclusive as to one party, was to be so considered as to both. And—

3. That the award was repugnant and void, being at first in favor of the plaintiff in error, and determining that the suit should be entered "settled," and afterwards awarding that a judgment should be entered for the defendant in error, upon a certain contingency.

*599] The case was submitted without argument, *Morsell*, *for the defendant in error, having cited Kyd on Awards 137, and *Lee* v. *Elkins*, 12 Mod. 586.

Washington, J., delivered the opinion of the court, as follows:—This is a writ of error to a judgment of the circuit court for the district of Columbia. Under a rule which was served upon the plaintiff in error, to show cause, during the term at which the rule was made, why judgment should not be entered on the award, he appeared and assigned for cause, that the said award was uncertain, not final, unreasonable, conditional and void. These objections are strictly technical, and referrible solely to defects supposed to appear on the face of the award, and do not aim to impeach it for any one of the causes which the law of Maryland, passed in October 1778, ch. 21, declares to be sufficient for setting aside an award.

This court, not meaning to decide whether any and what other objections than those stated in the statute of Maryland, may be alleged against entering judgment upon awards made under orders of reference, will proceed to consider those which were stated in this case.

It is contended, that this award is not final or certain, because it depends on a contingency, and will be an award in favor of the plaintiff, in one event, and in favor of the defendant, in another. This court does not so understand the effect of this award. It is clearly in favor of the defendant in error, in either event contemplated by the referees. The plaintiff is required, in conjunction with certain other persons, to convey to the defendant, for the benefit of himself and the heirs of Thomas Carson, on or before a fixed day, certain property specified in the award, or to pay the amount of the two bonds in suit. If he made the conveyance, then the referees have awarded certain property to the defendant; and if he failed to do this, judgment was to be entered against him, for the amount of those bonds. The defendant had his election to do either; and upon *satisfying [*600
the court, at the time he was required to show cause why judgment should not be entered on the award, that he had made such a conveyance as the award prescribed, the court ought to have ordered the suits to have been entered "settled."

If the plaintiff had made the conveyance, and the defendant, who, upon that act being done, was required by the award to transfer five shares in the Gold-mine Company of North Carolina, to the plaintiff, had failed to do so, the court ought to have ordered the suits to be entered "settled." But the plaintiff, having failed to perform the act, upon which alone this transfer was to be made, and the suits were to be entered "settled," became liable to pay the sums awarded by the referees, as the equivalent for the property to be conveyed, and consequently, the court was right in entering the judgment for the sums awarded.

There is no uncertainty in all this; or, at least, none which might not be rendered certain by the act of the plaintiff, in conformity with the award, and which must not necessarily be certain, at the time the court was to render judgment on the award. The plain meaning of the award is, that the plaintiff was to pay the amount of the bonds in suit, unless, by a certain day, he made a conveyance to the defendant, of the property described in the award, in which latter event, he was to receive from the defendant, a transfer of five shares in the Gold-mine Company, and to be discharged from the payment of the money, by an entry to that effect, to be made in the suits referred. But if he refused to make the conveyance, then judgment to be entered against him for the amount of the bonds in suit. If he entitled himself to this entry in his favor, by performing the other branch of the alternative, and the defendant failed to perform his part of the award, then the defendant could receive no benefit from the award, and the suits were to be entered "settled." Whether the conveyance from the plaintiff, and the transfer by the defendant, were made in due form, were questions proper for the consideration of the court.

The award is said to be uncertain, because the names *of the [*601
trustees who are to join in the conveyance, and of the heirs of Thomas Carson, are not stated, nor does the award declare who is to prepare and tender the deed. These, too, were questions proper for the considera-

tion of the court below, but form no objections to the award. It does not appear from the record, that the defendant had refused or failed to do everything which the law required him to perform, to entitle him to the judgment of the court, and we must, therefore, presume, that no delinquency on his part was shown by the plaintiff; that if it was necessary for him to prepare and tender the deed, such as the law required, he did so to the satisfaction of the court. If he failed to do that which would warrant the court in entering judgment on the award, it was the duty of the plaintiff to have shown this, as cause against entering the judgment, and to have spread all the facts upon the record, which might enable this court to decide whether the court below acted correctly or not.

The award is said to be unreasonable, because it requires the plaintiff to get other persons to join in the conveyance to the defendant, which he may not be able to do. But surely, if the plaintiff was bound to pay the bonds in suit, or to convey a good title to certain property, which title would not be valid, in the opinion of the referees, unless other persons joined in the conveyance, he cannot surely complain, that he is ordered to pay the money, unless he executes such a deed as will pass a good title. It is his misfortune if he cannot make the title, but it is no reason why, in that event he should not pay the money.

There are other causes assigned why the award is unreasonable; but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award.

Judgment affirmed, with costs.

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*602] *Wallen *v.* Williams. (*a*)

Equity practice.

The circuit court of Tennessee, as a court of equity, cannot award a writ of *hab. facias possessionem* to enforce its decree.[1]

Error to the Circuit Court for the district of East Tennessee, in a suit in equity, in which Joseph Williams, on the 15th of November 1799, brought his bill of complaint against Elisha Wallen and John Williams, whereby he stated that the defendants and others, in the year 1779, entered into a copartnership in the entering of lands in the land-office for the sale of lands in that part of the state of North Carolina which now lies within the district of East Tennessee; and that each party was, on demand, to pay his proportion of the money due to the state upon the entries, to the party who should advance it: and that if any party so failed to pay his proportion, he should forfeit his share of the lands entered, and should cease to be a partner. That Joseph Williams, the complainant, paid the whole of the money due to the state for the lands entered, and that John Williams, one of the defendants, not having paid anything, sold his share of the lands to the other defendant, Wallen, who had notice that nothing had been paid by John Williams.

(*a*) March 17th, 1813. Absent, Livingston, Todd and Story, Justices.

[1] The remedy is by injunction and writ of assistance. Commonwealth *v.* Dieffenbach, 3 Grant (Pa.) 368; Kershaw *v.* Thompson, 4 Johns. Ch. 609.

Wallen obtained patents, upon this assignment of John Williams, for two tracts of 640 acres each, and one for 440. The latter tract of 440 acres he sold to a purchaser without notice; but he still held the other two tracts. That the complainant had demanded from Wallen payment of John Williams's proportion of the money due to the state, which Wallen refused to pay. The defendant, in his answer, relied in part on the statute of limitations.

The facts being proved to the satisfaction of the judge, he decreed that "the said Elisha Wallen be divested of all the right, title, interest, property and claim which he had, or has, to the said two tracts of 640 acres, and each of them, and that all the right, title, interest, property and claim of, in and to said two tracts of land, and each of them, and every part and parcel thereof, be vested in the said complainant, Joseph Williams, his heirs and assigns for ever, to *have, hold, occupy, possess and enjoy the same, and each and every part thereof, with their hereditaments and appurtenances, against the said Elisha Wallen, his heirs and assigns for ever." [*603 And it was further decreed, that the defendant, Wallen, should pay to the complainant the sum of $593.33⅓, the value of the tract of 440 acres as found by the jury which had been impannelled to ascertain its value; and that for the purpose of compelling payment thereof, the complainant should have execution, which was accordingly issued and satisfied.

The complainant afterwards obtained a writ of *hab. facias*, grounded upon the affidavit of the marshal, that the defendant refused to deliver possession to the complainant, according to the decree. By virtue of this writ, the complainant was put into possession of the two tracts of 640 acres each; and the defendant, Wallen, brought his writ of error.

Jones, for the plaintiff in error, moved the court to direct the court below to quash the writ of *hab. facias*, and to award a writ of restitution; upon the ground, as it is understood, that the court below, as a court of equity, could not award such a writ. He cited 5 Com. Dig. tit. Pleader, 3 B. 20; and 9 Vin. Abr. 478 (8vo. Ed.), tit. Error, F. pl. 3.

There was no appearance for the defendant in error.

THE COURT made the order, agreeable to the motion.

FAIRFAX'S Devisee *v.* HUNTER'S Lessee. (*a*)

Lord Fairfax's estate.

Lord Fairfax, at the time of his death, had the absolute property, seisin and possession of the waste and unappropriated lands in the Northern Neck of Virginia.

An alien enemy may take lands in Virginia, by devise, and hold the same until office found.

The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck, until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax.

THIS was a writ of error to the Court of Appeals of Virginia, in an action of ejectment, involving the construction *of the treaties between Great Britain and the United States—the judgment of the court of [*604

(*a*) February 27th, 1813. Absent, MARSHALL, C. J., and WASHINGTON, J.

appeals b ing against the right claimed under those treaties. The state of the facts, as settled by the case agreed, was as follows:

1. The title of the late Lord Fairfax to all that entire territory and tract of land, called the Northern Neck of Virginia, the nature of his estate in the same as he inherited it, and the purport of the several charters and grants from the Kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an act of the assembly of Virginia, passed in the year 1736 (Rev. Code, vol. 1, ch. 3, p. 5), "for the confirming and better securing the titles to lands in the Northern Neck, held under the Right Honorable Thomas Lord Fairfax," &c.

From the recitals of the act, it appeared, that the first letters-patent (1 Car. II.) granting the land in question to Ralph Lord Hopton and others, being surrendered, in order to have the grant renewed with alterations, the Earl of St. Albans and others (partly survivors of, and partly purchasers under the first patentees) obtained new letters-patent (2 Car. II.) for the same land and appurtenances, and by the same description, but with additional privileges and reservations, &c.

The estate granted was described to be, "All that entire tract, territory or parcel of land, situate, &c., and bounded by, and within the heads of the rivers Tappahannock, &c., together with the rivers themselves, and all the islands, &c., and all woods, underwoods, timber, &c., mines of gold and silver, lead, tin, &c., and quarries of stone and coal, &c., to have, hold, and enjoy the said tract of land, &c., to the said (patentees), their heirs and assigns for ever, to their only use and behoof, and to no other use, intent or purpose whatsoever."

There was reserved to the crown, the annual rent of 6*l.* 13*s.* 4*d.*, "in lieu of all services and demands whatsoever;" also one-fifth part of all gold, and one-tenth part of all silver mines.

*605] *To the absolute title and seisin in fee of the land and its appurtenances, and the beneficial use and enjoyment of the same, assured to the patentees, as tenants *in capite*, by the most direct and abundant terms of conveyancing, there were superadded certain collateral powers of baronial dominion; reserving, however, to the governor, council and assembly of Virginia, the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants, for the public and common defence of the colony, as well as a general jurisdiction over the patentees, their heirs and assigns, and all other inhabitants of the said territory.

In the enumeration of privileges specifically granted to the patentees, their heirs and assigns, was "freely, and without molestation of the King, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for or buy the same." There was also a condition to avoid the grant, as to so much of the granted premises as should not be possessed, inhabited or planted by the means or procurement of the patentees, their heirs or assigns, in the space of 21 years.

The third and last of the letters-patent referred to (4 Jac. II.), after reciting a sale and conveyance of the granted premises by the former patentees, to Thomas Lord Culpepper, "who was thereby become sole owner and proprietor thereof in fee-simple," proceeded to confirm the same to Lord Cul-

pepper, in fee-simple, and to release him from the said condition, of having the lands inhabited or planted as aforesaid.

The said act of assembly then recited, that Thomas Lord Fairfax, heir-at-law of Lord Culpepper, had become "sole proprietor of the said territory, with the appurtenances, and the above-recited letters-patent."

By another act of assembly, passed in the year 1748 (Rev. Code, vol. 1, ch. 4, p. 10), certain grants from the Crown, made while the exact boundaries of the Northern *Neck were doubtful, for lands which proved to be within those boundaries, as then recently settled and determined, [*606 were, with the express consent of Lord Fairfax, confirmed to the grantees; to be held, nevertheless, of him, and all the rents, services, profits and emoluments (reserved by such grants) to be paid and performed to him.

In another act of assembly, passed May 1779, for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands, there is the following clause, viz. (Chancery Rev. of 1783, ch. 13, § 6, p. 98): "And that the proprietors of land within this commonwealth, may no longer be subject to any servile, feudal or precarious tenure; and to prevent the danger to a free state from perpetual revenue; be it enacted, that the royal mines, quit-rents, and all other reservations and conditions in the patents or grants of land from the Crown of England, under the former government, shall be, and are hereby declared null and void; and that all lands, thereby respectively granted, shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with the lands hereafter to be granted by the commonwealth, by virtue of this act."

2. As respects the actual exercise of his proprietary rights by Lord Fairfax. It was agreed, that he did, in the year 1748, open and conduct, at his own expense, an office, within the Northern Neck, for granting and conveying what he described and called the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published; that he did, from time to time, grant parcels of such lands in fee (the deeds being registered at his said office, in books kept for that purpose, by his own clerks and agents); that according to the uniform tenor of such grants, he did, styling himself proprietor of the Northern Neck, &c., in consideration of a certain composition to him paid, and of certain annual rents therein reserved, grant, &c.; with a clause of re-entry for non-payment of the rent, &c.; that he also demised, for lives and terms of years, *parcels of the same description of lands, also reserving [*607 annual rents; that he kept his said office open, for the purposes aforesaid, from the year 1748, till his death in December 1781; during the whole of which period, and before, he exercised the right of granting, in fee, and demising for lives and terms of years as aforesaid; and received and enjoyed the rents annually, as they accrued, as well under the grants in fee, as under the leases for lives and years. It was also agreed that Lord Fairfax died seised of lands in the Northern Neck, equal to about 300,000 acres, which had been granted by him in fee to one T. B. Martin, upon the same terms and conditions, and in the same form, as the other grants in fee before described; which lands were, soon after being so granted, reconveyed to Lord Fairfax in fee.

3. Lord Fairfax being a citizen and inhabitant of Virginia, died in the

month of December 1781; and by his last will and testament, duly made and published, devised the whole of his lands, &c., called or known by the name of the Northern Neck of Virginia, in fee, to Denny Fairfax (the original defendant in ejectment), by the name and description of the Reverend Denny Martin, &c., upon condition of his taking the name and arms of Fairfax, &c., and it was admitted, that he fully complied with the conditions of the devise.

4. It was agreed, that Denny Fairfax, the devisee, was a native-born British subject, and never became a citizen of the United States, nor any one of them; but always resided in England; as well during the revolutionary war, as from his birth, about the year 1750, to his death, which happened some time between the years 1796 and 1803, as appears from the record of the proceedings in the court of appeals. It was also admitted, that Lord Fairfax left, at his death, a nephew named Thomas Bryan Martin, who was always a citizen of Virginia, being the younger brother of the said devisee, and the second son of a sister of the said Lord Fairfax; which sister was still living, and had always been a British subject.

*608] 5. The land demanded by this ejectment, being *agreed to be part and parcel of the said territory and tract of land, called the Northern Neck, and to be a part of that description of lands, within the Northern Neck, called and described by Lord Fairfax, as "waste and ungranted;" and being also agreed never to have been escheated and seized into the hands of the commonwealth of Virginia, pursuant to certain acts of assembly concerning escheators, and never to have been the subject of any inquest of office, was contained and included in a certain patent, bearing date the 30th April 1789, under the hand of the then governor, and the seal of the commonwealth of Virginia, purporting that the land in question, was granted by the said commonwealth unto David Hunter (the lessor of the plaintiff in ejectment) and his heirs for ever, by virtue and in consideration of a land-office treasury warrant, issued the 23d January 1788. The said lessor of the plaintiff in ejectment was, and always had been a citizen of Virginia; and in pursuance of his said patent, entered into the land in question, and was thereof possessed, prior to the institution of the said action of ejectment.

6. The definitive treaty of peace concluded in the year 1783, between the United States of America and Great Britain, and also the several acts of the assembly of Virginia, concerning the premises, were referred to as making a part of the case agreed.

Treaties and acts of assembly referred to.

Provisional articles of peace between Great Britain and the United States, concluded 30th November 1782, Art. 5 and 6.

Definitive treaty of peace between the same powers, concluded 3d September 1783, Art. 5 and 6.

Treaty of amity, &c., between the same powers, concluded 19th November 1794, Art. 9.

"An act respecting future confiscations. (October 1783.) Whereas, it is stipulated, by the sixth article of the treaty of peace between the United

*609] States and the king of Great Britain, that there shall be no future confiscations *made; be it enacted, that no future confiscations shall be

made, any law to the contrary notwithstanding; provided, that this act shall not extend to any suit, depending in any court, which was commenced prior to the ratification of the treaty of peace."

"An act declaring who shall be deemed citizens of this commonwealth." (May 1799, ch. 55, repealed.)

"An act for sequestering British property, &c. (October 1777, ch. 9, Ch. Rev. p. 64.) All the property and estate whatsoever of British subjects is, by this act, sequestered into the hands of commissioners of sequestration, by them to be preserved, according to certain regulations, for the purpose of being restored or otherwise dealt with, according as the king of Great Britain should act towards the property of citizens of the commonwealth, in the like circumstances. The preamble declaring that inasmuch as the British sovereign was not yet known to have set the example of confiscation, 'the public faith and the law and usages of nations,' required the like forbearance on our part.

"An act concerning escheats and forfeitures from British subjects. (May 1779, ch. 14, Ch. Rev. p. 98): After reciting the former act, and that it had been found that the property, so sequestered, was liable to be wasted, &c., and that from the advanced price at which it would then sell, it would be most for the benefit of the former owners, in the event of its being thereafter restored, or of the public, if not so restored, that the sale should take place immediately, &c., repeals so much of the former act, as was supposed to have suspended the operation of the laws of escheat and forfeiture, and then declares that all the property, real and personal, within the commonwealth, belonging, at the time of passing the act, to any British subject, 'shall be deemed to be vested in the commonwealth; the lands, slaves and other real estate, by way of escheat, and the personal estate, by forfeiture.' The proceedings on inquests of office, for the purposes of escheat under this act, are prescribed. The duties of escheator are directed to be performed, in the Northern Neck, by the sheriffs of counties. Section 3 declares who shall be deemed British subjects within the meaning of the act: *'1. All persons, subjects of his Britannic Majesty, who, on the 19th April 1775, when hostilities commenced at Lexington, between the United States of America and the other parts of the British empire, were resident or following their vocations in any part of the world, other than the said United States, and have not since, either entered into public employment of the said states, or joined the same, and by *overt* act adhered to them,' &c. [*610

"An act to amend the foregoing (October 1779, ch. 18, Ibid. p. 110), directs the modes of proceeding in inquests of office, traverse of office and *monstrans de droit*, as well by British subjects as others.

"An act concerning escheators (May 1779, ch. 45, Ibid. p. 106, October 1785, ch. 63, p. 52, Rev. Code, vol. 1. p. 126), directs the appointment of an escheator for every county, except the counties in the Northern Neck; his qualification, duties, &c., proceedings on inquests of office, traverse and *monstrans de droit*, &c., prohibits the granting of any lands, seized into the hands of the commonwealth upon office found, till the lapse of twelve months after the return of the inquisition and verdict, into the office of the general court; if no claim be made within that period, or being made, shall be found and discussed for the commonwealth, the clerk of the general court is, within

two months thereafter, to certify the fact to the proper escheator, who is, thereupon, to proceed to sell.

"An act to extend the operation of the foregoing act, to the counties of the Northern Neck." (1785, ch. 53, p. 37.)

"An act to amend and reduce into one, the several acts for ascertaining certain taxes, establishing a permanent revenue, &c. (October 1782, ch. 8, § 24, Ch. Rev. p. 176), sequesters, in the hands of persons holding lands in the Northern Neck, all quit-rents then due, until the right of descent shall be more fully ascertained, and the general assembly shall make final provision thereon; and all quit-rents thereafter to become due, shall be paid into the public treasury, under the operation of the laws of that session; for
*611] which quit-rents, *the inhabitants of the Northern Neck shall be exonerated from the future claim of the proprietor.

"An act concerning surveyors" (October 1782, ch. 33, § 3, Ibid. p. 180), recites that the death of Lord Fairfax may occasion great inconvenience to those inclined to make entries for vacant lands in the Northern Neck; provides that all entries made with the surveyors of the counties in the Northern Neck, and returned to the office formerly kept by Lord Fairfax, shall be deemed as good and valid in law, as those made under his direction, until some mode shall be taken up and adopted by the general assembly, concerning the territory of the Northern Neck.

"An act for safe keeping the land-papers of the Northern Neck" (October, 1785, ch. 63, p. 36), reciting that it was customary to keep the records, &c., of lands within the Northern Neck in the office of the late proprietor, and that it was necessary that the records on which the titles to lands depended, should be all kept in one office; provides for the removal of the same into the register's office, &c. Also provides for issuing grants for surveys, under entries made in the life of the proprietor, and under entries made with surveyors, pursuant to the act last above recited; declaring them to be cases till then unprovided for.

Section 5 subjects the unappropriated lands, within the district of the Northern Neck, to the same regulations, and to be granted in the same manner, as is by law directed in cases of other unappropriated lands belonging to the commonwealth. Section 6, for ever, thereafter, exonerates landholders, within the said district, from composition and quit-rents.

"An act declaring who shall be deemed citizens of this commonwealth." (May 1779, ch. 55. Repealed.)

"An act declaring tenants of lands or slaves in taille, to hold the same in fee-simple." (May 1776, ch. 26, Ch. Rev. p. 45.)

*An act to amend the foregoing (October 1783, ch. 27, Ibid. p.
*612] 204), lands or slaves, which, by virtue of the former act, have, or shall become escheatable to the commonwealth, for defect of blood, shall descend, and be deemed to have descended, agreeable to the limitations of the deed or will creating such estates: provided, this act shall not extend to any lands or slaves escheated and sold for the use of the commonwealth.

C. Lee and *Jones*, on the part of the plaintiff in error, contended, 1st, That Lord Halifax was, at his death, seised of an absolute and unconditional estate of inheritance in the whole of that description of land, within the boundaries of his letters-patent, designated by him as "waste and ungrant-

ed ;" that is to say, in all the lands within those boundaries, except such as had been parcelled out into tenements, and granted in fee, by himself or his ancestors or predecessors, or by his or their consent or authority ; and that he was in the actual seisin and possession of the soil, with the like title to the immediate pernancy and fruition of the profits, and under the like sanctions, as ordinary proprietors in fee, under grants derived from the crown, prior to the revolution.

2d. That the estate, by virtue of the will of Lord Fairfax, vested in Denny Fairfax, the devisee, and has never been divested out of him by office found and seizure, nor by any equivalent mode of confiscation whatsoever ; and that the treaty of peace found him seised of the estate, unaltered from the condition in which it was originally taken under the devise.

3d. That the treaty of peace prohibited the confiscation of the estate, whether by inquest of office, or by any other mode whatsoever ; and so operated a release and confirmation to the British proprietor, whose title was again explicitly acknowledged and confirmed by the treaty of 1794 ; which completely removed every incapacity and disability that might possibly be supposed to remain in him, as a landed proprietor.

4th. That the patent, under which the defendant in error claims the land in question, was not authorized by any *pre-existing law of Virginia, but was in direct contravention of the treaty of peace, and of the statute of Virginia, enacted expressly in execution of the treaty, and strictly enjoining the observance of its stipulations with good faith : and therefore, the said patent conveys no title to the defendant in error. [*613

I. Upon the first point, they relied upon the express words of the grant, from the crown to the original patentees, and the following cases : *Picket* v. *Dowdall*, 2 Wash. 113 ; *Johnson* v. *Buffington*, Ibid. 120 ; *Curry* v. *Burns*, Ibid. 125 ; *Birch* v. *Alexander*, 1 Ibid. 34 ; and *Mc Curdy* v. *Potts*, 2 Dall. 99.

II. The estate, by the devise, vested in Denny Fairfax, who continued to hold the same until the treaty of peace. Although an alien enemy, he could take and hold, until office found. The law is perfectly settled, that an alien can take by purchase, although he cannot take by descent. In this respect, there is no difference between an alien enemy and an alien friend. He took a fee-simple, subject to the right of the sovereign to seize it. Co. Litt. 2 *b ; Page's Case*, 5 Co. 52 ; 9 Ibid. 141 *a ;* 2 Bl. Com. 293 ; Powell on Dev. 316 ; 2 Vent. 270. It is essential to the plaintiff's title, that the estate should have vested in Denny Fairfax, for if it did not, it could not escheat to the commonwealth, under whom the plaintiff claims. It is one of the principles of the common law, upon which the security of private property from the grasp of power depends, that the crown can take only by matter of record. 3 Bl. Com. 259. Those authorities which say an alien may take, but cannot hold, clearly mean that he cannot hold against the claim of the crown asserted in a legal manner. Co. Litt. 2 *a, b.* An alien may suffer a common recovery. Goldsb. 102 ; 4 Leon. 82 ; Bro. tit. Denizen and Alien, 17. And it is expressly laid down, that only the tenant of the freehold can suffer a common recovery. 3 Bl. Com. 356–7. But he could not be tenant of the freehold, unless the estate vested and remained in him. 1 Bac. Abr. 133. The case of an alien purchasing and being afterwards made a *denizen is very strong, for in that case, although the lands [*614

be forfeitable, they descend. This could not be, if the estate did not remain in the alien, from the time of his purchase, till his becoming a denizen. It is also laid down, that if an alien and a subject purchase jointly, the estate will survive, upon the death of the alien, unless office be found, consequently, the estate remained in the alien until his death. It is expressly decided in *Page's Case*, 5 Co. 52, that until office found, nothing vests in the king. *Nichol's Case*, 2 Plowd. 481, 486; *Duplessis's Case*, 2 Ves. 539; *Sadler's Case*, 4 Co. 58.

In this case, no office was found, nor any equivalent act done to vest the estate in the commonwealth, before the treaty of peace of 1783. The only act on the subject passed in 1782, ch. 33, § 3 (Chancery Revisal 180). This manifests no intention to confiscate. On the contrary, by making the entries for lands in the Northern Neck, returnable to the former office of Lord Fairfax, the legislature show a disposition not to molest his title. The treaty of peace then found the freehold of the land in Denny Fairfax.

III. That treaty released the forfeiture, and no subsequent act of the legislature could affect the title. The 5th article engages that congress shall earnestly recommend the restoration of confiscated estates; and the 6th article stipulates that "no further confiscation shall be made." The term "confiscation" embraces every case of the money or estate of an individual, brought into the treasury in virtue of any forfeiture; and in this sense it is generally used in treaties. Cowell, tit. Confiscation; 1 W. Bl. 183; 3 Dall. 234; 1 Bl. Com. 299. Lands acquired by an alien are, on that account, liable to forfeiture. 1 Bl. Com. 372; 2 Ibid. 274. Escheat is one mode of confiscation. Confiscation Law of Virginia, 1779. 2 Bl. Com. 243, 244, 252, 272, 293.

The 5th article of the treaty illustrates the 6th. Why should congress *615] recommend the restoration of confiscated *estates belonging to real British subjects, if they were to be immediately taken back upon the plea of alienage? If an estate had been thus restored to a British subject, under the 5th article, the 6th would have protected him in the enjoyment of it, or the 5th would have been wholly nugatory. There was no provision in the treaty, to protect restored estates, but the prohibition of future confiscations contained in the 6th article. If, in one case, the term, confiscation, in that article, meant confiscation by reason of that alienage which was the consequence of the part taken in the war, why not give it the same meaning in all cases of alienage arising from the same cause? Denny Fairfax became an alien, by reason of the part he took in the war. He chose to take part with Great Britain, and thereby became an alien, whereby his land became liable to confiscation, according to the laws of Virginia. Whether the confiscation was to be mediately or immediately the consequence of the part taken in the war, was immaterial. It would have been a "future confiscation, by reason of the part taken by him in the war." Any subsequent act of confiscation, therefore, by the state of Virginia, would have been void, as being contrary to the express stipulation of the treaty. Thomas Parker's Rep. 267, 161, Co. Litt. 2 *b*, Hargrave's note 4. The treaty of 1794, is merely declaratory of the effect of the treaty of peace. It makes no new provision.

Harper, contrà.—1. As to the nature of Lord Fairfax's title to the waste

and unappropriated lands. This title was not that of a common subject. It was a grant by the crown, of the same right to dispose of the lands which the sovereign had. It was a right to grant the lands to individuals, and to receive the services and quit-rents due therefor. It was not contemplated that he himself should occupy the lands. It was a mere delegation of a part of the sovereign power, and so far as it was not executed by him, it passed, with the other rights of sovereignty, to the commonwealth of Virginia, at the time of the revolution.

*This was the construction put upon it by Lord Fairfax himself; for when he intended to appropriate any part of the lands to his own use, he granted it to a third person, and then took back the title from his own grantee. His deeds were not in the common form, but were made to resemble those of the crown. [*616

2. The defendants in error still contend, that there is a difference between an alien friend and an alien enemy, as to the right to hold lands. In the latter case, an office is not necessary. The right and possession are both thrown upon the commonwealth.

3. But the principal question is, what effect had the treaty of peace upon this devise? It is said, that the provision, that no future confiscations should be made, removes the disability of alienage. The title of the commonwealth of Virginia was complete, before the treaty of peace. Nothing more was necessary than to pursue the legal proceedings to put the state into possession. The office is no part of the title. This was complete, at the death of Lord Fairfax. It vested *eo instanti* in the commonwealth. If it passed to Denny Fairfax, it was to the use of the commonwealth. But if any title vested in Denny Fairfax, what kind of title was it? It could not descend from him. Upon his death, the right and possession were cast upon the commonwealth. He had no beneficial interest. He was only a trustee of an estate at will. Co. Litt. 2 *b*; Plowd. 229. An office is only a suit brought by the king to establish his title, by proof of the facts upon which his title depends. It is not to give title, but to prove the fact of alienage. The office is the remedy, not the right. It is only the means of gaining possession. Attornment to an alien is an attornment to the use of the king. Co. Litt. 310 *b*. An alien cannot sell. Co. Litt. 42 *b*. He has nothing but a naked possession. It is said, he is a good tenant to the *præcipe*, and may suffer a common recovery; but it is for the use of the king. The treaty of peace does not protect the title.

*Confiscation does not mean the recovery of a debt, or of anything to which the state had a right before; but it is the assumption of a new right; the creation of a right, by an act of sovereign power. It is a transfer, not of property, but of the right of property, from individual to public use. But here the right existed before. If this be not the general meaning of the word "confiscation," it is the meaning of it, as used in the treaty. The contracting parties were speaking of the acts of the state governments, which were intended as punishments for the part which certain persons had taken in the war. The estates to be restored were not such as had escheated by reason of alienage, but such as had been confiscated on account of the part taken in the war. [*617

If the title was not protected by the treaty, then, upon the death of Denny Fairfax, it vested completely in the commonwealth. The Fairfax

title was extinct. The commonwealth was estopped by its deed from claiming it, so that the title of Hunter was unquestionable.

As to the 9th article of the treaty of 1794, Denny Fairfax could continue to hold only what he then held, and as he then held. If he held anything, it was, at most, an estate for life, remainder to the commonwealth in fee, defeasible, during his life, by office found. Consequently, at his death, the commonwealth had an estate in fee. The treaty of 1794 was intended to protect those only who became aliens, by the separation of the two countries, while they held the estates, and not those who were aliens, when their estates accrued. If it had intended to protect the latter class, it would have protected estates acquired by descent, as well as those acquired by devise: for they are both within the same reason, yet it cannot be said, that an alien, who, but for his alienage, would have inherited an estate, upon a descent cast before 1794, is benefited by that treaty. It cannot be said, that he then held the estate of his ancestor which his alienage had prevented from descending upon him.

March 15th, 1813. The court having taken time since last term to con-
*618] sider this case, *Story, J., delivered their opinion, as follows (Marshall, Ch. J., and Todd, J., being absent):—The first question is, whether Lord Fairfax was proprietor of, and seised of the soil of the waste and unappropriated lands in the Northern Neck, by virtue of the royal grants, 2 Charles II. and 4 James II., or whether he had mere seignorial rights therein as lord paramount, disconnected from all interest in the land, except of sale or alienation?

The royal charter expressly conveys all that entire tract, territory, and parcel of land, situate, &c., together with the rivers, islands, woods, timber, &c., mines, quarries of stone and coal, &c., to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent or purpose whatsoever. It is difficult to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the *dominium directum et utile*, the complete and absolute dominion in property, it will not be easy to fix on anything which shall constitute such dominion.

The ground of the objection would seem to have been, that the royal charter had declared that the grantees should hold of the king as tenants *in capite*, and that it proceeded to declare, that the grantees and their heirs and assigns should have power "freely and without molestation of the king, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for and buy the same," which words were to be considered as restrictive or explanatory of the preceding words of the charter, and as confining the rights granted to the mere authority to sell or alien. But it is very clear, that this clause imposes no restriction or explanation of the general terms of the grant. As the grantees held as tenants *in capite* of the king, they could not sell or alien without the royal license, and
*619] if they did, it was, in ancient strictness, an *absolute forfeiture of the land, 2 Inst. 66; and after the statute 1 Edw. III., ch. 12, though the forfeiture did not attach, yet a reasonable fine was to be paid to the

king upon the alienation. 2 Inst. 67 ; Staundf. Prerog. 27 ; 2 Bl. Com. 72. It was not until ten years after the first charter (12 Car. I., ch. 24), that all fines for alienations and tenures of the king *in capite* were abolished. 2 Bl. Com. 77. So that the object of this clause was manifestly to give the royal assent to alienations, without the claim of any fine therefor.

We are, therefore, satisfied, that by virtue of the charter and the intermediate grants, Lord Fairfax, at the time of his death, had the absolute property of the soil of the land in controversy, and the acts of ownership exercised by him over the whole waste and unappropriated lands, as stated in the case, vested in him a complete seisin and possession thereof. Even if there had been no acts of ownership proved, we should have been of opinion, that as there was no adverse possession, and the land was waste and unappropriated, the legal seisin must be, upon principle, considered as passing with the title.

On this point, we have the satisfaction to find, that our view of the title of Lord Fairfax seems incidentally confirmed by the opinion of the court of appeals of Virginia, in *Picket* v. *Dowdell*, 2 Wash. 106 ; *Johnson* v. *Buffington*, 2 Ibid. 116 ; and *Curry* v. *Burns*, Ibid. 121.

The next question is, as to the nature and character of the title which Denny Fairfax took by the will of Lord Fairfax, he being, at the time of the death of Lord Fairfax, an alien enemy.

It is clear by the common law, that an alien can take lands by purchase, though not by descent ; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. 11 Hen. IV. 26 ; 14 Ibid. 26 ; Co. Litt. 2 *b*. Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests in the alien ; Pow. Dev. 316, &c.; Park. Rep. 144 ; *Co. Litt. 2 *b*, not for his own benefit, but for the benefit of the state ; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. 11 Hen. IV. 26 ; 14 Ibid. 20. But until the lands are so seized, the alien has complete dominion over the same. He is a good tenant of the freehold in a *præcipe* on a common recovery. 4 Leon. 84 ; Goldsb. 102 ; 10 Mod. 128. And may convey the same to a purchaser. *Sheafe* v. *O'Neile*, 1 Mass. 256. Though Co. Litt. 52 *b*, seems to the contrary, yet it must probably mean, that he can convey a defeasible estate only, which an office found will divest. It seems, indeed, to have been held, that an alien cannot maintain a real action for the recovery of lands. Co. Litt. 129 *b ;* Thel. Dig. ch. 6 ; Dyer, 2 *b ;* but it does not then follow, that he may not defend, in a real action, his title to the lands against all persons but the sovereign. [*620

We do not find, that in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. Dyer 2 *b ; Brandon* v. *Nesbitt*, 6 T. R. 23 ; 3 Bos. & Pul. 113 ; 5 Rob. 102. But as to capacity to purchase, no case has been cited in which it has been denied, and in *Attorney-General* v. *Wheeden & Shales*, Park. Rep. 267, it was adjudged, that a bequest to an alien enemy was good, and after a peace might be enforced

Indeed, the common law, in these particulars, seems to coincide with the jus-gentium. Bynk. Quest. Pub. Jur. ch. 7; Vattel, lib. 2, ch. 8, § 112, 114; Grot. lib. 2, ch. 6, § 16.

It has not been attempted to place the title of Denny Fairfax upon the ground of his being an *ante-natus*, born under a common allegiance before the American revolution, and this has been abandoned upon good reason; for whatever doubts may have been formerly entertained, it is now settled, that a British subject, born before, cannot, since the revolution, take lands by descent in the United States. *Dawson's Lessee* v. *Godfrey*, 4 Cr. 321.

*621] But it has been argued, that although Denny Fairfax *had capacity to take the lands as devisee, yet he took to the use of the commonwealth only, and had, therefore, but a momentary seisin; that in fact he was but a mere trustee of the estate, at the will of the commonwealth, and that by operation of law, immediately upon the death of the testator, Lord Fairfax, the title vested in the commonwealth, and left but a mere naked possession in the devisee.

If we are right in the position, that the capacity of an alien enemy does not differ in this respect from an alien friend, it will not be easy to maintain this argument. It is incontrovertibly settled, upon the fullest authority, that the title acquired by an alien by purchase, is not divested, until office found. The principle is founded upon the ground, that as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be divested out of him, but by some notorious act, by which it may appear that the freehold is in another. 1 Bac. Abr. Alien, C. p. 133. Now, an office of entitling is necessary to give this notoriety, and fix the title in the sovereign. So it was adjudged in *Page's Case*, 5 Co. 22, and has been uniformly recognised. Park. Rep. 267; Ibid. 144; Hob. 231; Bro. Denizen, pl. 17; Co. Litt. 2 *b*. And the reason of the difference, why, when an alien dies, the sovereign is seised, without office found, is because otherwise the freehold would be in abeyance, as an alien cannot have any inheritable blood. Nay, even after office found, the king is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the king must enter or seize by his officer, before the possession in deed shall be adjudged in him. 14 Hen. VII. 21; 15 Ibid. 6, 20; Staundf. Prerog. Reg. ch. 18, p. 54; 4 Co. 58 *a*. And if we were to yield to the authority of Staundford (Prer. Reg. ch. 18, p. 56), that in the case of alien enemy, the king "*ratione guerræ*," might seize, without office found, yet the same learned authority assures us, "that the king must seize in those cases, ere he can have an interest in the lands, because they be penal towards the party." 4 Co. 58 *b*. And until the king be in possession, by office found, he cannot grant lands which are forfeited by alienage. Staundf. Pre. Reg. ch. 18, f. 54; Stat. 18 Hen. VI., ch. 6.

*622] *To apply these principles to the present case, Denny Fairfax had a complete, though defeasible title, by virtue of the devise, and as the possession was either vacant or not adverse, of course, the law united a seisin to his title in the lands in controversy; and this title could only be divested by an inquest of office, perfected by an entry and seizure, where the possession was not vacant. And no grant by the commonwealth, according to the common law, could be valid, until the title was, by such means, fixed in the commonwealth. It is admitted, that no entry or seizure was

made by the commonwealth "*ratione guerræ*" during the war. It is also admitted, that no inquest of office was ever made, pursuant to the acts on this subject, at any time. And it would seem, therefore, to follow, upon common-law reasoning, that the grant to the lessor of the original plaintiff, by the public patent of 30th April 1789, issued improvidently and erroneously, and passed nothing. And if this be true, and there be no act of Virginia altering the common law, it is quite immaterial, what is the validity of the title of the original defendant, as against the commonwealth; for the plaintiff must recover by the strength of his own title, and not by the weakness of that of his adversary.

But it is contended, 1st, That the common law as to inquests of office and seizure, so far as the same respects the lands in controversy, is completely dispensed with by statutes of the commonwealth, so as to make the grant to the original plaintiff in 1789, complete and perfect. And 2d, and further, if it be not so, yet as the devisee died pending the suit, the freehold was thereby cast upon the commonwealth, without an inquest, and thus arises a retroactive confirmation of the title of the original plaintiff, of which he may now avail himself. As to the first point, we will not say, that it was not competent for the legislature (supposing no treaty in the way), by a special act, to have vested the land in the commonwealth, without an inquest of office, for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed, upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings. No part of the United States seems to have been more aware of its importance, or *more cautious [*623 to guard against its abolition, than the commonwealth of Virginia. It prevents individuals from being harrssed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly, by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent of its acquisitions *pro defectu hæredis;* and above all, it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.

Let us now consider the several acts which have been referred to in the argument, from which we think it will abundantly appear, that, during the war, the lands in controversy were never, by any public law, vested in the commonwealth. We dismiss, at once, the act of 1777, ch. 9, and of 1779, ch. 14, as they are restrained to estates held by British subjects, at the times of their respective enactments, and do not extend to estates subsequently acquired.

The next act is that of 1782, ch. 8, the 24th section, after reciting that "since the death of the late proprietor of the Northern Neck, there is reason to suppose that the said proprietorship hath descended upon alien enemies," enacts, that persons holding lands in said Neck, shall retain sequestered in their hands, all quit-rents which were then due, until the right of descent should be more fully ascertained; and that all quit-rents, thereafter to become due, shall be paid into the public treasury, and the parties exonerated from the future claim of the proprietor. Admitting that this section as to

the quit-rents, was equivalent to an inquest of office; it cannot be extended, by construction, to include the waste lands of the proprietor. Neither the words, nor the intention, of the legislature would authorize such a construction. But it may well be doubted, if, even as to the quit-rents, the provision is not to be considered as a sequestration *jure belli*, rather than a seizure for alienage; for it proceeds on the ground, that the property had descended, not upon aliens, but upon alien enemies. So far as the treaty of peace might be deemed material in the case, this distinction would deserve consideration.

*624] *The next is the act of 1782, ch. 33, which, after reciting that "the death of Lord Fairfax may occasion great inconvenience to those who may incline to make entries for vacant lands in the Northern Neck, proceeds (§ 3) to enact, that all entries made with the surveyors, &c., and returned to the office formerly kept by Lord Fairfax, shall be held as good and valid as those heretofore made under his direction, "until some mode shall be taken up and adoped by the general assembly, concerning the territory of the Northern Neck." This act, so far from containg in itself any provision for vesting all the vacant lands of Lord Fairfax in the commonwealth, expressly reserves, to a future time, all decisions as to the disposal of the territory. It suffers rights and titles to be acquired, exactly in the same manner, and with the same conditions, which Lord Fairfax had by permanent regulations prescribed in his offce. No other acts were passed on the subject during the war.

We are now led to consider the act of 1785, ch. 47, which has presented some difficulty, if it stand unaffected by the treaty of peace. The fourth section, after a recital, "that since the death of the late proprietor, no mode hath been adopted to enable those who had before his death made entries within the said district according to an act, &c. (act 1782, ch. 33), to obtain titles to the same," enacts, that in all cases of such entries, grants shall be issued by the commonwealth to the parties, in the same manner, as by law is directed in cases of other unappropriated lands. The 5th section then declares, that the unappropriated lands within the Northern Neck should be subject to the same regulations, and be granted in the same manner, and *caveats* should be proceeded upon, tried and determined, as is by law directed, in cases of other unappropriated lands belonging to the commonwealth. The 6th section extinguishes for the future all quit-rents. The patent of the original plaintiff issued pursuant to the 5th section of this act.

It has been argued, that the act of 1785 amounts to a legislative appropriation of all the lands in controversy. That it must be considered as completely divesting the title of Denny Fairfax for the cause of alienage, and

*625] *and vesting it in the commonwealth. After the most mature reflection, we cannot subscribe to the argument. In acts of sovereignty so highly penal, it is against the ordinary rule, to enlarge, by implication and inference, the extent of the language employed. It would be to declare purposes which the legislature have not chosen to avow, and to create vested estates, when the common law would pronounce a contrary sentence, and the guardians of the public interests have not expressed an intention to abrogate that law. If the legislature have proceeded upon the supposition that the lands were already vested in the commonwealth, we do not perceive how it helps the case. If the legislature, upon a mistake of facts, proceed

to grant defective titles, we know of no rule of law which requires a court to declare, in penal cases, that to be actually done which ought previously to have been done. Perhaps, as to grants under the 4th section, upon entries under the act of 1782, ch. 33, it might not be too much to hold, that such grants conveyed no more than the title of the commonwealth, exactly in the same state as the commonwealth itself held it, viz., an inchoate right, to be reduced into possession and consummated by a suit in the nature, or with the effect, of an inquest of office. But we give no opinion on this point, because the patent of the original plaintiff manifestly issued under the succeeding section; and upon a construction, which we give to this section, it issued improvidently and passed no title whatever. That construction is, that the unappropriated lands in the Northern Neck should be granted in the same manner as the other lands of the commonwealth, when the title of the commonwealth was perfected by possession. It seems to us difficult to contend, that the legislature meant to grant mere titles and rights of entry of the commonwealth, to lands, in the same manner as it did lands of which the commonwealth was in actual possession and seisin. It would be selling suits and controversies through the whole country, and enacting a general statute in favor of maintenance, an offence which the common law has denounced with extraordinary severity. Consistent, therefore, with the manifest intention of the legislature, grants were to issue for lands in the Northern Neck, precisely in the same manner as for lands in other parts of the state, and under the same *limitation, viz., that the commonwealth should have, at the time of the grant, a complete title and seisin. [*626

We are the more confirmed in this construction, by the act concerning escheators (act 1779, ch. 45), which regulates the manner of proceeding in cases of escheat, and was by a subsequent act (act 1785, ch. 53), expressly extended to the counties in the Northern Neck. This act of 1779 expressly prohibits the granting of any lands, seized into the hands of the commonwealth upon office found, till the lapse of twelve months after the return of the inquisition and verdict into the office of the general court, and afterwards authorizes the proper escheator to proceed to sell, in case no claim should be filed, within that time, and substantiated against the commonwealth. It is apparent, from this act, that it was not the intention of the legislature to dispose of lands, accruing by escheat, in the same manner as lands to which the commonwealth already possessed a perfect title. It has not been denied, that the regulations of this act were designed to apply as well to titles accruing upon purchases by aliens (which are not in strictness, escheats), as upon forfeitures for other causes; and but for the act of 1785, ch. 47, we do not perceive but that the vacant lands held by the devisee of Lord Fairfax, in the Northern Neck, would have been completely within the act regulating proceedings upon escheats.

The real fact appears to have been, that the legislature supposed that the commonwealth were in actual seisin and possession of the vacant lands of Lord Fairfax, either upon the principle that an alien enemy could not take by devise, or the belief that the acts of 1782, ch. 8, and ch. 33, had already vested the property in the commonwealth. In either case, it was a mistake which surely ought not to be pressed to the injury of third persons.

But if the construction which we have suggested, be incorrect, we think,

that, at all events, the title of Hunter, under the grant of 1789, cannot be considered as more extensive than the title of the commonwealth, viz., a title inchoate and imperfect; to be consummated by an actual entry, under an inquest of office, or its equivalent, a suit and judgment at law by the grantee.

*627] *This view of the acts of Virginia, renders it wholly unnecessary to consider a point, which has been very elaborately argued at the bar, whether the treaty of peace, which declares "that no future confiscations shall be made," protects from forfeiture, under the municipal laws respecting alienage, estates held by British subjects, at the time of the ratification of that treaty. For we are all well satisfied, that the treaty of 1794 completely protects and confirms the title of Denny Fairfax, even admitting that the treaty of peace left him wholly unprovided for.

The 9th article is in these words: "It is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens."

Now, we cannot yield to the argument that Denny Fairfax had no title, but a mere naked possession or trust estate. In our judgment, by virtue of the devise to him, he held a fee-simple in his own right. At the time of the commencement of this suit (in 1791), he was in complete possession and seisin of the land. That possession and seisin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage.

It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself, or its grantee. But it has not so done, and its own inchoate title (and of course, the derivative title, if any, of its grantee) has, by the operation of the treaty, become ineffectual and void.

It becomes unnecessary to consider the argument as to the effect of the

*628] death of Denny Fairfax, pending the *suit, because, admitting it to be correctly applied in general, the treaty of 1794 completely avoids it. The heirs of Denny Fairfax were made capable in law to take from him by descent, and the freehold was not, therefore, on his death, cast upon the commonwealth. On the whole, the court are of opinion, that the judgment of the court of appeals of Virginia ought to be reversed, and that the judgment of the district court of Winchester be affirmed, with costs, &c.

JOHNSON, J. (*dissenting*).—After the maturest investigation of this case that circumstances would permit me to make, I am obliged to dissent from the opinion of the majority of my brethren.

The material questions are, 1st. Whether an alien can take lands as a devisee? and if he can, 2d. Whether an inquest of office was indispensably necessary to divest him of his interest, for the benefit of the state? 3d. Whether the disability of the devisee was not cured by the treaty of peace, or the treaty of 1794?

With regard to the treaty of peace, it is very clear to me, that that does not affect the case. The words of the 4th article are, "There shall be no future confiscations made, nor any prosecution commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war." Now, should we admit, as has been strongly insisted, that to escheat is to confiscate, it would still remain to show that this was "a confiscation on account of the part taken by the devisee in the war of the revolution." But the disability of an alien to hold real estate is the result of a general principle of the common law, and was in no wise attached to the individual on account of his conduct in the revolutionary struggle. The alien who had taken part with this country and *fought [*629 the battles of the states, may have been affected by it no less than he who fought against us, and the member of any other community in the world may as well have been the object of its application as the subject of Great Britain. The object evidently was, to secure the individual from legal punishment, not to cure a legal disability existing in him.

With regard to the bearing of the treaty of 1794 on the interests of the parties, the only difficulty arises from the vague signification of the words "now holding," made use of in the article which relates to this subject. But in conformity with the liberal spirit in which national contracts ought to be construed, I am satisfied to consider that treaty as extending to all cases "of a rightful possession or legal title defeasible only on the ground of alien disability and existing at the date of that treaty."

What, then, were the rights of the devisee in this case? and were they in existence at the date of this treaty? Whoever looks into the learning on the capacity of an alien to take lands as devisee, will find it involved in some difficulties. There is no decided case, that I know of, upon the subject. And the opinions of learned men upon it, when compared, will be found to have been expressed with doubt, or scarcely reconcilable to each other. The general rule is, that an alien may take by purchase, but cannot hold. Yet so fragile or flimsy is the right he acquires, that, if tortiously dispossessed, no one contends that he can maintain an action against the evictor. To assert that he has a right, and yet admit that he has no remedy, appears to me, rather paradoxical. Yet all admit, that the bailiff of the king cannot enter on an alien purchaser, until office found. But where a freehold is cast upon the alien by act of law, as by descent, dower, curtesy, &c., it is admitted, that no inquest of office is necessary to vest the estate in the king, and he may enter immediately. Whether an alien devisee is to be considered as a purchaser, according to the meaning of that term, as applied to an alien, or whether his estate is to be considered as one of those which are cast on him by operation of law, is an alternative, either branch of which may be laid hold *of with some confidence. Chief Baron GILBERT asserts, [*630 without reservation, that a devise to an alien is void. (Gilbert on Devises, p. 15.) But Mr. Powell maintains that he takes under it as a purchaser. (Powell on Dev. 317.) In support of Gilbert's opinion, it might be urged, that a devise takes effect under statute, and in that view, the interest may be said to be cast on the alien by operation of law. Yet, I have no hesitation in deciding in favor of the doctrine as laid down by Powell. Not on the words of Lord HARDWICKE, as quoted from *Knight* v. *Du Plessis;* for the judge there expressly declines giving an opinion; but

from a reference to the principle upon which the doctrine is certainly founded.

The only unexceptionable reason that can be assigned, why an alien can take by deed, though he cannot hold, is, that otherwise the proprietor would be restricted in his choice of an alienee; or, in other words, in his right of alienation. And to declare such a conveyance null and void, would be attended with this absurdity, that the estate would still remain in the alienor, in opposition to his own will and contract. It would, therefore, seem, that the law on this subject would be more satisfactorily expressed, by asserting that an alien is a competent party to a contract, so that a conveyance, executed to him, shall divest the feoffor or donor, in order that it may escheat. The tendency of this doctrine to favor the royal prerogative of escheat, would no doubt secure to it a welcome reception, yet it is not too much to pronounce it reasonable in the abstract. This reason is as applicable to the case of a devise, as of a contract, and in the technical application of the term purchaser, a devisee is included.

But it is contended, that the grant to Lord Fairfax was a grant or cession of sovereign power, and as such was assumed by the state when it declared itself independent. Upon considering, as well the acts of the state, with regard to this property, as the acts of Lord Fairfax himself, there is reason to think that both acted under this impression. But to decide on this question, we must look into the deed of cession, and upon its construction the decision of this court must depend. And here, in every part of it, we find it divested of the chief attributes of sovereignty—not a power legislative, judicial or executive given, and the words such as are adapted to
*631] convey an interest, *but no jurisdiction. Some few royal prerogatives, it is true, are expressly conveyed, and these unquestionably must have accrued to the state upon the assertion of independence. But the interest in the soil remained to the grantee. So far, therefore, I feel no difficulty about sustaining the claim of the devisee.

But did this interest remain in him at the time of the treaty of 1794? I am of opinion, it did not. The interest acquired under the devise was a mere *scintilla juris*, and that *scintilla* was extinguished, by the grant of the state, vesting this tract in the plaintiff in error. I will not say, what would have been the effect of a more general grant. But this grant emanated under a law expressly relating to the lands of Lord Fairfax, authorizing them to be entered, surveyed and granted.

The only objection that can be set up to the validity of this grant is, that it was not preceded by an inquest of office. And the question then will be, whether it was not competent for the state to assert its rights over the alien's property, by any other means than an inquest of office. I am of opinion, that it was. That the mere executive of the state could not have done it, I will readily admit; but what was there to restrict the supreme legislative power from dispensing with the inquest of office? In the case of *Smith* v. *State of Maryland*, this court sustained a specific confiscation of lands, under a law of the state, where there was neither conviction nor inquest of office. And in Great Britain, in the case of treason, an inquest of office is expressly dispensed with by the statute 33 Hen. VIII, c. 30. So that there is nothing mystical, nor any thing of indispensable obligation, in this inquest of office. It is, in Great Britain, a salutary restraint upon

the exercise of arbitrary power by the crown, and affords the subject a simple and decent mode of contesting the claim of his sovereign ; but the legislative power of that country certainly may assert, and has asserted, the right of dispensing with it, and I see no reason why it was not competent for the legislature of the state of Virginia to do the same.

Several collateral questions have arisen in this case, on which, as I do not differ materially from my brethren, *I will only express my opinion in the briefest manner. I am of opinion, that whenever the case, [*632 made out in the pleadings, does not, in law, sanction the judgment which has been given upon it, the error sufficiently appears upon the record, to bring the case within the 25th section of the judiciary act. I am also of opinion, that whenever a case is brought up to this court, under that section, the title of the parties litigant must necessarily be inquired into, and that such an inquiry must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it ; otherwise, an appeal to this court would be worse than nugatory. And that, in ejectment, at least, if not in every possible case, the decision of this court must conform to the state of rights of the parties, at the time of its own judgment : so that a treaty, although ratified subsequent to the decision of the court appealed from, becomes a part of the law of the case, and must control our decision.

Judgment reversed.

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