cluding improvement originally made by the said John Ash, sen., which is designated in the plat filed in the said cause by figure 2, in the centre; and with further directions *to order the said Charles Simms to convey [*28
to the plaintiffs in the circuit court, respectively, the land included in his patent, and lying within their several claims as made in their bill, and as sustained by the evidence in the cause. All which is ordered and decreed accordingly.

Speake and others *v.* United States. (*a*)

Embargo-bond.—Estoppel.—Alteration.

A bond taken by virtue of the 1st section of the embargo law of January 9th, 1808, is not void, although taken by consent of parties, after the vessel had sailed.

The obligors are estopped to deny that the penalty of such a bond is double the true value of the vessel and cargo.

The name of an obligor may be erased from a bond, and a new obligor inserted, by consent of all the parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial, whether the consent be given before or after the execution of the deed.[1]

Error to the Circuit Court for the district of Columbia, in an action of debt for $8787, upon a bond dated 14th April 1808, taken by the collector of the port of Georgetown, with condition to be void, if the brig Active "should not proceed to any foreign port or place, and the cargo should be relanded in some port of the United States." The bond was executed by Speake, the master of the vessel, and by Beverly and Ober the owners of the cargo, in compliance with the 1st section of the act of congress of the 9th of January 1808, 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." (2 U. S. Stat. 453.)

The defendants having pleaded, severally, sundry pleas, upon which issues in fact were joined, pleaded jointly (after *oyer*): 1st. "That they ought not to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid, because they say, that the said writing obligatory was required and taken, by one John Barnes," collector, &c., "by color of his said office as collector as aforesaid, and by pretence of an act of congress, entitled," &c. (the act of January 9th, 1808, 2 U. S. Stat. 453), "which said writing obligatory and the condition thereof were not taken by the said *John [*29
Barnes, collector," &c., "pursuant to the said act of congress, but contrary thereto in this, viz., that the said writing obligatory was not sealed or delivered by the said Robert Ober, until after the vessel in the condition of the said writing obligatory mentioned, had received a clearance in due form from the said collector, and after she had been allowed to depart, and had actually departed from the said port of Georgetown, under the clearance so as aforesaid granted to her, by reason whereof, the said writing obligatory is void and of no effect in law; and this, the said defendants are ready to verify; wherefore, they pray judgment, if they ought to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid." To this plea, there was a general demurrer and joinder.

(*a*) February 10th, 1815. Absent, Todd, Justice.

[1] Knapp *v.* Maltby, 13 Wend. 587; s. p. Penny *v.* Corwithe, 18 Johns. 499.

2d Joint plea. That they ought not to be charged, &c., "because they say, that the said writing obligatory was required and taken by one John Barnes," collector, &c., "by color of his said office as collector, and by pretence of an act of congress," &c. (the act of 9th January 1808), "which said writing obligatory and the condition thereof were not taken by the said John Barnes, collector as aforesaid, pursuant to the said act of congress, but contrary thereto, in this, to wit, that the said writing obligatory was taken in a sum more than double the value of the vessel and cargo in the condition of the said writing obligatory mentioned; by reason whereof, the said writing obligatory became void and of no effect in law; and this, the said defendants are ready to verify; wherefore," &c. To this plea also, there was a general demurrer and joinder.

3d Joint plea. The defendants say, that the plaintiffs ought not to maintain their action against them, "because they say, that on the 14th day of April 1808, at," &c., "the said writing obligatory was signed and sealed by the said defendants, Josias M. Speake and Robert Beverly, and a certain Ebenezer Eliason, and was then and there delivered to one John Barnes," collector, &c., "for the purpose of obtaining a clearance for the
*30] vessel in the condition of the said writing obligatory *mentioned, under the authority of an act of congress, entitled," &c., "and the said defendants say, that after the said writing obligatory was so executed and delivered as aforesaid, a clearance was granted in due form of law to the said vessel, and after she had departed from the port of Georgetown, under the said clearance, and while the said writing obligatory was in the custody and keeping of the said John Barnes," collector &c., "the said writing obligatory, by the authority, consent and direction of the said John Barnes, collector as aforesaid, was materially altered and changed in this, to wit, that the name and seal of the said Ebenezer Eliason were cancelled and erased from the said writing obligatory, and the name, signature and seal of the said defendant, Robert Ober, substituted and inserted therein, without the license, consent or authority of the said defendant, Robert Beverly, whereby the said writing obligatory was of no force or effect whatever, as the joint deed of them, the said defendants, Josias M. Speake, Robert Beverly and Robert Ober; and so the said defendants say, that the writing obligatory is not their joint deed; and this they are ready to verify; wherefore, they pray judgment, if the United States ought to have or maintain their action aforesaid against them."

Replication. "That the said writing obligatory was so altered and changed," &c., "with the assent and by the concurrent license, direction and authority of all the said defendants and of the said Ebenezer Eliason, and not without the license, consent and authority of the said Josias M. Speake, Robert Beverly and Robert Ober, in manner and form," &c. To this replication, there was a general demurrer and joinder.

4th Joint plea. This plea was exactly like the 3d, except that it did not aver that the substitution of Ober for Eliason was without the consent of
*31] any of the defendants. *To this plea also, there was a replication like that to the 3d plea, and a general demurrer and joinder.

The court below decided all the demurrers in favor of the United States. At the trial of the issues of fact, a bill of exception was taken by the defendants, which stated, that the attorney for the United States produced the

bond in the declaration mentioned, and proved its execution by the subscribing witness, who, being cross-examined by the counsel for the defendants, testified, that the defendants, Speake and Beverly, came to the collector's office, and executed the bond, but the collector would not grant a clearance, without another obligor, when the name of the defendant, Ober, was mentioned by the other defendants, but as he was then absent, they proposed that one Ebenezer Eliason should be added as the third obligor, and that he should sign and seal the obligation; but that a blank should be left in its body, to be filled afterwards with the name of Eliason or Ober, and that it should remain in the possession of the collector for some time, to give an opportunity to Ober to execute the same; and it was understood and agreed between the parties aforesaid, that upon the return of Ober, if he should execute the same, the name and seal of Eliason should be striken out, and that of Ober should be signed in his stead, and that his name should be inserted in the body of the bond. Accordingly with this understanding, the bond was executed by Speake and Beverly, in the forenoon, and in the afternoon of the same day, by Eliason, in the absence of Speake and Beverly, but upon the condition agreed upon between the collector and himself, and Speake and Beverly, that his name should be erased from the bond, upon Ober's executing the same. After the bond was so executed, a clearance was granted, and after the vessel had sailed, the defendant, Ober, came to the office and executed the bond, and the blank in the body of the bond was filled with his name, when that of Eliason, with his seal, was erased; at which time, neither Speake nor Beverly was present, nor had they given any assent to the said transaction other that what had taken place at the time of their execution of the bond. The witness further testified, that it appeared from the papers in the collector's office, that Speake was the sole owner of the vessel and resided in Washington county, * in the district of Columbia, and that Beverly and Ober were the owners and shippers of the cargo. [*32

Whereupon, the counsel for the defendants prayed the court to instruct the jury, that if they should believe that the bond aforesaid was executed and erased, at the periods and under the circumstances stated by the witness, on his cross-examination, and that at the time of such execution, Speake was the sole owner of the vessel, and the other defendants, Beverly and Ober, the owners and shippers of the cargo, they ought to find the issues for the defendants, on the joint and several pleas of *non est factum;* which instruction the court refused to give as prayed; but at the instance of the attorney of the United States, instructed them, that if they should find from the evidence, that the erasure of the signature and seal of Eliason, and the substitution of the signature and seal of Ober, and the insertion of his name in the body of the obligation, was done with the assent and in pursuance of the request and agreement of all the parties to the bond, expressed and well understood at the time they respectively executed the same, then the jury ought to find all the issues of *non est factum,* joined in this cause, for the United States, notwithstanding it should appear that such alteration of the bond was not made until after the vessel had cleared out and sailed from Georgetown. To which refusal and instruction, the defendants excepted, and brought their writ of error.

Swann and *C. Lee,* for the plaintiffs in error.—1. As to the first joint

plea, that the bond was not executed by Ober, until after the vessel had sailed. The collector was bound to take the bond, before the sailing of the vessel. When an officer is authorized by law to do an act, he can only do it as the law requires. The law must be construed strictly, and strictly pursued. 3 Call 421. If the defect had appeared upon the face of the bond, this case would be clearly in our favor. Our case is analogous to that of a sheriff, who may take bail before the return of the writ, but not afterwards. 2 Chitty's Pleading 478. So, in the case of a sheriff's bond, in England, if not taken according to the statute, it is void. 2 Saund. 60. After the
*33] departure of the vessel, *the power of the collector to take the bond ceased. The cases all show that such an averment may be made. *Pullein* v. *Benson*, 1 Ld. Raym. 349; *Collins* v. *Blantern*, 2 Wils. 347.

2. The same argument applies to the second joint plea. The law authorizes a bond to be taken in only double the value of the vessel and cargo. If the officer requires a bond in a larger sum, he exceeds his authority and the bond is void.

3. The third joint plea, and the bill of exception, present a question of great importance—shall a parol agreement authorize an officer to make a material alteration in a sealed instrument? The consequences of such a doctrine would be most dangerous. If one party can be thus substituted for another, why may not the sum be altered? Why not the whole instrument be changed? Why may it not be discharged by parol? Why may not an entirely different contract be substituted? It is in direct hostility to the rule of law, that a sealed contract cannot be denied, nor varied, nor discharged by parol. The bond was not delivered as an escrow. It was delivered to the only agent of the United States authorized to receive it. It then became completely executed. No material alteration could be made, even by the consent of all the parties, if that consent was evidenced merely by parol. Even if it had been expressly delivered as an escrow, yet, if delivered to the collector, it could not be as an escrow. A bond cannot be delivered to the obligee as an escrow. *Moss* v. *Riddle*, 5 Cr. 351.

By the delivery, it became absolute and binding upon all the parties. A discharge of one was the discharge of all. *Thoroughgood's Case*, 9 Co. 137; *Henry Pigot's Case*, 4 Ibid. 27. It is of no consequence, whether the name of Eliason be material or not. An immaterial alteration by the obligee avoids the bond. No parol understanding or agreement of the parties can prevent a material alteration from making the deed void. *Markham* v. *Gonaston*, Cro. Eliz. 627. The replication admits the erasure and alteration, but relies on the fact, that it was done by the consent of all the parties. No subsequent parol consent can vary a written instrument under seal. There would be no
*34] safety, if such a doctrine *should prevail as is necessary to support this replication. There would be no safety in a sealed instrument, if the subsequent agreement, or even the understanding of the parties, at the time of its execution, could be given in evidence by parol, to vary the instrument.

Jones, contrà.—1. As to the first plea. The law does not require the bond to be given, before the departure of the vessel. By consent of the parties, it may be given afterwards. The plea states that one of the oblig-

ors executed the bond, after the vessel had sailed. There is nothing in the law to make the deed void for that cause.

2. As to the second plea. The obligors are estopped by their bond from denying the value of the vessel and cargo. The bond is their own voluntary act. They have agreed to the value. If the question of value were open, after giving the bond, it would lead to endless litigation.

3. As to the erasure. There is no authority which forbids such an alteration by the consent of all parties. In the case in Croke, the alteration was made without consent of parties. It is immaterial, whether the consent be prior or subsequent.

February 16th, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows :—This is an action of debt, brought upon a bond given under the first section of the embargo act of the 9th of January 1808, ch. 8. After *oyer* of the bond and condition, various pleas were pleaded by the defendants ; but it is unnecessary to consider any others than those upon which questions have been argued at the bar.

The second separate plea of the defendant, Robert Ober, and the first joint plea of all the defendants allege, in substance, that the bond was taken by the collector of the customs, at Georgetown, by color of his office, and by pretence of the act of congress aforesaid, *and that the bond and condition were not taken pursuant to the act of congress, but contrary thereto, in this, to wit, that the bond was not sealed or delivered, until after the vessel in the same condition mentioned had received a clearance in due form, and after she had actually departed from the port of Georgetown, under the clearance, by reason whereof the bond is void. To this plea, there was a general demurrer and joinder in demurrer ; on which the court below gave judgment for the United States. [*35

It is argued by the plaintiffs in error, that the act of congress of the 9th of January 1808, § 1, having declared that no vessel licensed for the coasting trade shall be allowed to depart from any port of the United States, or shall receive a clearance, until the owner, &c., shall give bond to the United States, in a sum double the value of the vesssel and cargo, &c., the time of giving the bond is of the essence of the provision ; and that if the bond be not taken, until after the clearance or departure of the vessel, it is illegal and void. We cannot yield assent to this argument. In our opinion, the statute, as to the time of taking the bond and granting a clearance, is merely directory to the collector. It is, undoubtedly, his duty to comply with the literal requirements of the statute. If he neglect so to do, it is an irregularity which may subject him to personal peril and responsibility. If the state of facts has existed, to which the statute provision is applicable, the authority to require and the duty to give, the bond attaches ; and by the voluntary consent of the parties, it may well be given *nunc pro tunc*. Upon any other construction, the owner of the vessel might be involved in great difficulties. If the collector be not authorized to receive the bond, after a clearance, neither is he authorized to grant a clearance, before he has received the bond. A clearance, therefore, granted before such bond should be given, would be illegal and void ; and a departure from port, under such void clearance, would subject the owner, vessel and cargo to the forfeiture

inflicted by the third section of the act. There is no error in the judgment of the court below on this plea.

*36] *The second joint plea of the defendants alleges, that the bond was not taken pursuant to the act of congress, but contrary thereto, in this, that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States; and we are of opinion, that the judgment so given ought to be affirmed. There is no allegation or pretence that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression or circumvention. It must, therefore, be taken to have been a voluntary *bonâ fide* bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties, and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme, to admit the parties to avoid a sealed instrument, by averring that there was an error in the value, by an innocent mistake, or by accident, or by circumstances against which no human foresight could guard. A mistake of one dollar would be as fatal as of ten thousand dollars. Suppose, the double value were underrated, could the United States avoid the bond, and thereby subject the party to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties, voluntarily, and without fraud, assent to the insertion of a given sum, it is as much an estoppel, as if the bond had specially recited that such sum was the double value.

The third joint plea, in substance, alleges, that after the execution of the bond, and after the clearance and departure of the vessel and cargo, the bond was, by the authority, consent and direction of the collector, materially altered and changed, in this, that the name of Ebenezer Eliason was cancelled and erased from the bond, and the name, signature and seal of the defendant, Robert Ober, substituted and inserted therein, without the

*37] license, consent or authority of the defendant, *Robert Beverly, whereby the bond became of no force. To this plea, the United States replied, that the bond was so altered and changed, with the assent and by the concurrent license, direction and authority of all the defendants, and of the said Ebenezer Eliason, and not without the license, consent and authority of the defendants, and prayed that the same might be inquired of by the country. To this replication, there was a general demurrer and joinder in demurrer, on which the court below gave judgment for the United States: and we are of opinion, that the judgment was right. It is clear, at the common law, that an alteration or addition in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it. And this principle equally applies, whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed; and the cases in the books in which erasures, interlineations and alterations in deeds have been held to

avoid them, will be found, on examination, to have been cases in which no such consent had been given.

It has been objected, that this principle of letting in parol evidence to prove alterations in a deed, to be made by consent, exposes all the mischiefs against which the statute of frauds was intended to guard the public. If this objection were valid, it would equally apply to such alterations, when made before the execution of the deed ; for if not taken notice of by memorandum on the deed itself, they must be proved in the same manner. But it is to be considered, that the parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. On *non est factum*, the present validity of the deed or contract is in issue ; and every circumstance that goes to show that it is not the deed or contract of the party, is provable by parol evidence. It is of necessity, therefore, that the other party should support it by the same evidence. The fact, that there is an erasure or interlineation, apparent on the face of the deed, does not, of itself, avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant. Parol evidence *is let in, for this purpose ; and the mischief, if any, would equally press on both sides. The principle, however, which has already been stated, is too firmly fixed to be shaken by any reasoning *ab inconvenienti*. [*38

The decision upon the third joint plea renders it unnecessary to examine the bill of exceptions taken at the trial, on the issue of *non est factum*. That bill presents the same point as the third joint plea, with this difference only, that the alteration in the deed, by the addition of a new obligor, was, in fact, made in pursuance of an agreement entered into between the parties, prior to the original execution of the deed.

On the whole, the majority of the court are of opinion, that the judgment of the court below must be affirmed.

Livingston, J. (*dissenting.*)—In dissenting from the court in its judgment on the issue of law arising out of the third joint plea, I can only say, that I am not prepared to admit that every alteration whatever in a deed, after its execution, for such is the extent of the opinion just given, may be proved by parol testimony. After perfecting a deed in one form, no material alteration should be set up, unaccompanied by a new delivery, and a note or memorandum thereof ; otherwise, a bond, which is proved by a subscribing witness to have been actually given for only one hundred dollars, may be converted into one for as many thousands, if the obligee can only produce a witness who will say that he understood the obligor as assenting to it. The only case which I have been able to find, of those cited, such is the difficulty of procuring books in this place, is the one in Levinz, p. 11, 35, which establishes, that after the delivery of a bond, a new obligor may be added in this way ; not that the name of one may be struck out, and another substituted in his place. Without denying the authority of the case, my answer to it is, that such addition might be of benefit, but could not injure the first set of obligors ; and therefore, the court might feel less difficulty in admitting such fact to be proved. It is, therefore, no interference with this decision, to say, that no change whatever in a sealed instrument, after its execution, which may increase the liability, or be, in

any way, to the prejudice of the party whose deed it is (and such *is the case here), should be palmed on him by parol testimony; and so, *vice versâ*, that no alteration which may be, in any way, injurious to the grantee or obligee, should be set up by the other party; but that the terms in which the deed is originally executed should alone be binding, until alterations are introduced into it by the same solemnities which gave existence to the first. Such, in my opinion, is the salutary rule of the common law; and therefore, I think, that the judgment of the circuit court ought to be reversed.

Marshall, Ch. J., was rather inclined to think, that the plea was good, which stated that the bond was given for more than double the value of the vessel and cargo. If the bond was given for more than double that value, he thought it was void in law. He should not, however, have intimated his opinion on this point, if a dissenting opinion had not been given on another point in the cause, and his silence might have been construed into an assent to the entire opinion of the court as it had been delivered.

Judgment affirmed.

Taber *v.* Perrott & Lee. (*a*)

Competency of witness.

A. being sole owner of a bill of exchange, indorsed it in blank, and delivered it to B., to deliver to C. for collection, and when collected, to place the amount to the credit of A. and B., in account; C. collected the amount, but refused to place it to the credit of A. and B., who settled their account with C. and paid him the balance; A. afterwards sued C. for the amount received upon the bills: *held*, that B. was a competent witness for A.

Error to the Circuit Court for the district of Rhode Island, in an action of *assumpsit*, to recover from the defendants, Perrott & Lee, the amount of certain bills of exchange put into their hands to collect, by the plaintiff Taber, and his deceased partner, Gardner. At the trial below, several exceptions were taken, in which the following facts apeared:

The plaintiff produced a witness, John L. Boss, who being duly admitted and sworn, testified, that Messrs. Taber & Gardner, merchants, of Rhode
*40] Island, were *holders and owners of French government bills to a large amount, which were by them indorsed in blank, and given to their agent, the said John L. Boss, to take to France for collection. That he, Boss, had no interest in the bills, and received them as agent for the plaintiffs, and this was known to Perrott & Lee. That he carried them to France, in 1802, in a vessel of the plaintiffs, with a cargo consigned to the defendants, Perrott & Lee, of Bordeaux, in which cargo, Boss had an interest. That he delivered the bills to Perrott & Lee, to negotiate and receive the amount. That Boss went to Paris, in October 1802, and while there, received a letter, on the 26th October, from Perrott & Lee, informing him that Hotel, Thomas & Co., of Paris, were the house to whom the bills were sent, and introducing him to that house, and they wrote a letter to Hotel, Thomas & Co. directing them, when the bills were paid, to place the money to the credit of Perrott & Bineau, a banking-house at Bordeaux, which Per-

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(*a*) February 14th, 1815. Absent, Todd, Justice.