the case of *Otis* v. *Bacon*, it is a question which ought to be left, in the instruction of the court, open to the jury. And that if any positive instruction on the subject had been given to the jury in this cause, it ought to have been in favor of the defendant, as the arrival in Hyannis Bay would not have been deemed a legal termination of the voyage, either on a policy of insurance, a charter-party, bottomry-bond, or any other maritime contract.

A majority of the court are, therefore, of opinion, that the court of Massachusetts erred in this case, and that the judgment ought to be reversed.

Judgment reversed.

Mr. Justice STORY did not sit in this cause.

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*25] *MCIVER *et al.*, Lessees, *v.* RAGAN *et al.*

*Limitation.*

The plaintiffs in ejectment claimed under a grant from the state of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which, by the statutes of that state and Tennessee, constitutes a bar to the action, if the possession be under color of title: to repel this defence, the plaintiffs proved, that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning, and nearly the whole land, and all the corners, except one, were within the Cherokee Indian boundary, not having been ceded to the United States, until the year 1806, within seven years from which time the suit was brought; but the land in the defendant's possession, and for which the suit was brought, did not lie within the Indian boundary: *Held*, that, notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not, therefore, survey the land granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years under color of title.

McIver *v.* Reagan, Cooke 366, affirmed.

ERROR to the Circuit Court for the district of West Tennessee. The plaintiffs in error brought an ejectment in that court for 5000 acres of land, in possession of the defendant, Ragan, and on the trial, gave in evidence a grant from the state of North Carolina of 40,000 acres, comprehending the lands for which the suit was instituted.

The defendants claimed under a junior patent to Mabane, and a possession of seven years held by Ragan, which, by the statutes of North Caro-
*26] lina and *Tennessee, constitutes a bar to the action, if the possession be under color of title.

To repel this defence, the plaintiffs proved, that no corner or course of the grant, under which they claimed, was marked, except the beginning corner. That the beginning, and nearly the whole land, and all the corners, except one, were within the Indian boundary, being part of the lands reserved by treaty for the Cherokee Indians. These lands were not ceded to the United States, until the year 1806, within seven years from which time, this suit was instituted. But the land, in possession of the defendant, Ragan, and for which this ejectment was brought, did not lie within the Indian boundary.

The laws of the United States prohibited all persons from surveying or marking any lands within the country reserved by treaty for the Indians.

Upon this testimony, the counsel for the plaintiffs requested the court to instruct the jury, that "the act of limitations would not run against the

plaintiffs, for any part of the said tract, although such part should be out of the Indian boundary, until the Indian title was extinguished to that part of the tract which includes the beginning corner, and the lines running from it, so as to enable them to survey their land, and prove the defendant to be within their grant." But the judge instructed the jury, that, "although the Indian boundary included the beginning corner, and part of the lines of the said tract, yet, if the defendants had actual possession of part of the said tract, not so included within the said Indian boundary, and retained possession thereof for seven *years, without any suit being commenced, the plaintiff would thereby be barred from a recovery." To this [*27 opinion, the plaintiffs, by their counsel, excepted.

The jury found a verdict for the defendants, on which a judgment was rendered, and the cause was brought before this court by writ of error.

February 6th. *Swann* and *Campbell*, for the plaintiffs in error and in ejectment.—1. Statutes of limitation, all over the world, except certain cases of a peculiar nature from their operation; and the impediment in this case is analogous to the exceptions expressly provided. The case of civil war interrupting all the proceedings in courts of justice, is not stronger than the present; the omission in the statute ought, therefore, to be supplied by judicial equity.

2. The act of the 30th of March 1802, ch. 13, § 5, prohibits the surveying, or attempting to survey, or designating any of the boundaries, &c., of lands within the Indian territory, under severe penalties; and the party could not have obtained a passport from the officers authorized to grant it, by the 3d section of the act, in order to survey lands, but merely to go into the Indian country for any lawful purpose.

3. The record does not regularly deduce the defendant's title. There is no presumption raised, that Ragan continued his possession under Mabane, and without it, that possession would not be under color of title, according to the statutes of limitation of North Carolina and Tennessee, and the decision *of this court in the case of *Patton's Lessee* v. *Easton*, [*28 1 Wheat. 476.

*Jones* and *Thomas*, contrà.—The exceptions in the statute of limitations (which statute gives the right of property as well as of possession) are expressed by the legislature, and cannot be multiplied by implication. But supposing the statute not to apply to lands within the Indian boundary; the lands held by the defendant was not within the Indian boundary, and therefore, the limitation applies to it. If the plaintiffs had instituted a suit, they might have entered the Indian country, under an order of court, and surveyed the lands. The character of the defendants' posssession, and not that of the plaintiffs, is to determine the right of property.

February 11th, 1817. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—It is contended by the plaintiffs in error, that the judge misconstrued the law, in his instructions to the jury. The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended, that as the plaintiffs were disabled, by statute, from surveying their land, and consequently, from prosecuting this suit with effect,

they must be excused from *bringing it; and are within the equity, though not within the letter of the exceptions.

The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession, under color of a title believed to be good. The possession of the defendants being of lands, not within the Indian territory, and being in itself legal, no reason exists, as connected with that possession, why it should not avail them and perfect their title as intended by the act. The claim of the plaintiffs to be excepted from the operation of the act, is founded, so far as respects this point, not on the character of the defendants' possession, but on the impediments to the assertion of their own title.

Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far, for this court to add to those exceptions. It is admitted, that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a country are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiffs labored, respected the trial, not the institution of their suit. There was no obstruction to the bringing of this ejectment at an earlier day. If, at the trial, a
*30] survey had been *found indispensable to the justice of the cause, the sound discretion of the court would have been exercised, on a motion for a continuance. Had such a motion been overruled, the plaintiffs would have been in the condition of all those who, from causes which they cannot control, are unable to obtain that testimony which will establish their rights. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations, unless the legislature shall so declare its will.

It has also been contended, that in this case, the possession is not under color of title. The ejectment was served on Ragan, who was the tenant in possession; and on his motion, David Mabane and John Thomson, executors of the last will and testament of James Mabane, deceased, and landlords to the said Henry Ragan, were admitted as defendants with him in the cause. At the trial, they produced a grant for the land in controversy to James Mabane, and proved, "that Ragan took possession of the same, under James Mabane, the grantee, in 1804, and continued to occupy the same ever since."

It is argued, that though Ragan is stated to have taken possession under
*31] Mabane, he is not stated to *have continued that possession under Mabane, and this court will not presume that he did so. Without such presumption, his possession, it is said, would not be under color of title, and consequently, would be no bar to the action, according to the statute of Tennessee. The court cannot yield its assent to this hypercriticism on the language of the exceptions. The representatives of Mabane came in as defendants and plead the general issue. They are stated on the record to

be the landlords of Ragan. When Ragan is said to have taken possession under Mabane, and to have continued to occupy the land, the fair inference is, that the possession was continued under the same right by which it was originally taken. Neither the statement of the counsel, nor the opinion of the court turns, in any degree, on the nature and character of Ragan's possession, but on the disability of the plaintiffs to survey their land. For all these reasons, this court is decidedly of opinion, that the possession of Ragan was the possession of Mabane, and was under color of title.

Judgment affirmed.

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## *Hunter *et al. v.* Bryant. [*32

### *Marriage settlement.*

H., in contemplation of marriage with B., gave a bond for $5000 and interest, to trustees, to secure to B. a support, during the marriage, and after the death of H., in case she should survive him; and to their child or children, in case he should survive her; with condition, that if H. should, within the time of his life, or within one year after the marriage (whichsoever of the said terms should first expire), convey to the trustee some good estate, real or personal, sufficient to secure the annual payment of $300 for the separate use of his wife, during the marriage, and also sufficient to secure the payment of the said $5000 to her use, in case she should survive her husband, to be paid within six months after his death; and in case of her death before her husband, to be paid to their child or children; or, if H. should die before B., and by his will should, within a year from its date, make such devises and bequests as should be adequate to these provisions, then the bond to be void: H. died, leaving his widow B. and a son, having, by his last will, devised a tract of 1000 acres of land in the Mississippi territory, to his son, in fee; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her in fee, of the son's moiety, if he died before he attained "the lawful age to will it away;" and the residue of his estate, real and personal, to be divided equally between his wife and son, with the same contingent devise over to her, as with regard to the tract of 10,000 acres of land. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at $5000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband, or otherwise," to be divided between her son and the plaintiff below (Bryant), with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought this bill to charge the lands of H. with the payment of the bond of $5000, and interest, to which the plaintiff derived his right under the nuncupative will of B. By the laws of Kentucky, this will did not pass the real estate of the testator, but was sufficient to pass her personal estate, including the bond. **Held*, that the provision made in the will of H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect between the provision under the will and the bond, and that this privilege was extended to her devisee, the plaintiff. [*33

Actual maintenance is equivalent to the payment of a sum secured for separate maintenance, and therefore, interest upon the bond, during the husband's lifetime, was not allowed.

Under all the circumstances of the case, it was determined, that the bond was chargeable on the residue of the estate, and of this, the personalty first in order.

Bryant *v.* Hunter, 3 W. C. C. 48, reversed.

Appeal from the Circuit Court for the district of Pennsylvania. This cause was argued by *Key* and *Hopkinson*, for the appellants and defendants, and by *Jones*, for the plaintiffs and respondents.

March 12th, 1817. Johnson, Justice, delivered the opinion of the court.—This is an appeal from a decree in equity, in the district of Pennsylvania, on a bill filed by Thomas Y. Bryant, against the legal representatives of John Hare. The object of the bill is to charge the lands of Andrew Hare,