

Etting v. United States Bank.

agent of the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise, in the principle of decision. But however this may be, in the present case, if the vessel was sent in for adjudication, the cargo must, of necessity, accompany her; nor could its particular ownership be fully ascertained, until the examinations of the crew were regularly taken. There is no evidence in this case to show, that at any subsequent period, it was desirable, or could have been advantageous to the claimants, to have separated the ship and *cargo, and to have instituted a new voyage for the latter, under other auspices.

In the district court, an allowance was made of \$500, distributable among the crew, on account of their confinement on the passage to Boston, on the ground, that the sending in of the vessel was wrongful. That award was reversed in the circuit court; and no appeal was taken by the crew, as, indeed, none could be, on account of this insufficiency of the sum to entitle the parties in interest to appeal. It is only necessary, therefore, to state, that that matter is not now before this court; and it is to be presumed, that the confinement was such only as was indispensable for the safety of the seizers.

Upon the whole, it is the opinion of the court, that the decree of the circuit court ought to be affirmed, and it is, accordingly, affirmed, without costs to either party.

Decree accordingly

*59] *SOLOMON ETTING, Plaintiff in error, v. PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Charge.—Court and jury.—Divided court.

Although a judge may refuse to declare the law to the jury on a hypothetical question, not warranted by the testimony in the cause, yet, if he proceed to state the law, and state it erroneously, his opinion may be revised in the court above; and if it can have had any influence on the jury, their verdict will be set aside.¹

Although it is the province of the court to construe written instruments, yet, where the effect of such instruments depends, not merely on the construction and meaning of the instruments, but upon collateral facts *in pais*, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury.²

Where the court is equally divided in opinion, upon a writ of error, the judgment of the court below is to be affirmed.

Quære? What concealment or suppression of material facts, in a contract where both parties have not equal access to the means of information, will avoid the contract?

ERROR to the Circuit Court of Maryland. This was an action of *assumpsit*, brought in the court below, by the defendants in error, against the plaintiff in error, Etting, as the indorser of the promissory note of James W. McCullough, under the following circumstances.

In the year 1819, the president of the branch bank, established at Baltimore, his partner in trade, McCullough, the cashier of the branch, and *60] Williams, one of the directors of the parent *bank, had contracted a debt to the bank to the amount of \$3,497,700. The directors at Philadelphia, in consequence of some information which they had received

¹ *Beaver v. Taylor*, 1 Wall. 637.

² *Richardson v. Boston*, 19 How. 263.

Etting v. United States Bank.

respecting it, passed a resolution, on the 19th of February 1819, calculated to draw forth a complete statement of the case, with all its circumstances. This resolution brought the papers it required, and also brought the president and cashier to Philadelphia, who attended for the purpose of making verbal explanations. These were received, and the case was referred, on the 16th of March, to a committee, whose report was made on the 30th of the said month. It appeared by this report, that the securities offered for the debt consisted of 20,848 shares of the stock of the bank, of 26,550 shares, previously pledged, for very large sums, in London, Liverpool, New York and Boston, the amount of which was not stated, and the personal liability of the debtors themselves. The report stated, "as the result of many conferences, and a good deal of deliberation," an offer on the part of the debtors to give additional security for \$900,000, payable in five years, by annual instalments. A part of the proposed arrangement was, that the shares previously pledged in London and elsewhere, should be liberated from the claim of the bank, and that the separate liability of each for \$300,000, should be received, instead of the joint liability of all for \$900,000. This offer, with some modifications, was accepted by the bank. A part of the security offered by McCullough, was *sixteen merchants of Baltimore, who were to become bound for \$12,500 each. The committee recommended the [*61 acceptance of these terms, and also recommended, that the sufficiency of the security offered by Williams and McCullough, including the sixteen sureties proposed by McCullough, should be referred to the members of the board, residing in Baltimore. This course was adopted by the bank, and the committee of members residing in Baltimore reported on the whole subject. Of the sixteen names proposed for their consideration, three were withdrawn, and three were objected to. Among those who were accepted was Etting, the plaintiff in error. The negotiations, investigations and arrangements for the completion of the business, were some time in progress. Propositions were made for changes of the securities, and on the 10th of May, the president of the bank addressed a letter to the committee in Baltimore, urging them to bring it to an immediate close. On the 14th of May, the committee in Baltimore reported the documents which had been executed in pursuance of previous arrangements made with the debtors, a report of which was made by the committee at Philadelphia, on the 17th of the same month, and on the 18th, McCullough was removed from the office of cashier, which he had held from the first establishment of the bank. It was admitted, that he was a young man, worth nothing, who had a family, and whose salary as cashier was \$4000.

*When the note indorsed by Etting, the plaintiff in error, fell due, he refused to pay it; on which it was protested for non-payment, and this suit was brought by the bank. At the trial in the court below, the whole matter was given in evidence, and the court was moved to instruct the jury on the law which would arise on the facts of the case, and the inferences which the jury might draw from those facts. The counsel for the plaintiffs moved the court to instruct the jury, that if they should be of opinion, from the evidence, that the defendant, Etting, without any communication with the plaintiffs, but on the application of McCullough only, agreed to become his indorser, under the arrangement made between him and the plaintiffs, although they should be satisfied, from the evidence [*62

Etting v. United States Bank.

offered by the defendant, that the said McCullough deceived the said Etting; that it was known to the bank before, or pending the negotiation, that the debt from McCullough, or the greater part thereof, had grown out of his unauthorized and fraudulent appropriation of their funds to his own use, which knowledge the bank did not promulgate, though they contemplated his removal as soon as the securities should be given, in conformity with the arrangement which had been made; that the defendant indorsed the note, in ignorance of any fraud on the bank, or of any abuse of his office of cashier, or of any probability of his removal from the said office; that, had the defendant known these circumstances, he would not have indorsed the said

*63] note; and that the bank forbore *to promulgate either the information they possessed, or their intention to remove the said McCullough, under the impression, that the disclosure would increase the difficulty of the said McCullough in procuring security, if not render it impossible for him to procure it; yet, if they should also be of opinion, that the defendant, without making any inquiries of the plaintiffs on the subject of such information and intention, or holding any communication with them on the subject of his intended indorsement, did, of his own accord, on the application of the said McCullough, and for the purpose of giving effect to the said arrangement, indorse the said note on which this action is brought, that there was nothing in the evidence so given by the defendant, to affect the plaintiff's right of recovery in this action. That, in order to vitiate the said note and indorsement in law, and to bar the plaintiff's right of recovery thereon, on the ground of a fraudulent misrepresentation, or fraudulent concealment of circumstances known to them, and unknown to the defendant, it was incumbent on the defendant, to show that he applied to the plaintiffs for information, or held some communication with them for the purpose of receiving such information, and that on such application or communication, the plaintiffs either misrepresented or concealed such circumstances; and that, in the absence of such proof, there was nothing in the facts so given in evidence by the defendant, to affect the right of recovery in the action.

*64] *The court gave the instruction as asked, to which an exception was taken.

The counsel for the defendant then moved the court for instructions, that if the jury should draw from the evidence certain inferences which were stated, the plaintiffs were not entitled to recover. These inferences were, that the bank was fully informed, in March 1819, of the fraudulent conduct of McCullough, the extent of his misapplication of their funds, and of his insolvency; that on receiving this information, they became satisfied of his unfitness to continue in office, and determined to remove him. That, however, they continued him in office until the 18th of May, carefully concealing the circumstances, and their determination, for the purpose of obtaining security of the debt due to them from the said McCullough, one of which so contemplated securities was the note in question. That the defendant was, to the knowledge of the plaintiffs, ignorant of McCullough's breach of duty, and of the determination to remove him, and indorsed the note by reason of that ignorance. The court refused to give this instruction, unless the jury should be further of opinion, that the defendant was led into this state of ignorance, in consequence of inquiries made by him of the plaintiffs, or of some previous communication between them and him.

Etting v. United States Bank.

On the farther application of the counsel for the defendant, praying the court to instruct the jury, that on the statement and evidence contained *in the bills of exception, if the jury believed the same, the plaintiffs were not entitled to recover; the court refused to give the instruction asked, and directed the jury, that on the evidence aforesaid, the plaintiffs were entitled to recover. [*65]

Judgment was rendered for the plaintiffs in the court below, and the cause was brought by a writ of error to this court.

March 9th and 10th. The cause was argued by *Webster* and *Taney*, for the plaintiff in error; and by the *Attorney-General* and *Emmet*, for the defendants in error. The discussion took a wide range upon the doctrine of misrepresentation and concealment in contracts; but as that point was not determined by the court, it has not been thought necessary to report anything more than a concise summary of the arguments of counsel.

The following points were made for the *plaintiff* in error, upon the instructions given and refused by the court below. 1. That the concealment of the facts and circumstances above mentioned, or the concealment of any one of them, whereby the plaintiff in error was induced to enter into the contract in question, was a fraud upon him, and vitiated the contract. 2. That if the mere omission to communicate the said facts and circumstances would not be a fraud, yet, the act of the defendants in error, of continuing McCullough in office, in order to give *him credit, and thereby to procure the security in question, by which means the plaintiff in error was deceived, and induced to indorse the said note, was a fraud upon him, and vitiated the contract. 3. That the continuance of McCullough in the office of cashier, from the 16th of March 1819 (when his misconduct in office came to the knowledge of the president and directors of the bank), until the 18th of May following, when he was dismissed, was a violation of the duty of the president and directors to the government of the United States, and to the public, and therefore, vitiated any contract obtained by means of such continuance in office. [*66]

Upon the first point, it was argued, that the concealment of material circumstances, known to one party, and unknown to the other, vitiates the contract. 1 Com. Cont. 38; 1 W. Bl. 465; 1 Fonbl. Eq. 379, note h; 1 Doug. 18; *Hill v. Gray*, 1 Starkie 434; Verplanck on Contracts, *passim*; 8 Mass. 408. In the opinion given by the court below, the principle was admitted, but with this qualification, that it must be on inquiry or communication, for the purpose of information. In this view of the subject, the only question would be, whether the rule is subject to this limitation, *i. e.*, of inquiry or communication for the purpose of information. But an exception to the rule was supposed to exist, and it might be said, that a party is not bound to communicate circumstances extrinsic *to this contract, and that the circumstances concealed were extrinsic. If the proposition were true, although there had been inquiry and communication, yet the facts themselves being of such a character that they need not have been disclosed, that alone created the exception to the rule. But it was insisted, the exception ought to be confined to those facts which are equally open to both parties. *Laidlaw v. Organ*, 2 Wheat. 183. The ground upon which Etting undertook for McCullough's performance, was his confidence in his supposed integrity, and in his resources and credit derived from his connec- [*67]

Etting v. United States Bank.

tion with the bank. No case could be found, which states, that inquiry is necessary to create the obligation to disclose material facts, which are not equally within the knowledge of both parties. The fraud consists in dealing with the party in ignorance, and leaving him so. It is not necessary that the other party should have created the false impression, or intended to have created it. It is sufficient that he knows it, and takes advantage of it. *Stuart v. Wilkins*, 1 Doug. 18; *Pidcock v. Bishop*, 3 Barn. & Cresw. 605; *Smith v. Bank of Scotland*, 1 Dow P. C. 272; 1 Brod. & Bing. 289; *Jackson v. Duchaire*, 3 T. R. 551. Undue concealment consists in the suppression of a material fact, not in the knowledge of both parties, and not of a nature to be equally known to both parties, in a case where confidence is reposed that the fact does not exist. In *Laidlaw v. Organ*, *the
 *68] intelligence was of a nature to be equally known to both parties, and it was not a fact respecting which confidence is generally reposed that it will be disclosed.

On the second point, it was argued, that here was an act done in order to give a false credit, and it did give false credit. It was a positive deceit by acts, though not by words. It was asked, whether a party might lawfully deceive in one way, and not in the other? The law is more consistent with common justice, and says you must do nothing to deceive. 2 Wheat. 295; 1 Dow P. C. 294-5; 2 T. R. 587. It was a case of industrious concealment. Sugd. on Vend. 226-7, and cases there collected. By continuing the cashier in office, the defendants in error gave him a fictitious credit, which they knew did not belong to him. It was analogous to the ordinary case of the fraudulent misrepresentation of the credit of another. *Paisley v. Freeman*, 3 T. R. 51. It had been said, there was no inquiry. Why was there none? Because, the very continuance of the officer in office, was evidence that they thought him honest. It might, perhaps, be contended, that nothing was positively said or done by the bank, calculated to mislead the surety. But silence, or an omission to act, may, in many cases, as effectually deceive the party, as the most explicit declaration, or the most positive acts. Continuing the cashier in office was equivalent to a *suggestio falsi*. (a)

*69] On the third point, the peculiar character of the bank was insisted on, as an instrument of the government, not created for its own profit merely, but as a means to aid the financial operations of the government.

(a) In the case of *Smith v. Bank of Scotland*, 1 Dow P. C. 294; Lord ELDON spoke of another case which had come before him (Maltby's Case): "A clerk to the Fishmonger's Company had incurred a considerable debt. The deficit had been increasing from year to year, and was at length carried beyond what the company were likely to recover. They demanded additional security, which he procured. The case had come before him only upon motion, but he had thought a good deal upon it, and the light in which it appeared to him was this: If he knew himself to be cheated by an agent, and, concealing that fact, applied for security, in such a manner, and under such circumstances, as held him out to others as one whom he considered as a trustworthy person, and any one acting under the impression that the agent was so considered by his employer, had become bound for him; it appeared to him, that he could not conscientiously hold that security. He was, then, of opinion, that the Fishmonger's Company could not hold their security. He did not know what had become of the case afterwards, but he believed, that his opinion was submitted to, and that no further proceedings were had. He had since reconsidered the matter, and still retained his former opinion, and would act upon it judicially, if occasion offered."

Etting v. United States Bank.

McCulloch v. Maryland, 4 Wheat. 411, 422. Both the public and the government were deceived and injured by the misplaced confidence of the bank in their cashier. It was their duty to have removed him, the instant his default was discovered. It is contrary to the policy of the law, to enforce a contract obtained by a breach of duty to the public. The bank may be considered as a public officer, and is bound by the same obligations, and owes the same duties, as any other public officer. But would it be pretended, that a public officer could keep an unworthy agent or deputy in office, for *the mere purpose of securing a debt due to himself? [*70

On the part of the *defendants* in error, it was stated, that the rule is accurately laid down by Mr. Fonblanque, as to what circumstances a contracting party is bound to disclose: "If a man, by the suppression of a truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of a good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation." 1 Fonbl. Eq. 164. Under certain modifications, and with certain exceptions, the party is bound to communicate all circumstances intrinsic in the contract itself; all those circumstances which enter into the contract as ingredients, and from constituent parts of it. But with regard to circumstances extrinsic to the contract, though forming inducements to enter into it, however powerfully he may believe and know they are operating with the opposite party, he is at liberty to keep silence. Intrinsic circumstances are such, for example, as regard the quality and price of the article, which must, of necessity, enter into the inducement. Extrinsic circumstances are those considerations which from no component part of the contract itself, but which may form inducement with the party to enter into it. The distinction is founded *in reason, and is necessary to the business of life. (2 Wheat. 185 n. and the passages from Pothier there cited.) With regard to the whole class of extrinsic circumstances, though, if the party undertake to disclose them, he must take care to state the truth, yet, he may maintain the most obstinate silence respecting them, and the contract will still be valid. [*71

As to the objection, that the rule must be received with the qualification, that the facts are equally accessible to both parties, it was said, that if by this was meant, that they must be equally accessible to both, by the use of ordinary diligence, it could not be considered as well founded. *Fox v. Mackreth*, 2 Bro. C. C. 420. And if it meant nothing more than that it was physically accessible, where the party pushes his inquiries in all possible directions, and takes sufficient time to make the discovery, then it was inapplicable to any practical purpose in the business of life. The qualification had been borrowed from the law with regard to intrinsic circumstances, to which it was properly applied, and transferred to extrinsic circumstances, to which it was wholly inapplicable. Assuming, that, with regard to extrinsic circumstances, a party may conceal them, without impairing the contract, there was not a feature in any one of the instructions in this case which was not justified by the operation of that principle. The keeping the cashier in office was doing nothing. *It was a mere forbearance to act. All the cases referred to, of industrious concealment, [*72

Etting v. United States Bank.

admitted of two answers: 1. That the concealment was of circumstances intrinsic to the contract. 2. That, in all the cases, no acts were done to alter the antecedent state of things, for the purpose of concealment. As to the case of *Smith v. Bank of Scotland*, 1 Dow P. C. 272. which had been relied upon as analogous to the present, it would be found, that there was a positive misrepresentation on the part of the bank, they alleging that further security was wanted on account of an increase of business, when, in fact, there was a decrease. Another case from the same book might have been cited, where an attempt was made to set aside a security bond, alleged to have been obtained by unfounded representations of circumstances, generally, without any direct reference to the bond, and the court having, according to the forms of the Scottish law, appointed the sureties to say whether they would refer to the respondent's oath, "that he did elicit that bond?" and the sureties having admitted, that "they never meant to say that there was any degree of personal influence with either of them to elicit the bond of relief," the court of session pronounced in favor of the bond, which was affirmed by the house of lords on appeal. *Webster v. Chrystie*, 1 Dow P. C. 247. So, here, it might be asked, whether the plaintiffs below had done anything to *elicit the note. All that was alleged was, *73] that they had not communicated their intention of removing the cashier, when they were not asked respecting their intentions, and when it was equally lawful for them to retain or to remove him. The effort on the other side is to induce the court to establish a new rule of law, which, however analogous to other principles merely applicable to the contract of insurance, was admitted, even by the ingenious and learned author of the treatise which had been referred to, not to form a part of the jurisprudence of this country. Verplanck on Contracts.

March 16th, 1826. MARSHALL, Ch. J., delivered the opinion of the court.—If this case depended on the deservedly high character of the individuals who were engaged on the part of the bank in the transactions in which the suit originated; if elevation above the possibility of suspicion that they could have meditated anything believed by themselves to be legally or morally wrong, could decide it, this cause would not have required the great efforts which have been bestowed upon it. The names which appear on this record can never be connected with actual fraud; nor would any difficulty be found in protecting them from the imputation, were it possible that it could be made. But judicial inquiries are into the rights of the parties; *and, although high and honorable character has, and ought to have, *74] great influence in weighing testimony in which that character is in any manner involved; yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide.

At the trial, several points of law were raised by both parties, on which opinions were given, to which exceptions were taken, and the correctness of those opinions constitutes the single inquiry in this court. [Here the learned chief justice stated the case, as it is stated above.]

As preliminary to the inquiry, whether the law arising on the facts, and on the inference assumed in the bills of exception contained in the record

Etting v. United States Bank.

was correctly stated by the court, a point has been made at the bar, which must be disposed of. It has been contended, that a court is not bound to answer abstract or hypothetical questions of law, not growing out of the testimony in the cause, which may be propounded at the bar; and to apply this principle, it has been also contended, that the testimony contained in the record, and referred to in the bills of exception, contains nothing from which the jury could possibly draw those inferences of fact upon which the court was asked to declare the law. That the points made in the bill of exceptions constitute a distinct and totally different case from that made by the evidence. *That a judge cannot be required to declare the law on hypothetical questions, which do not belong to the cause on trial, [*75 has been frequently asserted in this court, and is, we believe, incontrovertible. *Hamilton v. Russell*, 1 Cranch 309, 318. The court may, at any time, refuse to give an opinion on such a point; and if the party propounding the question is dissatisfied with it, he may except to the refusal, which exception will avail him, if he shows that the question was warranted by the testimony, and that the opinion he asked ought to have been given. But if the judge proceeds to state the law, and states it erroneously, his opinions ought to be revised; and if it can have had any influence on the jury, their verdict ought to be set aside.

It cannot, however, we think, be correctly affirmed, with respect to the case now under consideration, that the points stated in the bills of exception have no relation to the testimony to which those bills refer. That testimony consists of various communications and reports, made to the bank, of their own transactions, and of the admissions of parties. It has been said, that this testimony is all in writing, and is to be construed by the court; and from this proposition is deduced the corollary, that the jury was not at liberty to draw inferences from it.

Were the fact as alleged, and were it true, that the testimony is all in writing, the consequence drawn from it cannot be admitted. Conceding it to be the province of the court, to construe any particular paper which was offered in *evidence, the report of the 30th of March for example, and to declare the meaning of every sentence, and of the whole instrument, yet this report contains a great variety of extrinsic circumstances, suggests measures of deep interest, was followed by numerous successive acts which took place in the country, and which do not derive all their influence on the cause, from the construction of the particular papers in which they are communicated, but, in a considerable degree, from their connection with each other, from the motives in which they originate, and from the effects they were calculated to produce, and did produce, on others. These subjects are peculiarly proper for the consideration of a jury. If the testimony be examined, it will, we think, appear, that the counsel for the plaintiffs has not asked the court to give its opinion on any inferences of fact which it was not, at least, possible for the jury to draw from the evidence. The knowledge of the bank is not questioned. The ignorance of Etting might be inferred from the absence of all testimony proving his knowledge that any fraud had been practised by McCullough. The original resolution of the bank to remove McCullough might be inferred from their knowledge of his unfitness for the office, and from the fact that they did remove him, the instant the securities were obtained which they expected from him. The

Etting v. United States Bank.

same facts might justify the inference respecting the motives which induced the bank to retain him in office, until those securities were procured.

*77] We are far from saying, that these inferences were *all of them such as the jury ought to have drawn. It is not difficult to perceive, that the bank might have acted on motives equally unexceptionable in morals and in law. The jury might very well have believed that the bank thought the 26,550 shares of stock were not worth more than the sums for which they were pledged, or, at any rate, were not a safe security, and might, therefore, think it advisable to relinquish that pledge, if other security could be substituted in its place. Others might estimate that stock more highly than they did, and might estimate it rightly. Friends, therefore, acting on their own judgment of the value of this stock, might be found willing to indorse the paper of Mr. McCullough on receiving it as a pledge. The motive, too, for retaining Mr. McCullough in office might be to induce him to do the bank all the justice in his power, not to induce others to indorse his notes. The whole subject was before the jury, and they might have drawn from the testimony either these inferences, or those which are stated in the bills of exception. The counsel for the plaintiffs, believing the law to be in their favor even upon that view of the testimony which is taken in the exceptions, and fearing that the jury, should they take that view, might find for the defendant, chose to refer the law to the court. Whether his fears respecting the jury were well or ill founded, this cause must now be decided on the correctness of the opinion given by the circuit court.

*78] In the very elaborate arguments which have *been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.

Judgment affirmed.